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Since 11 January 2001, official judgment numbers have been given to all judgments delivered in the House of Lords, Privy Council, both divisions of the Court of Appeal and the Administrative Court. All such judgments have fixed paragraph numbering, as do judgments delivered on or after 11 January 2001 in those parts of the High Court which did not then adopt the system of official judgment numbers (see Practice Note (judgments: neutral citation) [2001] 1 All ER 193 for the Court of Appeal and the High Court). On 14 January 2002 the system of judgment numbers was extended to all parts of the High Court (see Practice Direction (High Court judgments: neutral citation) [2002] 1 All ER 351). We have adopted the following practice in respect of judgments with official judgment numbers and official paragraph numbering:

- The official judgment number is inserted immediately beneath the case name;
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- When such a judgment is subsequently cited in another report,
  - (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;
  - (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;
  - (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

## CITATION

These reports are cited thus:

[2005] 1 All ER

## REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

### **Halsbury's Laws of England**

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) para 9 refers to paragraph 9 on page 11 of the 2004 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

### **Halsbury's Statutes of England and Wales**

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

### **Halsbury's Statutory Instruments**

The reference 14 *Halsbury's Statutory Instruments* (2004 issue) 201 refers to page 201 of the 2004 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

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—Compulsory winding up – Secretary of State taking view that it is expedient in the public interest that company be wound up – Whether court should accept undertakings from company as alternative to winding it up on public interest grounds

**Re Supporting Link Alliance Ltd..** .. .. . **Sir Andrew Morritt V-C** **303**

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—Drugs – Concealing or converting property known to be proceeds of drug trafficking or having reasonable grounds for suspecting property to be proceeds of drug trafficking – Whether necessary for prosecution to prove property actually proceeds of drug trafficking

**R v Montila** .. .. . **HL 113**

—Indecent assault consisting solely of acts of unlawful intercourse with girl under 16 – Whether permissible to bring prosecution for such assault if prosecution for unlawful sexual intercourse with girl under 16 precluded by expiry of limitation period

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R (on the application of X) v Chief Constable of the West Midlands Police CA 810

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—Service – Service by first class post at individual's last known residence – Defendant having no notice of proceedings – Whether order made at trial to be set aside – Whether breach of right to access to court

Akram v Adam .. .. . CA 741

**PRISON** – Parole Board recommending revocation of licence of prisoner released on licence – Parole Board deciding not to order re-release of prisoner – Whether decision procedurally fair – Whether prisoner entitled to oral hearing – Whether decision breaching right to liberty and security – Whether decision breaching right to fair trial

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<b>Omilaju v Waltham Forest London BC</b> .. .. .									
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# House of Lords petitions

This list, which covers the period 29 November 2004 to 17 March 2005, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

**Fattal v Keepers and Governors of the Free Grammar School of John Lyon** [2005] 1 All ER 466. Leave to appeal refused 16 March 2005 (Lord Hoffmann, Lord Hope of Craighead and Lord Scott of Foscote).

**Omilaju v Waltham Forest London BC** [2005] 1 All ER 75. Leave to appeal refused 16 February 2005 (Lord Steyn, Lord Rodger of Earlsferry and Lord Carswell).

**Vakante v Addey & Stanhope School** [2004] 4 All ER 1056. Leave to appeal refused 26 January 2005 (Lord Bingham of Cornhill, Lord Hope of Craighead and Baroness Hale of Richmond).

**R (on the application of Fisher) v English Nature** [2004] 4 All ER 861. Leave to appeal refused 16 December 2004 (Lord Nicholls of Birkenhead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood).





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R v J  
[2004] UKHL 42

HOUSE OF LORDS

d

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD CLYDE, LORD RODGER OF  
EARLSFERRY AND BARONESS HALE OF RICHMOND

22 JULY, 14 OCTOBER 2004

e

*Criminal law – Indecent assault – Indecent assault consisting solely of acts of unlawful intercourse with girl under 16 – Whether permissible to bring prosecution for such assault if prosecution for unlawful sexual intercourse with girl under 16 precluded by expiry of limitation period – Sexual Offences Act 1956, ss 6(1), 14(1), 37(2), Sch 2, para 10(a).*

f

In 1996 to 1997, when the defendant was aged 35 to 37, he repeatedly had sexual intercourse with the complainant, who was then aged 13 to 14. The complainant did not reveal what had happened between herself and the defendant until three years later. By that time it was too late to prosecute the defendant, under s 6(1)<sup>a</sup> of the Sexual Offences Act 1956, for having unlawful intercourse with a girl under 16, because s 37(2)<sup>b</sup> of, and para 10(a)<sup>c</sup> of Sch 2 to, the 1956 Act provided that no

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such prosecution could be commenced more than 12 months after the offence charged. There was, however, no time limit for bringing a prosecution for indecent assault on a woman contrary to s 14(1)<sup>d</sup> of the Act—an offence which, when the Act was passed, had the same maximum sentence as an offence under s 6(1). Accordingly, the prosecution preferred an indictment containing, inter

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alia, three specimen counts of indecent assault based solely on the sexual intercourse between the defendant and the complainant. The defendant applied to stay the prosecution on the ground that a charge of indecent assault in such circumstances was a device to circumvent the time limit on a prosecution for unlawful sexual intercourse, and so amounted to an abuse of the process of the court. The judge rejected the application, and the defendant was convicted on

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the three counts. Those convictions were upheld by the Court of Appeal which,

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a Section 6, so far as material, is set out at [6], below

b Section 37, so far as material, provides: '(2) The second column in the [second] Schedule shows, for any offence, ... what special restrictions (if any) there are on the commencement of a prosecution.'

c Paragraph 10(a) is set out at [7], below

d Section 14, so far as material, is set out at [12], below



like the judge, rejected the defendant's contention that his prosecution was an abuse of process. On the defendant's appeal to the House of Lords, their Lordships approached the issue primarily as one of statutory construction rather than abuse of process. a

**Held** – (Baroness Hale dissenting) On the true construction of the legislation, it was impermissible for the Crown to prosecute a charge of indecent assault under s 14(1) of the 1956 Act in circumstances where the conduct upon which that charge was based was only an act of unlawful sexual intercourse with a girl under the age of 16, in respect of which no prosecution might be commenced under s 6(1) of the Act by virtue of s 37(2) of, and Sch 2 to, the Act. Parliament had to have intended the prohibition in para 10(a) of Sch 2 to have some meaningful effect. There was no possible purpose that Parliament could have intended to serve by prohibiting prosecution under s 6 after the lapse of 12 months if exactly the same conduct could thereafter be prosecuted, with exposure to the same penalty, under s 14. The legislative adjuration was explicit. Sections 6 and 37 and Sch 2 disclosed a clear intention on the part of Parliament that a man who had sexual intercourse with a girl over 13 and under 16 was not to be prosecuted for doing so unless the prosecution was begun within 12 months of the intercourse. Parliament did not intend the plain meaning of its legislation to be evaded, and it was the duty of the courts not to facilitate the circumvention of the parliamentary intent. In those circumstances, the conclusion was inescapable. As a matter of construction, the time limit could not be circumvented by the manipulation of the indictment to charge conduct falling squarely within s 6(1) as an offence under s 14 solely in order to avoid that time limit. Section 14 was not to be construed and applied in such a way as would amount to a fraud upon s 37 as it affected s 6. Accordingly, the appeal would be allowed (see [18], [26], [27], [37], [40], [50], [62]–[64], [66], below). b  
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*R v Cotton* (1896) 60 JP 824 considered. f

Decision of Court of Appeal [2003] 1 All ER 518 reversed.

## Notes

For indecent assault on a woman and unlawful sexual intercourse with a girl under 16, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 522, 527.

For the Sexual Offences Act 1956, ss 6, 14, 37, Sch 2, para 10, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 239, 243, 254, 262. Paragraph 10 of Sch 2 has been repealed with effect from 1 May 2004 by the Sexual Offences Act 2003, s 140, Sch 7. g

## Cases referred to in opinions

*Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, [1993] 3 WLR 90, HL. h

*DPP v Rogers* [1953] 2 All ER 644, [1953] 1 WLR 1017, DC.

*Fairclough v Whipp* [1951] 2 All ER 834, DC.

*Faulkner v Talbot* [1981] 3 All ER 468, [1981] 1 WLR 1528, DC. j

*Fox v Bishop of Chester* (1829) 1 Dow & Cl 416, 6 ER 581, HL.

*M'Arthur v Lord Advocate* 1902 10 SLT 310, HC Just.

*Macknight v MacCulloch* 1910 SC(J) 29, HC Just.

*R v Blight* (1903) 22 NZLR 837, NZ CA.

*R v Cotton* (1896) 60 JP 824, Assizes.

- a* R v Derby Crown Court, *ex p* Brooks (1984) 80 Cr App R 164, DC.  
 R v Figg [2003] EWCA Crim 2751, [2004] 1 Cr App R (S) 409.  
 R v Hibberd [2001] 2 NZLR 211, NZ CA.  
 R v Hinton (1994) 16 Cr App R (S) 523, CA.  
 R v K [2001] UKHL 41, [2001] 3 All ER 897, [2002] 1 AC 462, [2001] 3 WLR 471.  
 R v Latif, R v Shahzad [1996] 1 All ER 353, [1996] 1 WLR 104, HL.
- b* R v McCormack [1969] 3 All ER 371, [1969] 2 QB 442, [1969] 3 WLR 175, CA.  
 R v Quayle (1992) 14 Cr App R (S) 726, CA.  
 R v Saraswati (1989) 18 NSWLR 143, NSW CA; *affg* sub nom *Saraswati v R* (1991) 172 CLR 1, Aus HC.  
*Robertson v Page* 1943 JC 32, HC Just.  
*Webster v Dominick* 2003 SLT 975, HC Just.

### Cases referred to in list of authorities

- A v UK* (1998) 5 BHRC 137, ECt HR.  
*A-G's Ref (No 39 of 2003)* [2004] 1 Cr App R (S) 468.  
*A-G's Ref (No 1 of 1990)* [1992] 3 All ER 169, [1992] QB 630, [1992] 3 WLR 9, CA.
- d* *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.  
*Costello-Roberts v UK* [1994] 1 FCR 65, ECt HR.  
*Elgouzouli-Daf v Comr of Police of the Metropolis, McBreaty v Ministry of Defence* [1995] 1 All ER 833, [1995] QB 335, [1995] 2 WLR 173, CA.  
*HM Advocate v Roose* (1999) SCCR 259, HC Just.  
*Kokkinakis v Greece* (1994) 17 EHRR 397, [1993] ECHR 14307/88, ECt HR.
- e* *R (on the application of Ebrahim) v Feltham Magistrates' Court, Mouat v DPP* [2001] EWHC Admin 130, [2001] 1 All ER 831, [2001] 1 WLR 1293, DC.  
*R (on the application of Junttan Oy) v Bristol Magistrates' Court* [2003] UKHL 55, [2004] 2 All ER 555, [2003] ICR 1475.  
*R v Ayres* [1984] 1 All ER 619, [1984] 1 AC 447, [1984] 2 WLR 257, HL.
- f* *R v Beckford* [1996] 1 Cr App R 94, CA.  
*R v Canterbury and St Augustine's Justices, ex p Klisiak, R v Ramsgate Justices, ex p Warren* [1981] 2 All ER 129, [1982] QB 398, [1981] 3 WLR 60, DC.  
*R v Wilson (Clarence), R v Jenkins (Edward John)* [1983] 3 All ER 448, [1984] AC 242, [1983] 3 WLR 686, HL.  
*R v Cooke* [1986] 2 All ER 985, [1986] AC 909, [1986] 3 WLR 327, HL.
- g* *R v Drury* [2001] EWCA Crim 975, [2001] All ER (D) 145 (Apr), [2001] Crim LR 847.  
*R v Forde* [1923] 2 KB 400, [1923] All ER Rep 477, CA.  
*R v Iles* [1998] 2 Cr App R (S) 63, CA.  
*R v Ireland, R v Burstow* [1997] 4 All ER 225, [1998] AC 147, [1997] 3 WLR 534, HL.
- h* *R v Johnson* [1997] 1 WLR 367, CA.  
*R v Madden* [1975] 3 All ER 155, [1975] 1 WLR 1379, CA.  
*R v Martley* [2000] 1 Cr App R (S) 416, CA.  
*R v Neale* (1844) 1 C & K 591.  
*R v Newcastle-upon Tyne Justices, ex p John Bryce (Contractors) Ltd* [1976] 2 All ER 611, [1976] 1 WLR 517.
- j* *R v Pain* (1985) 82 Cr App R 141, CA.  
*R v Reeves* [2001] EWCA Crim 1053, [2002] 1 Cr App R (S) 52.  
*R v Sefton Magistrates' Court, ex p Hardiker* (5 May 1998, unreported), DC.  
*R v Williams* [1893] 1 QB 320, CCR.  
*Stubbings v UK* [1997] 3 FCR 157, ECt HR.  
*SW v UK* (1996) 21 EHRR 363, [1995] ECHR 20166/92, ECt HR.

*Tsang Ping-nam v R* [1981] 1 WLR 1462, PC.

*X v Netherlands* (1985) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.

## Appeal

The defendant, J, appealed with leave of the Appeal Committee of the House of Lords given on 20 May 2003 from the decision of the Court of Appeal (Potter LJ, Butterfield J and Judge Paget QC) on 20 December 2002 ([2002] EWCA Crim 2983, [2003] 1 All ER 518, [2003] 1 WLR 1590) dismissing his appeal against his conviction in the Crown Court at Taunton on 1 November 2001, following a trial before Judge Hume-Jones and a jury, of three offences of indecent assault on a woman contrary to s 14(1) of the Sexual Offences Act 1956. The Court of Appeal certified that a point of law of general public importance, set out at [1], below, was involved in its decision. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Martin Meeke QC* and *Terence Holder* (instructed by *Risdon Hosegood*, Minehead) for J.

*David Perry* and *Miranda Hill* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration.

14 October 2004. The following opinions were delivered.

## LORD BINGHAM OF CORNHILL.

[1] My Lords, the point of law of general public importance certified by the Court of Appeal (Criminal Division) under s 33(2) of the Criminal Appeal Act 1968 in this case is:

‘Whether it is an abuse of process for the Crown to prosecute a charge of indecent assault under s 14(1) of the Sexual Offences Act 1956 in circumstances where the conduct upon which that charge is based is an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution may be commenced under s 6(1) of the 1956 Act by virtue of s 37(2) of, and Sch 2 to, the 1956 Act.’

The Court of Appeal (Potter LJ, Butterfield J and Judge Paget QC) ([2002] EWCA Crim 2983, [2003] 1 All ER 518, [2003] 1 WLR 1590) resolved that question in favour of the Crown and adversely to J, who appeals to the House against that decision.

[2] In 1996–1997, when he was aged 35–37 and she was aged 13–14, J repeatedly had sexual intercourse with C and at his request she repeatedly had oral intercourse with him. He ran a business on land rented from C’s father and she began working for him at the weekend and during the school holidays. He took this opportunity to cultivate a sexual relationship with her which culminated in the conduct already mentioned. J’s conduct was plainly criminal. It was made the more serious by the disparity between the respective ages of himself and C; by his standing as a middle-aged man, an associate of C’s father and her employer; by the steps which he took to groom C and, it seems, record on video their sexual activity; by the frequency of that activity; and by the period over which it continued.

a [3] C did not reveal what had happened between her and J until some three years later, when she was 17. By that time, as will be seen, it was too late to prosecute J under s 6 of the 1956 Act, either summarily or on indictment, for having unlawful sexual intercourse with a girl under the age of 16. An indictment was accordingly preferred containing four counts. The first three of these were specimen counts charging J with indecently assaulting C on dates in 1996 and b 1997, contrary to s 14(1) of the 1956 Act. The fourth was a specimen count charging him with committing an act of gross indecency with a child in 1996, contrary to s 1(1) of the Indecency with Children Act 1960. The prosecution's written case summary at the trial made plain that the first three counts were specimen counts relating to sexual intercourse between J and C and that the c fourth count was a specimen count relating to oral sex. When J appeared before Judge Hume-Jones in the Crown Court at Taunton in October 2001, application was made to stay the prosecution on the ground that to charge indecent assault in such circumstances was a device to circumvent the time limit on a prosecution for unlawful sexual intercourse and so amounted to an abuse of the process of the court. The judge rejected that application, ruling (in written reasons given later) d that there was nothing to prevent the prosecution charging indecent assault in the circumstances. Directing the jury in due course on the first three counts, the judge said:

e '... the allegation is that the defendant had sexual intercourse with [C] when she was under 16 ... there is no dispute that conduct such as that which is alleged is capable of constituting the offence of indecent assault ... In law, a girl under the ... age of 16, cannot consent to an indecent assault ... The sole issue for you on these counts is this. Are you satisfied, so that you are sure ... that the defendant had sexual intercourse with [C]?'

f By a majority, the jury convicted J on all four counts. He was sentenced to a total of three years' imprisonment on the first three counts and to 12 months' imprisonment consecutive on the fourth.

g [4] The Court of Appeal reduced J's sentence on the fourth count from 12 months' imprisonment to nine, acceding to a submission that he need not be a long-term prisoner. But the lawfulness of his conviction on the fourth count was not challenged in the Court of Appeal or before the House. It related to an act of oral intercourse, which does not fall within the definition of sexual intercourse in s 44 of the 1956 Act. It was of course an act incidental to the sexual relationship which existed between J and C, but it was an independent act, not inherent in or forming part of the sexual intercourse which took place between them. The charge under count 4 was properly laid and there is no reason to h doubt that J was properly convicted. That count need not be further considered.

j [5] J's challenge in the Court of Appeal to his convictions on the first three counts rested on essentially the same abuse of process argument as the judge had rejected. The Court of Appeal ([2003] 1 All ER 518) also rejected it. Having reviewed a body of authority relied on by one or other party, the court concluded: (1) that 'the substantive offence of indecent assault is plainly apt to cover the act of penile penetration involved in sexual intercourse and of the various acts of fondling and foreplay which precede it' (at [31]); (2) that selection of an appropriate charge generally lies within the discretion and responsibility of the Crown (at [32]); (3) that the court none the less reserves to itself a residual and discretionary power to stay criminal proceedings as an abuse of process (at [33]); (4) that the prosecution in this case had not been guilty of conduct which could



fairly be characterised as a misuse of the process of the court (at [38]); and (5) that it was not necessarily an abuse of process to bring a charge of indecent assault after the expiry of 12 months in respect of facts which would justify a charge under s 6 of the 1956 Act (at [38]). Giving the judgment of the court, Potter LJ said (at [39]):

‘We accept that the defendant is thereby deprived of a protection provided by the law in respect of prosecutions under s 6. However, we do not accept that it arises from misuse of process by the prosecution, so much as delay on the part of the complainant. The question is therefore whether, as a general proposition, so to proceed involves an affront to the public conscience, is necessarily contrary to the public interest, or undermines the integrity of the criminal justice system. In our view the answer to that question is No; it all depends upon the circumstances of the individual case. It must frequently be the position, as in this case, that the facts do not come to light until after the expiry of 12 months, upon the complaint of a victim who, free of the influence of the defendant, is able to appreciate the degree to which their relationship was an abusive one. The fact that Parliament may have thought fit to provide for a general limitation period in respect of prosecutions under s 6, based, it must be assumed, on the principle that stale complaints are inherently likely to give rise to evidential difficulty, does not in our view preclude a responsible prosecutor from taking the view that, in the particular circumstances, a fair trial is possible and that it is conducive, and not inimical, to justice to bring a different charge not subject to such a period of limitation.’

Then, having referred to the facts and observed that the counts laid could not and should not be regarded as a misuse of the process of the court or an affront to justice (at [40]), Potter LJ continued (at [41]):

‘Nothing which we have said should be taken as an encouragement to prosecutors to bring defendants to court on charges of indecent assault in cases where, were the time bar not applicable, the charge would have been laid under s 6. While the decision to do so will depend upon all the circumstances of the case, it seems to us that the decision to prosecute should depend, not simply upon the fact that the offence or offences have not come to light till after the expiry of a period of 12 months, but upon the presence of some unusual or aggravating feature sufficient to justify the avoidance of the limitation period provided for under s 6. Equally, nothing we have said should detract from the now settled practice of this court in treating two years’ imprisonment as the maximum sentence appropriate to a charge of indecent assault brought in circumstances where, but for the expiry of the 12-month time limit, the charge would appropriately have been laid under s 6.’

[6] At the heart of this appeal lie three statutory provisions to which reference must now be made. The first of these is s 6(1) of the 1956 Act which, as amended and so far as material, provided:

*‘Intercourse with girl between thirteen and sixteen.—(1) It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl ... under the age of sixteen.’*

a The subsection must be read with s 5 which made it an offence, and a much more  
serious offence, to have sexual intercourse with a girl under the age of 13.  
Section 6 was directed to the proscription of consensual intercourse with  
underage girls, since intercourse alleged to be non-consensual would be  
prosecuted as rape. As Mr Perry, for the Crown, has helpfully and painstakingly  
b demonstrated, s 6(1) was (until repealed by Sch 7 to the Sexual Offences Act 2003)  
the latest in a series of statutory provisions directed to that end, although the age  
below which a girl was protected has been increased over the centuries from 10  
(see 18 Eliz 1 cap 7, s 4) to 12 (see 9 Geo IV cap 31, s 17; s 51 of the Offences against  
the Person Act 1861) to 13 (see s 4 of the Offences against the Person Act 1875) to  
16 (see s 5(1) of the Criminal Law Amendment Act 1885). Neither of the  
c exceptions provided in s 6 applies in this case, and it was not suggested that  
the terms of sub-s (1) were in any way ambiguous or obscure. There can be no doubt  
that the acts of sexual intercourse with C charged against J in the first three  
counts, and found by the jury to have been committed, fell squarely within  
sub-s (1).

d [7] The second statutory provision crucial to the outcome of this appeal, given  
effect by s 37 of the 1956 Act, is found in para 10(a) of Sch 2 to that Act. This  
sub-paragraph related to the offence of intercourse with a girl under 16 contrary  
to s 6 and specified (as described in s 37(2)) a special restriction on the  
commencement of a prosecution. The special restriction was that 'a prosecution  
may not be commenced more than twelve months after the offence charged'.

e [8] As, again, Mr Perry has helpfully shown, this provision also had a number  
of ancestors. Section 5 of the Criminal Law Amendment Act 1885 provided that  
no prosecution for an offence under sub-s (1) (sexual intercourse with a girl aged  
between 13 and 16) should be commenced more than three months after the  
commission of the offence. Section 27 of the Prevention of Cruelty to Children  
Act 1904 increased the time limit to six months. Section 2 of the Criminal Law  
f Amendment Act 1922 increased the period to nine months. Section 1 of the  
Criminal Law Amendment Act 1928 made a further increase to 12 months. That  
provision was consolidated in the 1956 Act.

g [9] An increase in the time limit from nine months to 12 was recommended in  
a *Report of the Departmental Committee on Sexual Offences against Young Persons*  
under the chairmanship of Sir Ryland Adkins KC (1925) (Cmd 2561), which said:

h 'Para 41(8) The Criminal Law Amendment Act, 1885, section 5, provided  
that no prosecution for carnal knowledge of a girl between 13 and 16, or for  
the attempt, should be commenced more than three months after the  
commission of the offence. Six months was substituted for three months by  
a statute of 1904. The Criminal Law Amendment Act, 1922, section 2, has  
again extended the time, so that a prosecution for an offence under section 5  
of the Act of 1885 must today be commenced within nine months of the  
commission of the offence. The extension from six to nine months was only  
j made as recently as 1922, by way of compromise. There is a considerable  
body of evidence, however, to show that the limitation of nine months may  
be insufficient in many cases, to enable offenders to be brought to justice.  
There are occasions when the offence is not known until the girl has become  
a mother, and the evidence cannot be completed until after she has  
recovered sufficiently to make a statement. Or it may happen that the  
registration of the birth of a child, or an application for a summons for an  
affiliation order, is the first indication that an offence has been committed. In



such cases it is clear that more than nine months may have elapsed since the commission of the offence and that, as the law now stands, no criminal proceedings can be taken. Unless some limitation of time is imposed for the prosecution of these offences injury may be caused by charges being held over; witnesses for the defence as well as for the prosecution may be lost; and important facts on one side or the other may not be provable. We are satisfied from the evidence, however, that the present limitation of time may be too short in cases in which a prosecution is called for. We therefore recommend that the time limit for the taking of proceedings under the Criminal Law Amendment Act, 1885, section 5(1), be extended to 12 months.'

[10] The 12-month time limit was in its turn reviewed by the Criminal Law Revision Committee under the chairmanship of Lawton LJ which, in its Fifteenth Report on Sexual Offences (1984) (Cmnd 9213), advised:

### '7. Limitation

5.22 As we have already said, the object of the legislation against unlawful sexual intercourse is to protect girls, sometimes against themselves. The probability is that in the past the legislature was concerned with the damage that could be done to a young girl by pregnancy. In practice many complaints to the police are made when parents discover that their daughter has been made pregnant. In the last century a prosecution for unlawful sexual intercourse with a girl under 16 could not be commenced more than 3 months after the alleged act of intercourse. This has been extended gradually over the years and is now 12 months. In our opinion a period of limitation for this offence—which is only exceptionally found in the case of indictable offences—is of value in that it ensures that a prosecution may not be brought in respect of events that have become stale. For this purpose the present 12 month period seems right and we recommend that it should be retained.

5.23 Nothing we say here affects the offence of unlawful sexual intercourse with a girl under 13. No limitation period applies to that offence; nor, in view of its gravity, is it appropriate that one should.'

[11] After 1956, Parliament enacted statutes relating to sexual offences in 1960, 1967, 1976, 1985, 1992 and 1993, but it did not (until it enacted Sch 7 to the Sexual Offences Act 2003) abrogate or amend the 12-month time limit enacted in para 10(a) of Sch 2 to the 1956 Act. It was not suggested in argument that this provision was in any way ambiguous or obscure. It plainly precluded any prosecution of J under s 6 of the 1956 Act. That, of course, is why J was not prosecuted under that section for having sexual intercourse with C when she was under age.

[12] The third statutory provision important for present purposes is s 14 of the 1956 Act which, so far as relevant, provided:

*'Indecent assault on a woman.*—(1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.

(2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.'

a [13] The exception in sub-s (3) has no bearing on this case. Indecent assault on  
a woman, as a separate offence, dates back to s 52 of the Offences against the  
Person Act 1861, and s 1 of the Criminal Law Amendment Act 1922 first provided  
that it should be no defence to a charge or indictment for an indecent assault on  
b a child or young person under the age of 16 to prove that he or she consented to  
the act of indecency. The House was not addressed, and the present appeal calls  
for no decision, on the ingredients of indecent assault under s 14. It is enough to  
say that it includes an intentional touching of one person by another in  
circumstances of indecency, whether or not (where the person touched is a girl  
under 16) she consents: see *Faulkner v Talbot* [1981] 3 All ER 468 at 471, [1981]  
1 WLR 1528 at 1534. As the Court of Appeal held in para [31] of its judgment,  
c quoted in part in [5], above, this broad description is capable of covering the  
conduct of J when having sexual intercourse with C.

[14] The Court of Appeal was quite right, in my respectful opinion, to hold  
that the conduct of the prosecution in this case did not fall squarely within the  
category of abuse of the process of the court stigmatised by Sir Roger Ormrod,  
d delivering the judgment of Lord Lane CJ and himself, in *R v Derby Crown Court, ex*  
*p Brooks* (1984) 80 Cr App R 164 at 168–169. Nor was it within that considered by  
the House in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994]  
1 AC 42. As Mr Meeke QC, for J, roundly acknowledged, the prosecution had not  
been guilty of any devious, underhand or manipulative conduct. They had not  
e sought to take unfair advantage of a technicality or to prejudice the conduct of  
the defence in any improper way. The delay in prosecuting J, in no way the fault  
of the prosecution, did not imperil the fairness of the trial. There was no  
misconduct by the executive. This was a case in which the prosecution, learning  
of serious criminal conduct when it was too late to prosecute under s 6, sought to  
discharge its public duty by prosecuting under s 14. It was a decision which the  
f general public would applaud.

[15] In the course of argument before the House, however, it became clear  
that J's real complaint was not that the prosecution had abused the process of the  
court, as that expression is ordinarily understood, but that it had prosecuted  
under s 14 when, on a proper construction of the three statutory provisions  
discussed above and on the facts relied on to support the prosecution, it was  
g precluded by statute from doing so. This approach calls for recognition of some  
very basic but fundamental principles. It is the duty of the court to give full and  
fair effect to the meaning of a statute. In a purely domestic context such as this,  
it cannot construe the statute by reference to any extraneous legal instrument. It  
must seek to give effect to all the provisions of a statute. It cannot pick and  
h choose, giving effect to some and discounting others. It has no warrant, in a case  
such as this where no convention right is engaged (see the European Convention  
for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out  
in Sch 1 to the Human Rights Act 1998), to resort to the unique interpretative  
technique required by s 3 of the 1998 Act. If a statutory provision is clear and  
j unambiguous, the court may not decline to give effect to it on the ground that its  
rationale is anachronistic, or discredited, or unconvincing. The historical  
derivation of the 1956 Act has been shown to result in much internal  
inconsistency and lack of coherence (see, for example, *R v K* [2001] UKHL 41 at  
[4], [2001] 3 All ER 897 at [4], [2002] 1 AC 462) but the deficiencies of the Act  
cannot absolve the court from its duty to give effect to clear and unambiguous  
provisions.

[16] Thus the problem may be simply stated. In s 6 Parliament has criminalised a form of conduct compendiously described as having sexual intercourse with a girl under the age of 16. But it has prohibited the commencement of a prosecution for such conduct more than 12 months after the offence charged. In s 14 it has criminalised indecent assault, with or without her consent, on a girl under 16. Under that section a prosecution on indictment is, anomalously, subject to no time limit. Where, for good reason, a prosecution for having sexual intercourse is not commenced under s 6 within 12 months of the intercourse, may the defendant none the less be prosecuted, for the same conduct, under s 14?

[17] Mr Perry submitted that this question be answered affirmatively. He accepted in argument that this was to read para 10(a) of Sch 2 as if it provided that a prosecution for sexual intercourse with a girl under 16 might not be commenced more than 12 months after the offence charged but that, if a prosecution was not commenced within that time, the same conduct could thereafter be prosecuted under s 14.

[18] This is, to my mind, an impossible reading, since Parliament must have intended the prohibition in Sch 2, Pt II, para 10(a) to have some meaningful effect and this reading would deprive it of any meaningful effect whatever, given that when the 1956 Act was passed the same maximum penalty applied on conviction under either section. Put another way, what possible purpose could Parliament have intended to serve by prohibiting prosecution under s 6 after the lapse of 12 months if exactly the same conduct could thereafter be prosecuted, with exposure to the same penalty, under s 14?

[19] Authority on the application of other statutes, differently expressed, is of limited assistance in resolving a problem of this kind. But some help may be gained from *R v Cotton* (1896) 60 JP 824, which was not cited to the Court of Appeal. Section 9 of the Criminal Law Amendment Act 1885 provided that on a trial for rape the jury, if not satisfied that the defendant was guilty of rape but satisfied that he was guilty of having intercourse with a girl aged between 13 and 16, contrary to s 5(1) of the Act, might convict of the latter offence. The prosecutor opened the case as one in which that course could be adopted. Pollock B, the trial judge, questioned whether that was permissible where (as was the case) more than three months (the time limit for prosecution under s 5) had elapsed between the conduct alleged and the prosecution. He ruled (at 825):

‘The conclusion I have come to is that you cannot go on with the charge under section 5, more than three months having elapsed since the last commission of the offence. In substance, if this could be done, by shaping your charge as a charge of rape, you could always evade the statutory limit of time. In a case such as this, it would be the more reasonable construction of the sections to hold that the time must be considered as the essence of the charge. In substance, an indictment of rape under circumstances such as these must be treated as a charge of the lesser offence.’

The jury acquitted the defendant of rape, and he was discharged. The very brief report makes no reference to indecent assault, of which it was also open to the jury to convict under s 9. I would hesitate to accept all the reasoning of Pollock B. But the authority does show the rigour with which the time limit was applied on its first enactment, despite the consequence which might (and did) ensue.

[20] *R v Cotton* was cited in the Court of Appeal of New Zealand in *R v Blight* (1903) 22 NZLR 837. The Criminal Code in force at the time, reflecting the

a English, included an offence of sexual intercourse with a girl under 16, to which a one-month time limit applied, and also an offence of indecent assault to which no time limit applied but to which, in the case of a young victim, consent was not a defence. Well after expiry of the time limit, the defendant was prosecuted for indecent assault, he having had sexual intercourse with a girl under 16. A majority of the court held this course to be impermissible. As Williams J put it (at 847):

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c 'In the present case it is clear that everything done by the accused was an offence under section 196 [unlawful sexual intercourse] and nothing more. I think, therefore, the prosecution was instituted out of time. If the above construction be not adopted the result is that no effect could be given to section 196, and that section would be practically expunged from the Act, and the protection given by the time limit would be quite illusory.'

d Given that the maximum penalty for indecent assault was significantly greater than that for unlawful sexual intercourse, it is hard to accept the reasoning of Stout CJ, dissenting, that a defendant indicted for a minor offence is not entitled to be acquitted because the prosecution prove a major offence. The reasoning of the majority was recently approved and applied by the Court of Appeal of New Zealand in *R v Hibberd* [2001] 2 NZLR 211.

e [21] *R v Blight* was not followed by the Court of Criminal Appeal of New South Wales in *R v Saraswati* (1989) 18 NSWLR 143. The defendant had been convicted on several counts of indecency with a child, the only evidence relied on, in relation to some counts, being evidence of full sexual intercourse. There were statutory time limits which precluded prosecution for unlawful sexual intercourse and indecent assault, and it was held to be no abuse of process for the prosecution to rely on the evidence of sexual intercourse to establish the charge of indecency (see (1989) 18 NSWLR 143 at 145, 169–170). A majority of the High Court disagreed ((1991) 172 CLR 1). Toohey J (at 16) and McHugh J (at 23) relied on a—

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'rule that, when a statute specifically deals with a matter and makes it the subject of a condition or limitation, it excludes the right to use a general provision in the same statute to avoid that condition or limitation.'

g They could not accept (at 16, 24 respectively) that when Parliament amended the relevant Act to criminalise acts of indecency it intended that general power to be used to circumvent the time limit placed on prosecutions under the specifically applicable sections of the same statute.

h [22] The House was referred to a number of sentencing decisions of the Court of Appeal (Criminal Division) which, in my opinion, throw no light on the present problem. The issues addressed in these cases were the result of two things: the increase in the maximum penalty for indecent assault from two years' imprisonment to ten, enacted by s 3(3) of the Sexual Offences Act 1985; and the practice of prosecutors to lay charges under s 14 when the time for doing so under s 6 had expired. In *R v Quayle* (1992) 14 Cr App R (S) 726, it appears, the prosecution proceeded under s 14 because of the higher penalty. In *R v Hinton* (1994) 16 Cr App R (S) 523 it did so because the s 6 time limit had expired. In these, and a long string of later cases, the court tried to achieve a fair result for defendants by adjusting the sentences imposed on those whose indecent assaults consisted of unlawful sexual intercourse so that they reflected the maximum sentence fixed by statute for that offence. In none of these sentencing decisions

j



was the court called upon to consider the legitimacy of prosecuting acts of unlawful sexual intercourse as indecent assault after expiry of the time bar. It is, however, symptomatic of the irregularity of the exercise on which the courts were engaged that they felt constrained informally to reduce, by four-fifths, the maximum penalty set by Parliament for the offence of which the defendants had in fact been convicted.

[23] In arguing for the construction summarised in [17], above, Mr Perry suggested that any other construction would emasculate certain other provisions of the 1956 Act. The examples he gave were not persuasive. The essence of an offence under s 4 (administering drugs to obtain or facilitate intercourse) was the administering of the drug; there needed to be no proof of sexual intercourse. An offence against s 7 (intercourse with defective) was a specific offence, not subject to any time limit. In a case of incest by a man, prohibited by s 10, para 14(a) of Sch 2 provided that the jury might, as an alternative verdict, find the accused guilty of intercourse with a girl under 13 (contrary to s 5) or intercourse with a girl between 13 and 16 (contrary to s 6). A prosecution under s 10 could not be commenced except by or with the consent of the Director of Public Prosecutions (DPP), but was not stipulated to be the subject of any time limit. While it is unnecessary to decide the point, I incline to the view that an alternative verdict under s 6 in this context was subject to no time limit: the s 10 offence itself was not time-limited; nor was the s 5 offence; there was no repetition of the s 6 time limit; and the requirement for the DPP's consent could have been expected to ensure that s 10 would not be used as a means of circumventing the time limit applicable to prosecutions under s 6. Even if Pollock B was right to reach the conclusion he did in *R v Cotton* (1896) 60 JP 824 (see [19], above), I would incline to put a different construction on para 14(a) of Sch 2 to the 1956 Act.

[24] Mr Perry contended that conduct may not infrequently be covered by more than one criminal offence and that prosecutors must enjoy a wide measure of discretion in selecting what charges they should prefer. With this in general I agree, while observing that if conduct falls within a more general and also a more specific statutory provision one would ordinarily expect a charge to be laid under the latter, as exposing the defendant to the penalty which Parliament prescribed for the particular conduct in question. But these principles are not engaged by the present provisions, in which Parliament has ordained that conduct of a certain kind shall not be prosecuted otherwise than within a certain period.

[25] In very many cases, even where the 12-month time limit has passed, there will be independent acts other than sexual intercourse itself, or conduct inherent in or forming part of it, on which a prosecution could properly be founded. The present case is a good example, since oral intercourse was charged in the fourth count, other acts of oral intercourse could have been charged and there may well have been other acts independent of the sexual intercourse between J and C, and not inherent in or forming part of it, on which additional charges could have been founded. It is only where the time limit has expired, and when only evidence of sexual intercourse is relied on, that the defendant may not be prosecuted.

[26] I would answer the certified question by ruling:

'It is impermissible for the Crown to prosecute a charge of indecent assault under s 14(1) of the 1956 Act in circumstances where the conduct upon which that charge is based is only an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution might be

a commenced under s 6(1) of the Act by virtue of s 37(2) of and Sch 2 to that Act.'

[27] It follows that the prosecution of J under counts 1–3 should have been stayed, or those counts dismissed. For these reasons, and also those given by my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry, I would allow J's appeal and quash his convictions on those counts.

**LORD STEYN.**

[28] My Lords, until very recently the Sexual Offences Act 1956 differentiated between offences by a man of unlawful sexual intercourse with a girl under the age of 16 years, contrary to s 6(1), and by a person of indecent assault on a woman, contrary to s 14, in a curious way. Under s 6(1) a prosecution could not be brought more than 12 months after the offence was charged: see s 37 and para 10(a) of Sch 2 to the Act. But under s 14 no similar time bar was applicable. The policy underpinning the time bar under s 6 was apparently to prevent prosecutions in respect of stale charges. But that policy would appear to apply equally to charges under s 14. Allowing a time bar in one case but not in the other seemed strange. Moreover, in modern times the provision of a relatively short time bar of 12 months in respect of charges under s 6 was widely regarded as not in the public interest. Not surprisingly, Parliament abolished the time limit with effect from 1 May 2004 by the Sexual Offences Act 2003. The change in the law is, of course, not of retrospective effect. This appeal is concerned with the pre-existing law under which s 6 of the Act contained a time limit of 12 months on prosecutions but s 14 did not. The House has been told that there may be a number of other old cases which raise the same problem as is presently before the House.

[29] The broader policy issue whether there is, in the modern world, a sensible scope for some time limits under statutes like the 1956 Act is a matter for Parliament. For my part I would not wish without examination to rule out some time limits for prosecutions under the 2003 Act. Time limits necessarily have an arbitrary element. But it may well be that the bringing of truly stale charges, very many years after the events took place, are not in the interests of victims and society. This is a subject which could benefit from a Law Commission investigation.

[30] It is essential to concentrate on the precise way in which the appeal comes before the House. The problem arises in a stark form. On counts 1, 2 and 3 of the indictment the prosecution case was that the defendant had unlawful sexual intercourse with a girl under the age of 16 years. That was how the case was presented by the prosecution to the jury and how the judge summed up the case to the jury. The case fell squarely within s 6(1). But there was no charge under s 6(1) of the Act. In order to avoid the time limit under s 6(1), which would have been applicable on the facts of the case, the Crown Prosecutor in charge of the prosecution decided to frame the charge under s 14. He thought he was entitled to do so. It is necessary to emphasise that in this particular case, apart from the wish to avoid the time limit under s 6(1), there was no rational reason for deciding on a charge under s 14. The problem before the House arises in a simple form: was the Crown Prosecution Service (CPS) entitled, for the sole purpose of avoiding the 12-month time limit under s 6(1) to frame the charge under s 14?

[31] In the Crown Court, and in the Court of Appeal, the issue was regarded as whether it was an abuse of process for the CPS to act as it did. The judge held



that it was not an abuse of process. The Court of Appeal (Potter LJ, Butterfield J and Judge Paget QC) came to a similar conclusion ([2002] EWCA Crim 2983, [2003] 1 All ER 518, [2003] 1 WLR 1590). The court accepted (at [39]) that the defendant was 'deprived of a protection provided by the law in respect of prosecutions under s 6'. The court concluded that this did not arise from a misuse of process by the prosecution, but from delay by the complainant. But this was not a case about delay.

[32] In giving the judgment of the court Potter LJ was alive to the potential difficulties. He observed (at [41]):

'Nothing which we have said should be taken as an encouragement to prosecutors to bring defendants to court on charges of indecent assault in cases where, were the time bar not applicable, the charge would have been laid under s 6. While the decision to do so will depend upon all the circumstances of the case, it seems to us that the decision to prosecute should depend, not simply upon the fact that the offence or offences have not come to light till after the expiry of a period of 12 months, but upon the presence of some unusual or aggravating feature sufficient to justify the avoidance of the limitation period provided for under s 6.'

This observation raises the question: why should the Crown Prosecutor not *always* be entitled to avoid the time limit by charging an offence under s 6(1) as an offence under s 14? It is a question to which our law provides straightforward answers.

[33] Departing somewhat from the agreed issues on this appeal, it is in my view necessary to approach the problem from two different but connected angles. First, the question is whether as a matter of the correct interpretation of the Act a Crown Prosecutor may charge conduct covered by s 6(1) under s 14 for the sole purpose of avoiding the time limit under the former provision. Secondly, whatever the answer to the first question, whether it is within the powers of a Crown Prosecutor, tested against public law principles, to act in this way. I deal first with the question of statutory construction.

[34] Let it be imagined that the Director of Public Prosecutions issued an instruction, with the approval of the Attorney General, that in *all* cases covered by s 6(1) where a time limit arises the charge must be brought under s 14. The result would be that by the decision of the CPS the time limit provided by Parliament would be rendered wholly meaningless. That would be a comprehensive evasion of the intent of Parliament in making provision for the time limit.

[35] Let me now assume that instead the CPS permitted Crown Prosecutors to avoid the relevant time limit in particular cases where they deem it in the public interest. It is, of course, what happened in practice. That too must be an evasion of the intent of Parliament because Parliament provided for a general time limit on prosecutions under s 6(1) and not a discretionary one.

[36] An authority not cited in the Court of Appeal throws light on the correct approach to the adoption of such a prosecutorial strategy. In *R v Cotton* (1896) 60 JP 824 the defendant was charged with rape. By s 9 of the Criminal Law Amendment Act 1885 the offence under s 5(1) of the Act of unlawfully and carnally knowing a girl over 13 and under 16 years of age, was a statutory alternative to rape. There was, however, a proviso to s 5(1) that no prosecution should be commenced more than three months after the commission of the offence. Pollock B held (at 825):

- a 'The conclusion I have come to is that you cannot go on with the charge under section 5, more than three months having elapsed since the last commission of the offence. In substance, if this could be done, by shaping your charge as a charge of rape, you could always evade the statutory limit of time. In a case such as this, it would be the more reasonable construction of the sections to hold that the time must be considered as the essence of the charge. In substance, an indictment of rape under circumstances such as these must be treated as a charge of the lesser offence.'
- b

The jury acquitted the defendant of rape and he was discharged. It was thus held that as a matter of statutory interpretation the intent of Parliament cannot be lawfully evaded. A similar approach was adopted in *R v Blight* (1903) 22 NZLR 837 by a majority of the New Zealand Court of Appeal. This decision was recently followed in *R v Hibberd* [2001] 2 NZLR 211; see also the decision of the majority in the High Court of Australia in *Saraswati v R* (1991) 172 CLR 1.

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- [37] The legislative adjuration is explicit and strong: under s 6(1) 'a prosecution may not be commenced more than twelve months after the offence charged'. Parliament does not intend the plain meaning of its legislation to be evaded. And it is the duty of the courts not to facilitate the circumvention of the parliamentary intent: see *Bennion on Statutory Interpretation* (4th edn, 2002) pp 867–871 (section 319). In the present case the intent to avoid the statutory time limit is freely acknowledged and, in any event, manifest. In these circumstances the conclusion is inescapable: as a matter of construction of the Act the time limit cannot be circumvented by the manipulation of the indictment to charge conduct falling squarely within s 6(1) as an offence under s 14 solely in order to avoid the time limit under the former provision.
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- [38] Although this conclusion is sufficient to dispose of the appeal I will also consider the position under the common law. The present case is not easily accommodated under any of the traditional categories of abuse of process. It is not profitable to try to analyse it by reference to dicta about wholly different categories of abuse of process. On the other hand, it must be borne in mind that the category of cases in which the abuse of process principles can be applied are not closed: see *R v Latif*, *R v Shahzad* [1996] 1 All ER 353 at 360–361, [1996] 1 WLR 104 at 112–113. In any event, this is pre-eminently a corner of the law which must be considered from the point of view of legal principle. In our system of government Parliament has the primary responsibility for the bulk of the criminal law which is statute-based. The role of the courts is to interpret and apply statutes. The courts must loyally give effect to the statutes as enacted by Parliament. The judiciary may not render a statutory provision, such as a time limit, nugatory on the ground that it disagrees with the reason underlying it. The CPS as an independent law enforcement agency carries out duties of a public character. It must act fairly and within the law. It must observe statute law as Parliament framed it. In our parliamentary democracy nobody is above the law. The powers of the CPS are extensive but not extensive enough to permit it to take decisions intended to evade the clear intent of Parliament. And it is plain as a pikestaff that the CPS policy under challenge in the present appeal was intended to circumvent the intent of Parliament in creating a time limit for prosecutions under s 6(1).
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[39] It is, of course, true that the CPS has acted in good faith and in what it considered the public interest. But the particular policy it adopted unquestionably fell beyond its powers. It was ultra vires. For this further reason,

which overlaps with the point of statutory construction, I would hold that the decision of the CPS to charge the defendant under s 14 in order to avoid the time limit under s 6(1) was unlawful. a

[40] For these reasons, as well as the reasons given by my noble and learned friends Lord Bingham of Cornhill, and Lord Rodger of Earlsferry, I would also allow the appeal and quash the convictions on counts 1, 2 and 3 of the indictment. b

#### LORD CLYDE.

[41] My Lords, s 6(1) of the Sexual Offences Act 1956 provides that subject to certain exceptions it shall be an offence for a man to have unlawful sexual intercourse with a girl under the age of 16. Section 14(1) provides that subject to certain exceptions it shall be an offence for a person to make an indecent assault c on a woman. Section 37 and Sch 2 state the maximum sentences for these offences. In the case of s 6(1) the maximum sentence is two years. In the case of s 14(1) it is on indictment ten years. In the case of s 6(1), but not in the case of s 14(1), s 37 and Sch 2 prescribe a special restriction on the commencement of a prosecution, namely that a prosecution may not be commenced more than d 12 months after the offence charged. The present case concerns the interplay between these two sections. What happened here was that the appellant was alleged to have had unlawful sexual intercourse with a girl under the age of 16 which at the trial was proved to the satisfaction of the jury, but he was charged and was convicted of indecent assault under s 14(1) because the 12-month limit e for proceedings to be taken under s 6(1) had expired.

[42] The respondent provided a history of the development of the statutory provisions which lay behind the 1956 Act. If one goes no further back than the Offences against the Person Act 1861 one can find in ss 50 and 51 provisions for the offences of unlawful carnal knowledge of a girl under ten years of age in the one section and over ten and under 12 in the other. Section 52 provided for the offence of any indecent assault upon a female and any attempt to have carnal f knowledge of a girl under 12 years of age. It is not clear whether or not the mere act of intercourse with a willing girl, even if she could not in law consent, would have been understood in 1861 to be sufficient to comprise a charge of indecent assault. If the mere act of intercourse would not have been treated as an assault then at least at that period there would not have been the problem which arises g in the present case. But whatever may have been the understanding at that earlier time, the law proceeded to develop both through judicial decision and statute. The various statutory provisions were eventually consolidated in the 1956 Act. In *R v McCormack* [1969] 3 All ER 371 at 373, [1969] 2 QB 442 at 445 it was held as 'plain beyond argument' that if a man inserted his finger into the h vagina of a girl under 16 that would be an indecent assault in view of her age, however willing and co-operative she might be. The charge in question in that case was one of unlawful sexual intercourse and it was held to have been correct to leave to the jury as an alternative verdict a verdict of indecent assault.

[43] The present case however is not concerned with problems of alternative j verdicts. Nor is it concerned with the problem of the appropriate sentence in circumstances where what was in substance an offence under s 6(1) is presented as an indecent assault. That problem has been considered in such cases as *R v Hinton* (1994) 16 Cr App R (S) 523 and more recently in *R v Figg* [2003] EWCA Crim 2751, [2004] 1 Cr App R (S) 409. The problem in the present case is whether a prosecution for what is in substance unlawful sexual intercourse with a girl

a under 16 should properly have proceeded as an indecent assault when it was too late to proceed under s 6(1).

[44] The provision of a time limit on prosecutions for unlawful sexual intercourse with girls can be traced back to a proviso to s 5 of the Criminal Law Amendment Act 1885 which related to unlawful carnal knowledge of girls over 13 and under 16 years of age. The limit was then one of three months. The limit  
b was successively increased in later legislation to the eventual period of 12 months which was consolidated into the 1956 Act. Whatever the precise reasoning behind the imposition of the time limit may have been, its intention must at least in part have been to serve as a protection to an alleged offender. It was argued that the rationale for it was long outdated, but it was still standing in the legislation when the present case arose and it is for Parliament to decide whether  
c or not it should be changed. It has in fact recently been abolished by s 140 of and Sch 7 to the Sexual Offences Act 2003. But that cannot entitle us to ignore its existence for the purposes of the case before us or to modify its effect.

[45] The present case is plainly one where the act of sexual intercourse constituted the essence of the complaint. That was how the issue was presented  
d by the trial judge to the jury. He said to the jury: 'The sole issue for you on these counts is this. Are you satisfied, so that you are sure ... that the defendant had sexual intercourse with [C]?' There was nothing in the defendant's behaviour other than the act of intercourse which was of such significance or importance as to justify the framing of a charge of indecent assault in place of one of unlawful sexual intercourse. The decision to prosecute under s 14(1) and not under s 6(1)  
e appears to have been simply dictated by the expiry of the time limit.

[46] It is for the prosecution to decide at the outset in light of the factual material available what the appropriate charge should be. But it cannot be that the prosecutor should have a free discretion to decide which of these two sections to select. His decision upon the appropriate charge must be principally governed  
f by the predominating facts of the case. The behaviour complained of may include sexual intercourse but that may be only one element in a course of what was predominantly an indecent assault. The problem arises where the facts disclose nothing more in the way of assault than the act of unlawful sexual intercourse. That was the situation so far as the first three counts in the indictment in the present case were concerned.

[47] It cannot be that in every case where the facts fit the provisions of s 6(1) a prosecution could also be taken under s 14(1). If every case of unlawful sexual intercourse against a girl under 16 was necessarily to constitute an indecent assault, then s 6 would be otiose. Even if there may be some overlap between the provisions some distinct content must be found for s 6(1).  
g

[48] The appellant presented the case primarily as one of abuse of process. But in the course of the argument a second line of approach emerged, namely one of statutory construction, or of statutory application. In my view this is a sound approach to the problem. It recognises that it would be a misapplication of the statute to allow a case which neatly and comprehensively falls within s 6(1) to proceed under s 14(1). To do so would be to ignore the clear provision regarding  
j the time limit for prosecution which Parliament has attached to the offence detailed in s 6(1). It has of course to be accepted that the 1956 Act is a consolidating statute and that a complete coherence is not necessarily to be found among all its provisions. But the two offences detailed in ss 6(1) and 14(1) have in substance co-existed in the legislative history over a long period and should be open to a mutually consistent interpretation. Section 6(1) makes the particular



facts with which it deals a distinct offence and attaches to that offence a limitation on the period for prosecution. The effect of that is, that once the time limit has passed it is not possible to present the same facts as an offence under s 14(1). On the approach to construction adopted by Pollock B in *R v Cotton* (1896) 60 JP 824 at 825 'the time must be considered as the essence of the charge', and on that approach the exclusion of the one offence from the ambit of the other after the operation of the time limit becomes all the more obviously necessary. a

[49] The case does not fall readily into the established categories of abuse but the concept of abuse may defy exhaustive definition. What the prosecution did here, albeit with good intention and without malice or dishonesty, was to cut across the intention of Parliament and in particular the provision of a protection for a person against whom a particular offence has been alleged. The substance of the argument on abuse is that the prosecutor should not be entitled to circumvent that protection by resorting to another offence which is less suited to the facts of the case. In my view it can at least be argued that it would be something so wrong as to make it proper for a court to refuse to allow a prosecutor to proceed on such a course. The essence of the wrong is an illegality which in turn is based upon a misconstruction of the Act. While the label of abuse may not be appropriate for such a situation the illegality of the course would justify the intervention of the court. At the heart of the matter is the proper understanding of the relationship between the two statutory provisions. The two lines of approach may eventually turn out to be different ways of viewing the same point. But they both lead to the same result. b

[50] I accordingly agree that the appeal should be allowed. c

#### LORD RODGER OF EARLSFERRY. d

[51] My Lords, in 1996 the complainant began working for the appellant. In March 2000 she complained to the police that he had had consensual sexual intercourse with her on many occasions from July 1996 to September 1997 when she was between the ages of 13 and 15. It is agreed that these acts of intercourse would have constituted offences against s 6(1) of the Sexual Offences Act 1956 and would have been punishable with a maximum sentence of two years' imprisonment. Section 37(1) and (2) of that Act, together with para 10 of Pt II of Sch 2, provide, however, that such offences are to be prosecuted on indictment and that 'a prosecution may not be commenced more than 12 months after the offence charged'. Since the complainant did not approach the police to report the matter until more than two years after the end of the period in which the alleged conduct took place, it was impossible for the appellant to be prosecuted under s 6(1). e

[52] Under s 14 of the 1956 Act it was an offence, punishable with a maximum sentence of ten years' imprisonment, to make an indecent assault on a woman, including a girl. Schedule 2 prescribes no time limit for commencing the prosecution of such offences. In this case, therefore, the Crown prosecutor, realising that a prosecution under s 6 was barred by the lapse of time, deliberately chose to prosecute the appellant under s 14 in order to avoid the time bar. Counts 1–3 on the indictment against the appellant, which related to acts of sexual intercourse, were specimen counts of indecent assault contrary to s 14. Count 4, which related to distinct episodes of oral sex, was a specimen count of indecency with a child, contrary to s 1(1) of the Indecency with Children Act 1960. That offence is punishable with a maximum of ten years' imprisonment. In the result, on conviction the appellant was sentenced to concurrent terms of f



a 18 months' imprisonment on counts 1 and 2, to a consecutive term of 18 months' imprisonment on count 3 and to a consecutive term of 12 months' imprisonment, reduced on appeal to nine months, on count 4. No issue arises in relation to count 4, but the appellant contends that it was an abuse of process for the Crown to indict him on counts 1–3 when a prosecution under s 6 of the 1956 Act would have been time-barred.

b [53] While Mr Perry was unaware of any particular instruction to Crown prosecutors in relation to prosecutions under s 14 after the expiry of the time bar relating to s 6, it is clear that the Crown prosecutor's decision in this case was in line with decisions taken by the Crown in other cases in recent years. This can be seen from a series of cases, from *R v Hinton* (1994) 16 Cr App R (S) 523 to *R v Figg* [2003] EWCA Crim 2751, [2004] 1 Cr App R (S) 409, in which the Court of Appeal c has had to consider the proper approach to sentencing where defendants have been convicted following such prosecutions. In none of these cases did the Court of Appeal criticise the Crown's practice of prosecuting under s 14 when a prosecution under s 6 was barred by s 37 and Sch 2. I therefore approach the matter, as counsel for the appellant did, on the footing that the decision to d prosecute the appellant under s 14 was taken in all good faith, in the belief that it was something that the prosecutor was entitled to do. What matters, however, is not that the prosecutor acted in good faith but that he did so with the intention of avoiding or—to use other more or less loaded expressions—bypassing or circumventing or getting round the 12-month time limit applying to s 6.

e [54] The law of England, like the law of Scotland, has no general rule of limitation or prescription of crimes. Provided that the defendant can have a fair trial, proceedings may be begun long after the alleged crime. And in recent years, especially in the area of sexual offences, there have been many prosecutions for offences that came to light only decades after they were committed when, for the first time, the victim or victims revealed what had happened. Such prosecutions f are not without their difficulties but, in general, the stance of the law is that time does not run against iniquity.

[55] It is all the more significant that in certain cases Parliament has indeed provided that prosecutions can be brought only within a limited time after the offence was committed. Most obviously, s 127(1) of the Magistrates' Courts Act 1980 sets a six-month time limit for laying an information or making a complaint g in the magistrates' court, while in Scotland, under s 136(2) of the Criminal Procedure (Scotland) Act 1995, there is a similar time limit for commencing summary prosecutions—but only of statutory offences. In addition, it has long been the practice for individual statutes to say that any prosecution must begin within a certain time after the conduct complained of. s 62(1) of the Coal Mines h Regulation Act 1887, discussed in *Macknight v MacCulloch* 1910 SC(J) 29, and s 27 of the Food and Drugs (Adulteration) Act 1928, discussed in *Robertson v Page* 1943 JC 32, are old examples, while s 2(3) of the Theatres Act 1968, prescribing that proceedings on indictment for presenting or directing an obscene performance cannot be commenced more than two years after the commission of the offence, j is an example from a statute that is currently in force outside the realm of sexual offences.

[56] It is not always easy to discern the policy behind the provisions limiting the time for bringing proceedings. For instance, the bar on summary proceedings after six months in the 1980 Act cannot be based on any notion that the evidence then becomes stale since this would apply equally to the evidence in prosecutions on indictment, which are permitted. Similarly, evidence does not go stale more

quickly for statutory than for common law offences and yet the six-month limit in the 1995 Act applies only to statutory offences. In any event, the court will take notice of any difficulties with the evidence when making sure that the defendant can have a fair trial. It seems, therefore, that in these cases Parliament takes the rather broader view that, if the offences are worth prosecuting at all at summary level, they are only worth prosecuting if they come to light and can be dealt with soon after they are committed, in accordance with the prescribed time limit. Similarly, in passing the 1968 Act, Parliament must have taken the view that, if the prosecuting authorities could not decide within two years that the director of an obscene play was worth prosecuting on indictment, that should be an end of the matter. In enacting all these time limits, Parliament has taken a conscious decision to depart from the general rule that proceedings can be taken at any time. Moreover, it has done so, having regard to the spectrum of offending to which the time limit in question applies. Inevitably, in particular cases the time limits may seem to work capriciously and to give immunity to someone who deserves to be prosecuted. Especially after so many years of enacting and re-enacting time limits, Parliament must be taken to have been well aware of this risk, but to have decided none the less that the overall benefits of the limits outweigh their disadvantages. It follows that, even in 'hard' cases, the policy of Parliament must be applied and effect given to the time limits it has prescribed. If problems emerge, Parliament can, at any time, legislate to remedy them.

[57] The time bar relating to prosecutions under s 6 of the 1956 Act is to be considered in this light. It originated in s 5 of the Criminal Law Amendment Act 1885 which required prosecutions to be brought within three months. That time bar was, of course, applied by the courts, as can be seen not only from *R v Cotton* (1896) 60 JP 824 but, for instance, from *M'Arthur v Lord Advocate* 1902 10 SLT 310. The period was progressively extended until it was fixed at 12 months by s 1 of the Criminal Law Amendment Act 1928. To modern eyes at least, in a case like the present that 12-month time bar is likely to seem arbitrary, cutting off the otherwise legitimate prosecution of a man who, when in his mid-thirties, knowingly indulged in a prolonged sexual relationship with a girl between 13 and 15 years of age. Presumably, it is because of this perception that, in recent years, the Crown has sought to get round the time bar by bringing proceedings under s 14 of the 1956 Act. In their written case counsel for the Crown referred to the passage in the judgment of Edwards J in *R v Blight* (1903) 22 NZLR 837 at 851–853 where he sought to explain the thinking behind the one-month time limit in the equivalent New Zealand legislation of 1893. Edwards J's observations were very much of their time and, even assuming that they were valid then, they would not justify the time limit in the different social conditions of today. Mr Perry therefore felt able to denounce the time limit for prosecuting s 6 offences as being insupportable at the beginning of the twenty-first century. He urged the House in effect to hold that it is out of date and can properly be ignored, at least in cases with aggravating features. It is fair to say that he had some difficulty in identifying either the principled basis for such an approach or the class of cases where it would be appropriate.

[58] None the less, if one concentrates exclusively on cases like the present, Mr Perry's argument may seem powerful, if bold. But, although all too common, cases of this kind form only one part of a wider picture. Section 6 also applied to boys of roughly the same age who had sexual relations with girls under 16. If surveys of the sexual habits of teenagers are to be believed, or even half believed, there must be many thousands of boys and young men who would be exposed to

a the risk of prosecution under s 6 if their underage partners or their partners' parents were to inform the police of the sexual relations in which they had agreed to indulge. Without the time limit, this would remain a risk even many years later, when the boys were grown up, perhaps with a family and a successful career. In such cases, at least, there is something to be said for a provision that draws a line 12 months after the incident.

b [59] In this regard it is not without interest that, when the law relating to homosexual offences in Scotland was modernised in 1980, Parliament provided that no prosecution for committing or procuring unlawful homosexual acts is to be commenced more than 12 months after the date on which the offence was committed: see s 13(5), (6) and (11) of the Criminal Law (Consolidation) (Scotland) Act 1995. And, under s 5(3) and (4) of the same Act, in the case of prosecutions for sexual intercourse with a girl over the age of 13 but under 16, the time limit of one year remains in place, even though the offence now attracts a maximum sentence of ten years' imprisonment. On the other side of the world, the New Zealand legislature modernised the law relating to homosexual relationships by enacting the Homosexual Law Reform Act 1986 so as to amend the Crimes Act 1961. Section 3 of the 1986 Act introduced a new s 140A which created an offence relating to various kinds of indecent conduct with a boy between 12 and 16. There is no time limit for prosecutions for indecent assault but, in the case of any act of indecency with or upon such a boy, s 140A(6) provides that the prosecution has to be commenced within 12 months.

e [60] These modern enactments for Scotland and New Zealand suggest that, on one view, in the sensitive area of prosecutions for sexual offences there is still room for time limits. In any event, the question is one for the legislature, having regard to the offences in question. In England and Wales Parliament has introduced an entirely new scheme in the Sexual Offences Act 2003 and has taken the view that under that Act there should be no time limit for bringing prosecutions. That is how things are to be for the future, but it is no warrant for the courts to disregard the time bar relating to prosecutions under s 6 of the 1956 Act, as it applies to offences committed before 1 May of this year.

f [61] In the courts below, and again in this House, Mr Meeke QC argued that bringing the prosecution under s 14, in order to avoid the time bar applying to s 6, amounted to an abuse of process on the part of the Crown. The argument was rejected in the courts below. It seems to me that if, on a proper construction of s 14 in the context of the 1956 Act as a whole, it was open to the Crown to prosecute the appellant under s 14, then there can have been no abuse of process. But, equally, if on a proper construction of the legislation, it was not open to the Crown to prosecute the appellant under s 14, the appeal must succeed. The critical question is one of the construction of the Act. It appears that counsel for the appellant veered away from that approach because of the rag-bag nature of the 1956 Act as described by my noble and learned friend, Lord Bingham of Cornhill, in *R v K* [2001] UKHL 41 at [4], [2001] 3 All ER 897 at [4], [2002] 1 AC 462. Counsel considered that, since the 1956 Act disclosed no single, coherent legislative scheme, one could not argue that s 14 must be construed and applied in a way that respected the time bar applying to s 6 offences. The fact that the 1956 Act is not by any means entirely coherent is not, however, a reason for the courts to abandon their usual approach to interpretation and to construe its provisions in isolation, as if they had no bearing on one another.

j [62] Sections 6 and 37 and Sch 2 disclose a clear intention on the part of Parliament that a man who has sexual intercourse with a girl over 13 and under



16 is not to be prosecuted for doing so unless the prosecution is begun within 12 months of the intercourse. Section 14 must be construed and applied in a way that respects and does not defeat that intention. This is enjoined by more than one principle of statutory construction.

[63] Where Parliament has specifically provided a regime for the commencement of proceedings for the offence of having sexual intercourse with an underage girl, no other more general words, such as are to be found in s 14, are to derogate from that special provision: *generalia specialibus non derogant*. That was the approach favoured by the majority of the High Court of Australia in *Saraswati v R* (1991) 172 CLR 1 at 17–18, 23–24 per Gaudron and McHugh JJ respectively. To put the point another way, the Crown cannot do indirectly what it is forbidden to do directly.

[64] Another approach, which may be particularly apt in a case such as the present, is to say that s 14 must not be construed and applied in such a way as would amount to a fraud upon s 37 as it affects s 6. The notion of a fraud upon an Act, acting in fraudem legis, is ancient. Although the outer limits of the doctrine remain notoriously difficult to define, this case at least falls squarely within its scope. It would be wrong to construe s 14 in such a (literal) way as to permit the prosecutor, however well-intentioned, to use it in order to evade the time bar applying to prosecutions for sexual intercourse with an underage girl. To use the expression of Lord Eldon when proposing the question for the judges in *Fox v Bishop of Chester* (1829) 1 Dow & Cl 416 at 429, 6 ER 581 at 586, it would be ‘an insult’ to Parliament’s intention in enacting s 37, since ‘[i]n substance, if this could be done ... you could always evade the statutory limit of time’: see *R v Cotton* (1896) 60 JP 824 at 825 per Pollock B. As Williams J said in *R v Blight* (1903) 22 NZLR 837 at 847, s 37 and the relevant provision in Sch 2 ‘would be practically expunged from the Act, and the protection given by the time limit would be quite illusory’. An interpretation of s 14 that has such a result must be rejected. I accordingly hold that s 14 of the 1956 Act does not permit a prosecutor to raise proceedings for indecent assault where the act in question was simply sexual intercourse with an underage girl and a prosecution under s 6 would be barred by s 37 and para 10 of Pt II of Sch 2. This interpretation is in line with the approach to time limits for sexual offences envisaged by the High Court of Justiciary in *Webster v Dominick* 2003 SLT 975 at 985 (para 60) per Lord Justice Clerk Gill.

[65] Deploying his learning and experience, Mr Perry held up the prospect of all kinds of difficulties that would, he said, arise if your Lordships were to interpret the Act in this way. I am prepared to accept that there may indeed be some initial difficulties. But your Lordships would merely be adopting the same approach as has applied in the case of the equivalent legislation in New Zealand for over a century, following the decision in *R v Blight*. Significantly, Mr Perry was unable to point to any insuperable problems which the prosecutors or courts had encountered there. On the contrary, when, in *R v Hibberd* [2001] 2 NZLR 211, the Court of Appeal came to interpret the Crimes Act 1961 as amended to cover homosexual offences, in the light of their experience they deliberately adopted the same approach to the time bar as had been laid down in *R v Blight*.

[66] For these reasons, as well as those given by your Lordships, I would allow the appeal and make the order proposed by Lord Bingham of Cornhill.

#### BARONESS HALE OF RICHMOND.

[67] My Lords, the appellant was born on 16 August 1960. He is thus 22 years older than the complainant who was born on 28 September 1982. They lived in

- a the same village and their families were friends. The appellant began a business making horse boxes and trailers in premises rented from the complainant's father. The complainant, then aged 13, began working for him on Saturdays and in the school holidays. She complained that the appellant had regularly had vaginal sexual intercourse with her between July 1996, when she was 13, and September 1997, when she reached 15. She also complained of oral sexual intercourse when
- b she was 13. However, she did not make these complaints until March 2000, when she was 17. As this was more than 12 months after the acts concerned, the appellant could not be charged with the offence of unlawful sexual intercourse with a girl under 16, contrary to s 6(1) of the Sexual Offences Act 1956, because by virtue of s 37(2) and para 10 of Sch 2 to the Act, a prosecution for that offence (or for an attempt to commit that offence) may not be commenced more than
- c 12 months after the offence charged. However, it is now clear that the act of vaginal sexual intercourse also constitutes an indecent assault, to which no such time limit applies. Accordingly, the appellant was charged with and convicted of three specimen counts of indecent assault. He was sentenced to concurrent terms of 18 months' imprisonment on the first two and a further consecutive term
- d of 18 months' imprisonment on the third. It is against those three convictions that he appeals. He was also charged with one specimen count of indecency with a child, contrary to s 1(1) of the Indecency with Children Act 1960, in respect of the oral sexual intercourse. Again, no time restriction applies. He was convicted and sentenced to a term of 12 months' imprisonment, consecutive to the other terms, but reduced to nine months on appeal so as to reduce the total sentence below
- e four years. This was because 'the overall picture was not such that it was necessary to render the appellant a long-term prisoner' (see [2002] EWCA Crim 2983 at [44], [2003] 1 All ER 518 at [44], [2003] 1 WLR 1590). One can only speculate about what the Court of Appeal might have thought of the 'overall picture' had the oral sexual intercourse been the only criminal conduct with
- f which the appellant could be charged. There is no appeal against his conviction on that count.

[68] The point of law certified by the Court of Appeal for this House under s 33(2) of the Criminal Appeal Act 1968 is—

- g 'Whether it is an abuse of process for the Crown to prosecute a charge of indecent assault under s 14(1) of the 1956 Act in circumstances where the conduct upon which that charge is based is an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution may be commenced under s 6(1) of the 1956 Act by virtue of s 37(2) of, and Sch 2 to, the 1956 Act.'

- h [69] The parties' statement of facts and issues puts the matter in the same way. I have no difficulty in answering No to that question. Moreover, unlike your Lordships, I do not see this as a 'problem' to which other solutions have to be found so that the appeal may be allowed. In my view, the appellant was guilty of conduct which constituted the offences with which he was charged at the time
- j when he committed them; there is no good reason why he should not have been charged with and convicted of them; and the only unfairness will be that done to his victim, and the many others in her situation, by your Lordships' decision.

#### ABUSE OF PROCESS

[70] There are two broad categories of abuse of the criminal justice process. The first is where the defendant cannot receive a fair trial, for example because of

delay: see *R v Derby Crown Court, ex p Brooks* (1984) 80 Cr App R 164. There are cases where, because of the lapse of time since the alleged events, it will be so difficult for the defendant to rebut apparently credible accusations made against him or so difficult for the jury to assess the accuracy or reliability of competing accounts that he could not have a fair trial. But no one has suggested that in this case. It is acknowledged that the appellant could have and did have a fair trial.

[71] The second category of abuse is where it would be unfair for the defendant to be tried at all. The guiding principle was stated thus by my noble and learned friend, Lord Steyn, in *R v Latif, R v Shahzad* [1996] 1 All ER 353 at 361, [1996] 1 WLR 104 at 112, a case of entrapment involving illegal conduct on the part of the customs officers concerned:

'In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed (see *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42).'

[72] What are the 'countervailing considerations of policy and justice' in this case? On the one hand there is the need to protect the young from sexual exploitation and abuse, which we now know can cause very considerable physical, social and psychological harm. The law has for centuries taken a serious view of sexual intercourse with a girl who has in all probability not yet reached puberty. Ravishing a 'Maiden within Age' (ie under 12), with or without her consent, was an offence under the first Statute of Westminster, 3 Edw 1 stat 1 cap 13 (1275). The 'abominable wickedness' of carnally knowing and abusing a woman-child under the age of ten was made a felony by 18 Eliz 1 cap 7 in 1576. Blackstone reports that Sir Matthew Hale (later to be so much maligned by feminists) was 'of opinion that such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the common law, either with or without consent, amount to rape and felony: as well since as before the statute of queen Elizabeth'; but in general that law had been held to extend only to children under ten, although girls of 11 and 12 were still protected by the Statute of Westminster (see *Blackstone's Commentaries on the Laws of England* (15th edn, 1809) vol IV, p 212). The same distinction was drawn in their nineteenth century statutory replacements, first by 9 Geo IV cap 31, ss 16 and 17, in 1828; and second by ss 50 and 51 of the Offences against the Person Act 1861. The respective age limits were raised from ten to 12 and from 12 to 13 by ss 3 and 4 of the Offences against the Person Act 1875.

[73] Section 52 of the 1861 Act also introduced, for the first time, the offence of indecent assault upon 'any Female'. There was no statutory age of consent, but it may very well be that the common law approach to the age of discretion would have applied, so that a girl under 12 would have been deemed incapable of consenting. At this stage, neither common law nor statute laid down a minimum age for marriage, but '[i]t seems that the Common Law applied a presumption that a boy under 14 and a girl under 12 were not capable of marriage', although if they married before that age and cohabited after it, they



a were deemed to have ratified the union (see S M Cretney *Family Law in the Twentieth Century: A History* (2003) pp 57–58).

b [74] The law was slower to recognise that even consensual sexual activity with children who might well have reached the age of puberty was both harmful and abusive. The offence of ‘unlawful carnal knowledge’ of a girl of 13 but under 16 was introduced by the Criminal Law Amendment Act 1885 in response to a campaign against child brothels and trafficking in young girls, famously championed by W T Stead in *The Maiden Tribute of Modern Babylon—the Report of the Pall Mall Gazette’s Secret Commission* (1885). Dr Cretney reports (p 59, footnote 147) that ‘the Act was strongly opposed, much of the opposition based on fears that no man with young sons would be able safely to employ girls under 16 as domestic servants’, though he does not say whether this was because of fear c that the normal activities to be expected of the young men of the house would now land them in trouble or because of a fear of unjust accusations.

d [75] No doubt it was a bit of both. No prosecution could be brought for this new offence more than three months after its commission, although no such time limit applied to the equivalent offence with a girl under 13 or to an indecent assault. The time limit under the equivalent offence in New Zealand was one month. In *R v Blight* (1903) 22 NZLR 837 at 848, Denniston J made the obvious point that this offence might lead to pregnancy: it was thought then that a girl who fell pregnant, and thus was unquestionably the victim of an offence, was so likely to name the wrong man that the accused needed the exceptional protection of a very short time limit, one which elapsed before her pregnancy had become e obvious or even known. Edwards J made the additional point (at 852):

‘... the fact that the girl has consented to such an act is in itself strong evidence that her moral perceptions are not of a high character ... There is no vice more prevalent among persons of low moral perceptions than the vice of lying ...’

f Thus were the victims blamed for the very abuse against which the law was supposed to protect them.

g [76] Whatever the original rationale in England, it cannot long have been the supposed need to identify a perpetrator before a pregnancy became apparent, because the time limit was soon raised, first to six months by the Prevention of Cruelty to Children Act 1904, then to nine months by the Criminal Law Amendment Act 1922, and finally to 12 months by the Criminal Law Amendment Act 1928. It was precisely because a pregnancy or childbirth might reveal the offence that the limit was raised. The reasons given for having any limit at all—loss of witnesses and the difficulties of proof—might equally apply to h many other offences. But complainants in sexual offences were then still regarded with much more suspicion than other complainants, and so abolition may have been thought too radical to contemplate. However, it is hard to discern any coherent rationale after 1922, because the 1922 Act also provided that consent would no longer be a defence to an indecent assault upon a child or j young person under the age of 16. Thus most forms of sexual activity with a girl under 16 became a criminal offence whether or not she consented, but no time limit was prescribed.

[77] Carnal knowledge was not ‘unlawful’ if the couple were married to one another, but the law of marriage was aligned with the criminal law by the Age of Marriage Act 1929, which made void any marriage either party to which was under 16. Among the reasons given was consistency with the 1885 Act: a girl

could not consent to a single act of intercourse outside marriage but could give the perpetual and irrevocable consent involved in marriage (under the law as it was then understood to be, on the strength of a statement of Sir Matthew Hale). Girls might also be persuaded to leave their homes and families by the false promise of marriage, thus frustrating the object of combating trafficking in girls and the 'white slave trade'.

[78] The girl's age of consent has remained at 16 since then, although policy makers have seriously contemplated change: see, for example, the Policy Advisory Committee on Sexual Offences, *Report on the Age of Consent in relation to Sexual Offences* (1981) (Cmnd 8216). It is recognised that they need protection from two rather different sorts of harm. One is from premature sexual activity. It is entirely natural for young people to be interested in sex and to desire one another. But it is important for everyone to proceed at their own pace and when they feel ready. Girls must be free to say No if that is how they think and feel. The possibility of pregnancy is, or should be, an important factor in how they think and feel. The physical and psychological consequences of premature intercourse may be so much greater for them than they are for boys. Whether the age of consent is an important component in giving them some protection has been the subject of debate, but the conclusion so far has favoured its retention. The other sort of harm is sexual abuse of the sort shown by the facts of this case: a much older man in a position of trust who takes advantage of her youth and vulnerability. There is no debate at all that girls require protection from this sort of behaviour: it can cause untold damage to their self-esteem, their capacity to form ordinary intimate relationships in the future, and their perceptions of how to live in families, all of which are so crucial to their own ability to be effective partners and parents in their turn. Those with professional experience of trying to pick up the pieces, sometimes many years after the event, are in no doubt of the gravity of the risks involved. Such considerations of policy clearly favour prosecution for any offences committed, provided that a fair trial is possible.

[79] If that were not enough, the integrity of the criminal justice system requires that it make sense to victims and the general public as well as to the accused. How can it possibly be explained to the victim in this case that her abuser can be prosecuted for the oral sexual intercourse but not for the vaginal? Women vary in whether they see oral or vaginal intercourse as more serious and in their degrees of reluctance to comply with either. How can it be explained that he can be prosecuted for any peripheral and preparatory sexual acts but not for those which were part and parcel of committing or attempting to commit the act of vaginal intercourse? And if he is prosecuted for those other acts, will the fact that they also had vaginal sexual intercourse be considered relevant or will it have to be kept from the jury? Mr Meeke QC was careful not to offer us an answer to this question. This sort of irrational and incoherent distinction is exactly what brings the legal system into disrepute.

[80] On the other hand, what are the countervailing considerations of justice to the offender? The offender knows perfectly well that he is committing a criminal offence at the time when he commits it. A time limit is not an essential ingredient of the substantive offence or a substantive defence. It is in no way comparable to the requirement of mens rea, as held by this House in *R v K* [2001] UKHL 41, [2001] 3 All ER 897, [2002] 1 AC 462. It is a procedural bar which brings a fortuitous advantage to a defendant, even if there is a good reason for it. Sometimes the advantage is particularly undeserved. We do not know why this

- a complainant said nothing until she was 17, but sexual abusers commonly groom their victims by making them believe that their behaviour is normal. They make their victims fall in love with them. They often threaten or cajole their victims into silence. Delayed reporting is then the result of the abuser's own actions and merits no special protection. It is only when the delay has prejudiced the chances of a fair trial that special protection is deserved. That is not this case.
- b [81] In my view, the countervailing considerations of policy and justice did not require the trial judge to stay the proceedings as an abuse of process and he was entirely justified in refusing to do so. The public conscience would be more affronted by the prohibition of prosecution for offences which have undoubtedly been committed. Although the categories of abuse of process cannot be closed, it would be a misuse of principle and language to call what happened in this case
- c an abuse.

## STATUTORY CONSTRUCTION

- [82] Nevertheless, although not an abuse, the prosecution has been able to side-step a limitation which remained on the statute book at the material time.
- d The fact that many now think that it should not be there, and that Parliament has since legislated to remove it, is neither here nor there if the statute must be construed so as to give it effect in this case. The normal process of statutory construction involves ascertaining the intention of Parliament from the words used. Two possible constructions of the words used might have been argued in this case although neither was.
- e [83] The first is that the time bar applied to the offence of unlawful sexual intercourse under s 6(1) by para 10 of Sch 2 was also intended to apply to the offence of indecent assault under s 14. This cannot be so. There are many offences of indecent assault to which any supposed rationale for this time bar cannot possibly apply—forcible oral intercourse being a good example. If
- f Parliament had wanted to apply the time limit to indecent assault, it has had ample opportunity so to do, most notably in 1922 when it was legislating for both offences at the same time. There is absolutely nothing in Sch 2 to suggest that the express words in para 10 should be read by implication into para 17 where they do not appear.
- g [84] The second is to suggest that the offence of indecent assault does not include the indecent touching involved in vaginal sexual intercourse. This too is quite untenable. Vaginal sexual intercourse is rarely if ever the sort of passive invitation involved in the cases of *Fairclough v Whipp* [1951] 2 All ER 834 and *DPP v Rogers* [1953] 2 All ER 644, [1953] 1 WLR 1017 which necessitated the Indecency with Children Act 1960. It was decided in *R v McCormack* [1969] 3 All ER 371,
- h [1969] 2 QB 442 that a charge of unlawful sexual intercourse necessarily included an allegation of indecent assault; it was also decided in that case that penetration of the vagina with something other than a penis is an indecent assault unless done with valid consent, even if there was no evidence of compulsion or hostility. Penetration of other orifices with a penis is either an indecent assault or buggery.
- j No rational distinction can be drawn between the different sorts of penetration for this purpose. There is nothing in the words 'indecently assaults' to suggest that it should be.

[85] The only way in which this argument can be put is not at the level of the language used by Parliament in defining the individual offences but at the general level of underlying intention: when Parliament enacted a general offence which was capable of covering conduct included in a more specific offence it did not

intend that the general offence could be prosecuted in circumstances where the more specific one could not. There are several difficulties with applying this principle in this case. a

[86] The first is that there is no rational coherence in the statutory scheme which makes it necessary to draw such a conclusion. It has developed piecemeal over time, sometimes by parliamentary amendment and sometimes by statutory interpretation. Perhaps Parliament did not foresee either in 1922 or in 1956 that an indecent assault might include a consensual act without compulsion or hostility: see *R v McCormack*. Perhaps it did not address its mind to exactly what was meant by sexual intercourse: the definition in s 44 of the 1956 Act makes it clear that penetration but not emission of seed is required but does not say which orifice is to be penetrated: the reference to sexual intercourse 'whether natural or unnatural' might suggest that orifices other than the vagina were included. But if that were so, there should also have been an appeal against the conviction on count 4. b  
c

[87] The second difficulty is that it is not possible, in the light of the parliamentary history, to say which came first, the general or the particular. Indecent assault was enacted before the time-limited offence of unlawful sexual intercourse, but was extended to consensual activities with girls under 16 afterwards. Nor is it possible to say which, at whatever may have been the material time for ascertaining the parliamentary intention, was regarded as the more serious offence. Throughout most of their combined history, they attracted the same maximum penalty of two years' imprisonment, but unlawful sexual intercourse was triable only on indictment whereas indecent assault could be tried summarily, no doubt because some of the behaviours covered were seen as less serious. Then in 1985, the maximum penalty for indecent assault upon a woman was raised to ten years. This was mainly to bring it into line with the penalty for indecent assault upon a man, but also in recognition of the fact that some of the behaviours included were indeed serious. d  
e

[88] The third difficulty (which weighed with Deane and Dawson JJ, the dissenters in *Saraswati v R* (1991) 172 CLR 1 in the High Court of Australia) is that there are many situations in which the general and the more specific offences are not mutually exclusive. The fact that the more specific cannot be charged does not necessarily preclude a charge of the more general: the fact, for example, that a boy under 14 was presumed at common law to be incapable of the act of intercourse and therefore could not be charged with rape did not preclude his being charged with indecent assault based on the same conduct. The fact that the same conduct may amount to a summary offence which can only be prosecuted within six months and a more serious offence for which there is no time limit does not preclude the bringing of the more serious charge. f  
g  
h

[89] In short, the 1956 Act was a mess when it was enacted and became an ever greater mess with later amendments. It is not possible to discern within it such a coherent parliamentary intention as to require it to be construed so as to forbid prosecution for a 'mere' act of sexual intercourse after 12 months where that act properly falls within the definition of an indecent assault. Although we do have to try to make sense of the words Parliament has used, we do not have to supply Parliament with the thinking that it never did and words that it never used. j

#### ULTRA VIRES

[90] I fully accept that there are certain things which are outside the competence of prosecutors as public officials to do. The difficulty is in



- a formulating a reliable principle which would forbid a prosecution which was neither an abuse of the criminal justice process nor contrary to the implied intention of Parliament. The rationale behind the time limit can no longer be that which it was said to be in *R v Blight* (1903) 22 NZLR 837. If it is that the defendant can no longer have a fair trial, I would certainly agree that such prosecutions should be stayed either as an abuse of process or as outside the prosecutor's
- b competence to bring. If it is, as was suggested by the Criminal Law Revision Committee when it recommended retention of the time limit in its Fifteenth Report on Sexual Offences (Cmnd 9213) in 1984, that people should not be prosecuted for offences which were 'stale', it is unclear what this means in a case where a fair trial is still possible. If it means that something which was once a
- c matter deserving of punishment is no longer so because of the passage of time, then this will not invariably be so. At one extreme will be the teenage romance between a boy and a girl who have since gone their separate ways, where no possible personal or public interest would be served by prosecution. At the other will be prolonged and serious abuse of a position of trust by a person who might well be left to do it again unless action is taken. It will all depend upon the
- d circumstances, in which the interests of the accused, the victim and of society will all play their part. A just and humane prosecution policy should be capable of taking all these factors into account.

[91] But I cannot see any balance of those interests in this case which would lead to the conclusion that this prosecution should not have been brought. I would dismiss this appeal.

e

*Appeal allowed.*

Kate O'Hanlon Barrister.



## Greene v Associated Newspapers Ltd

[2004] EWCA Civ 1462

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MAY AND DYSON LJ

21 OCTOBER, 5 NOVEMBER 2004

*Libel and slander – Injunction – Interlocutory – Justification – Whether human rights legislation abrogating rule precluding court from imposing prior restraint in defamation action unless clear that no defence could succeed at trial – Human Rights Act 1998, ss 6, 12(3), Sch 1, Pt I, arts 8, 10.*

The claimant applied for an injunction restraining the defendant newspaper publisher from publishing a proposed article which she alleged would be defamatory of her. In her witness statement, the claimant alleged that an e-mail, which would have formed the basis of the story, was a forgery, and she sought an interim injunction at least until such time as it was possible for her to put proper evidence before the court on the authenticity of the e-mail. In response, the publisher stated that it would defend any libel action on the basis that the information was true and accurate. The judge stated that he would have granted the injunction if, as the claimant contended, the correct test was whether it was more likely than not that the claimant would establish at trial that publication should not be allowed. However, he held that he was bound by authority to apply a stricter test, namely the long-established common law rule that, if a defendant to a libel action had made a statement, verified as true, in which he maintained that he could and would justify the alleged libel, the claimant would be unable to obtain an interim injunction to restrain the publication of an alleged defamatory statement unless it was plain that the plea of justification was bound to fail. The judge concluded that the claimant had failed to make out her case to that high standard, and accordingly dismissed the application. The claimant appealed, contending that the rule applied by the judge had been changed by the Human Rights Act 1998. She relied primarily on s 12(3)<sup>a</sup> of the 1998 Act. That provision, which applied in cases where the grant of relief might affect the exercise of the right to freedom of expression under art 10<sup>b</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), precluded the court from granting such relief so as to restrain publication before trial unless it was satisfied that the applicant was likely to establish that publication should not be allowed. Alternatively, the claimant relied on s 6 of the Act<sup>c</sup>, which precluded a court from acting in a way that was incompatible with a

<sup>a</sup> Section 12(3) is set out at [59], below

<sup>b</sup> Article 10, so far as material, provides: '1. Everyone has the right to freedom of expression. This right shall include freedom to ... impart information ... without interference by public authority ... 2. The exercise of these freedoms ... may be subject to such ... restrictions ... as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation of others ...'

<sup>c</sup> Section 6, so far as material, provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

(3) In this section "public authority" includes—(a) a court ...'

- a convention right. In particular, she contended that she had a right to a reputation protected by art 8<sup>d</sup> of the convention, and that the rigidity of the rule applied by the judge ran roughshod over that right, giving a court no power to weigh the competing rights protected by arts 8 and 10 in the balance and give a proportionate response.
- b **Held** – The 1998 Act had not changed the rule that, in an action for defamation, a court would not impose a prior restraint on publication unless it was clear that no defence would succeed at trial. There was nothing in s 12(3) of the Act that could properly be interpreted as weakening in any way the force of that rule. In a section which was expressly concerned with the protection of freedom of expression and not with undermining it, Parliament could not be interpreted as having abrogated the rule by a sidewind. In any event, the very language of s 12(3) did not require such an interpretation. First principles in statutory interpretation would also rule out the dismantling of judge-made law by stealth (in the absence of necessary implication). As regards s 6 of the 1998 Act, there was nothing in the convention that required the elimination of the established rule. It was at the trial of a defamation action that English law showed itself appropriately solicitous of a claimant's right to a fair reputation. The effect of art 10 of the convention would be seriously weakened if a claimant were able to stop a defendant from exercising its art 10 right merely by arguing, on paper-based evidence, that it was more likely than not that the defendant could not show that what it wished to say about the claimant was true. It would mean that people with an undeserved fair reputation could stifle public criticism by obtaining injunctions simply because, on necessarily incomplete information, a court thought it more likely than not that they would defeat a defence of justification at trial. Once a claimant's right to a fair reputation was put in issue, it was the function of the trial, and the duty of the jury, to determine whether she had a right to be vindicated. It was impossible to speak sensibly of the violation of the right until it was established at the trial, and at the trial the rules of evidence would favour the claimant. Accordingly,
- g the appeal would be dismissed (see [57], [61], [62], [66], [72], [74]–[77], [82], below).

*Bonnard v Perryman* [1891–4] All ER Rep 965 applied.

*Cream Holdings Ltd v Banerjee* [2004] 4 All ER 617 distinguished.

## h Notes

For the grant of relief which might affect the convention right to freedom of expression and for the rule precluding the grant of interlocutory injunctions in defamation actions if defence raised, see respectively 8(1) *Halsbury's Laws* (4th edn) (2003 reissue) para 418 and 28 *Halsbury's Laws* (4th edn reissue) para 172.

For the Human Rights Act 1998, ss 6, 12, Sch 1, Pt I, arts 8, 10, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 683, 691, 707.

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d Article 8, so far as material, provides: '1. Everyone has the right to respect for his private ... life ...'

**Cases referred to in judgment**

- American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL. a
- Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148, NZ CA.
- Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.
- Bonnard v Perryman* [1891] 2 Ch 269, [1891–4] All ER Rep 965, CA; *rvsg* [1891] 2 Ch 269. b
- Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232.
- Coulson (William) & Sons v James Coulson & Co* (1887) 3 TLR 846, CA.
- Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617, [2004] 3 WLR 918; *rvsg* [2003] EWCA Civ 103, [2003] 2 All ER 318, [2003] Ch 650, [2003] 3 WLR 999. c
- F (a minor) (publication of information), Re* [1977] 1 All ER 114, [1977] Fam 58, [1976] 3 WLR 813, CA.
- Fraser v Evans* [1969] 1 All ER 8, [1969] 1 QB 349, [1968] 3 WLR 1172, CA. d
- Herbage v Pressdram Ltd* [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.
- Herbage v Times Newspapers* (1981) Times, 30 April, CA.
- Holley v Smyth* [1998] 1 All ER 853, [1998] QB 726, [1998] 2 WLR 742, CA.
- Khashoggi v IPC Magazines Ltd* [1986] 3 All ER 577, [1986] 1 WLR 1412, CA.
- Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, [1985] QB 526, [1984] 3 WLR 539, CA. e
- Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA.
- Observer v UK* (1992) 14 EHRR 153, [1991] ECHR 13585/88, ECt HR.
- Polly Peck (Holdings) plc v Trelford* [1986] 2 All ER 84, [1986] QB 1000, [1986] 2 WLR 845, CA.
- R (on the application of Rottman) v Comr of Police for the Metropolis* [2002] UKHL 20, [2002] 2 All ER 865, [2002] 2 AC 692. f
- Radio France v France App* no 53984/00 (30 March 2004, unreported), ECt HR.
- Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, HL.
- S (a child) (identification: restriction on publication), Re* [2004] UKHL 47, [2004] 4 All ER 683, [2004] 3 WLR 1129. g
- Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.
- Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137, HL. h

**Appeal**

The claimant, Martha Greene, appealed with permission of Fulford J from his decision on 16 October 2004 dismissing her application for an injunction restraining the defendant, Associated Newspapers Ltd, from publishing a proposed newspaper article which Miss Greene alleged would be defamatory of her. The facts are set out in the judgment of the court. j

*Richard Spearman QC* (instructed by *Farrer & Co*) for Miss Greene.

*Andrew Caldecott QC* and *Catrin Evans* (instructed by *Reynolds Porter Chamberlain*) for the defendant.

a 21 October 2004. The court announced that the appeal would be dismissed for reasons to be given later.

5 November 2004. The following judgment of the court was delivered.

**BROOKE LJ.**

b

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PART I

(1) *Introduction*

[1] In this country we have a free press. Our press is free to get things right and it is free to get things wrong. It is free to write after the manner of Milton, and it is free to write in a manner that would make Milton turn in his grave. Blackstone wrote in 1769 that the liberty of the press is essential in a free state,

and this liberty consists in laying no previous restraints on publication. 'Every freeman', he said, 'has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press' (see *Commentaries on the Laws of England* (15th edn, 1809) vol IV, pp 151–152. It is this freedom which is under challenge in this appeal. Mr Richard Spearman QC has argued before us that the enactment of the Human Rights Act 1998 has significantly weakened the inhibitions that judges should feel before imposing prior restraint on the press. This was a surprising proposition, but it deserves careful analysis.

[2] In Pt II of this judgment we describe what this case is all about. In Pt III we describe why the courts have shrunk from restraining publication of a defamatory libel unless it is clear that there is no defence. And in Pt IV we will explain the challenge that has been made to the approach the judges have adopted in this country and explain the reasons why we decided at the end of the hearing that the claimant was not entitled to the prior restraint of the Mail on Sunday which she sought.

## PART II

### (2) *The procedural background*

[3] This is an appeal by the claimant Martha Greene from an order of Fulford J on Saturday 16 October 2004 when he refused to grant her an injunction restraining an article which the defendants proposed to publish about her in the Mail on Sunday. Although the judge refused her the relief she sought, he granted her a temporary injunction so as to hold the position until the hearing of her appeal to this court. For that purpose he granted permission to appeal.

[4] The judge announced his decision at about 6 pm that day, because that was the printing deadline for the following day's Mail on Sunday, and the costs implications of a later decision prohibiting publication were very considerable. Counsel's submissions had concluded shortly before that hour, and because there was insufficient time for him to deliver an extempore judgment, he simply informed the parties of his decision and the outline reasons for it. He made his written judgment available to them before 9 am the following Monday. In it he apologised for the fact that he had not had the time to research and prepare his judgment in the usual way, with the result that it was short and lacked the benefit of thoroughgoing analysis. In these circumstances it was a model of its kind, and the parties and this court have good reason to be grateful to him for making his judgment available so speedily.

### (3) *The facts*

[5] We can take the facts, as they stood on 16 October 2004, from the judge's admirably clear recitation of them.

[6] The background to this application begins with an article published in the Mail on Sunday on Sunday 10 October 2004, which was written by Laura Collins and Sharon Churcher. The focus of the piece is revealed in the opening paragraph:

'The woman at the centre of the Blairs' £3.6 million house deal is a former business contact of convicted fraudster Peter Foster, The Mail on Sunday can reveal. Martha Greene has become one of Cherie Blair's closest friends and



a       confidantes and was entrusted with the role of go-between when, earlier this summer, the Blairs bought the property in Connaught Square, central London.’

A little later the article continues:

b       ‘Martha Greene, the 48-year-old New Yorker who runs the Villandry Restaurant and Foodstore in London’s Great Portland Street, was, like Foster, introduced to Cherie by her lifestyle “guru”, Carole Caplin. The women have known each other for six years, during which time Greene has seemingly supplanted Caplin as Cherie’s “new best friend”.’

c       [7] The authors then purported to quote from Peter Foster, who claimed that he had discussions with Martha Greene about Reneulle: ‘... a slimming firm through which (Foster) planned to market Trimmit diet pills.’ The article then contained this passage:

d       ‘Of course, any claims made by Foster must be treated with a degree of caution. But e-mail communications between Foster and Greene, seen by this newspaper, support his account. In one, dated November 6, 2002, Greene wrote to Foster: “As discussed, happy to assist you with the development of your Reneulle business in UK. I don’t need a fancy title, as you suggested, just a consultant would suit me fine. I would require a set fee of US\$15,000, if possible paid to my account in the US ... Can we do this without the need for a UK-based invoice through your overseas company? Would be helpful.”’

e       [8] On 15 October 2004, the claimant’s solicitors, Farrer & Co, wrote to Mr John Wellington, who is the managing editor of the Mail on Sunday. Their letter contained, among other things, the following objections to the article:

f       ‘The piece is littered with inaccuracies, some material, some less so. It is unnecessarily intrusive, for instance into her personal relationships and misuses what is clearly confidential medical information about her membership of and attendance at Alcoholics Anonymous, as well as her treatment for breast cancer. There can be no conceivable justification for putting this information into the public domain. The sting of the article is, however, to be found in your attempts to link our client to Peter Foster ... Our client has met Peter Foster on no more than six occasions between October 2002 and January 2003 and not otherwise. They were predominantly social events. She did not send Foster the e-mails you attribute to her. She did not have any form of business with him.’

g       [9] On the same day Sian James, the features editor of the Mail on Sunday, wrote to the claimant’s solicitors in a letter which crossed with their letter and did not purport to respond to it. Her letter contained the following passage:

h       ‘Thank you for your help with last week’s article. A further email has come into our possession which raises a number of points. We would be grateful for your response by 12 noon tomorrow so that we can include it in the article we are preparing for this Sunday’s Mail on Sunday. In an email you sent on Friday January 31, 2003 to Peter Foster, you say: “I would like you to give some thought to our suggestion of selling your diet aids over the internet. As you know, we are both very excited about the potential of the

internet and its global reach. Ivan has the experience with the structuring of a web site that is interactive and also how to advertise on the net.” Can you confirm that you are planning to enter into business with Peter Foster selling his slimming aids on the internet? a

[10] She then proceeded to ask a number of questions about the contents of the alleged e-mail, which appeared to evidence Miss Greene’s willingness to get herself involved with Mr Foster on his proposed business venture in a way which evaded British advertising standards, associated the Prime Minister’s family with the venture, and minimised its tax liabilities. She did not respond to the claimant’s solicitors’ letter after she received it. b

[11] The claimant’s solicitors replied the same day. The writer maintained and repeated the firm’s earlier representations about what was said to be the misuse of private information and referred to a ‘wholly erroneous and defamatory link between our client and Peter Foster’, before going on to emphasise the suggested falsity of the claim that there had ever been a business relationship between Mr Foster and Miss Greene. The firm’s representations are unequivocal: ‘Foster’s claims, as published by the Mail on Sunday are a fabrication.’ The letter continues: c  
d

‘The simple answer to the questions raised in your letter is that Foster is lying to you in suggesting that our client sent him an email on 31 January 2003. If Foster has provided you with what he claims to be an email from our client to him dated 31 January 2003, then it is a forgery and your paper is about to be duped and to dupe its readership in the event that you publish his claims. Newspapers are frequently the subject of scams and there is a need for considerable caution. Please provide us with details as to: at what time this email is said to have been sent; from what email address it is said it was sent, and to which email address it is said to have been sent, and ideally supply us with a copy of the alleged email. Without this information our client is obviously hampered in her ability to meet any case you may persist in maintaining that the email is genuine, and in demonstrating that the email is a forgery by independent or other forensic evidence. The suggestion that our client emailed Foster on 31 January is undermined by the sequence of events leading to Foster’s deportation at the end of January. On Monday 27 January 2003, Foster was detained at Dublin Airport by the Irish Garda having, it seems, spent most of the period leading up [to] 27 January in the Irish Republic. On Tuesday 28 January 2003 Foster was deported from Ireland. On 30 January 2003, Foster appears to have arrived back in Australia, landing at Sydney Airport before flying to the Gold Coast, south of Brisbane. All of this information is in the public domain and information that you could readily obtain. If you were to read the coverage given to Foster during January 2003, including that given over to his deportation from Ireland and his arrival back in Australia, the likelihood of our client emailing him on Friday 31 January to discuss a business proposition is highly unlikely.’ e  
f  
g  
h  
j

[12] Thereafter, the writer rehearses his views as to the identity of the possible authors of this e-mail, suggesting that it is Mr Foster himself, someone unknown who has perpetrated a criminal interception, one of Miss Greene’s own employees acting in breach of confidence, or an anonymous source. In relation

a to the latter, the writer suggests that such a source should be treated with great caution, adding:

b '... there can be no public interest in simply regurgitating claims of a conman or information obtained from one of the other sources we have identified without having properly taken steps to verify the information that has been provided and, at the very least, demonstrated that the email he claims to have been sent is authentic.'

c [13] The judge also had before him a witness statement from Miss Greene (which she undertook to sign and verify) and a witness statement from Mr Wellington (see [8], above), together with a separate letter dated 16 October 2004 from Mr Wellington.

d [14] In her statement Miss Greene said that Mr Peter Foster was a convicted fraudster. She maintained she never sent the e-mails referred to at [7], above. She said that between 18 October and 24 December 2002 she was undergoing treatment for breast cancer, having undergone a surgical operation on 17/18 October. As to their suggested business relationship, proposed or otherwise, she said:

e 'I confirm that I did have about two conversations with Foster in which he tried to persuade me to assist him in his business proposals. However, this was the extent of my involvement and I confirm I did not enter into a business relationship with him, take any steps to assist him, or receive any money from him.'

f [15] Miss Greene set out in an exhibit to her statement various supposed quotes from Mr Foster (particularly that which appeared in the Scotsman on 14 December 2002), in which he is alleged to have said that he could make money from a story about his predicament.

g [16] Miss Greene maintained, against the background of Mr Foster's convictions and deportation, that an article based on the 'e-mail' of 31 January 2003 (see [9], above) would be highly defamatory of her, particularly because of the suggestions that she was continuing to advise Mr Foster on business ventures, and that she was advising him on how to avoid the Advertising Standards Authority's code of practice and tax obligations. She added that it was defamatory to suggest that she had disloyally disavowed Mrs Blair to Mr Foster.

[17] Her statement ended in these terms:

h 'I am arranging for a forensic computer expert to examine my computers during the course of the next few days to demonstrate that the alleged email was not sent by me to Foster. In this regard, even if the court is not minded to injunct the defendants permanently until further order, I respectfully request that it orders an interim injunction to prevent the publication of the allegations the defendants propose to publish based on the email until such time as it is possible for proper evidence to be put before the court on the authenticity of the alleged email. If so, I also ask that the defendants disclose the email said to have been sent by me to Foster in order that this may be given to the computer forensic expert to assist in his examination of my computers. I confirm I have a PC in my office and my home.'

j [18] In his statement, Mr Wellington stated quite briefly:

'I do not know whether or not the editor will decide to publish an article about the business relationship between Martha Greene and Peter Foster, but if he does decide to do so I believe we will be able to stand up the story and, if the Mail on Sunday is sued, I confirm we will justify the sting of the article.'

[19] In the accompanying letter, which was not annexed to his witness statement, Mr Wellington suggested that the Mail on Sunday had no evidence that the e-mail of 31 January 2003 was a forgery. He said that previous e-mails supplied by Mr Foster in relation to Mrs Blair's purchase of flats in Bristol 'have been proved to be entirely genuine'. He added that the Mail on Sunday would defend any libel action on the basis that 'our information is true and accurate'.

(4) *The judge's conclusions on the facts*

[20] After setting out these facts, the judge commented that the conclusions he reached were perforce based on the material before him, with its self-evident limitations and lack of completeness. Given the approach of the courts following the decision of this court in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965, he said that it was unsurprising that Mr Wellington had opted to put only a short statement before the court. If a defendant to a libel action makes a statement verified as true in which he maintains that he can and will justify the alleged libel, the rule has always been that claimants will be unable to obtain an interim injunction to restrain the publication of an allegedly defamatory statement unless it is plain that the plea of justification is bound to fail.

[21] The judge said that his conclusions on the material before him were entirely test-dependent. If the test to be applied was that the claimant must demonstrate that ([1891] 2 Ch 269 at 284, [1891-4] All ER Rep 965 at 968 per Lord Coleridge CJ) 'it is clear that [the] alleged libel is untrue', he had no hesitation in finding that the claimant had failed to make out her case to that high standard. He said that although he had a substantial degree of scepticism about the e-mail of 31 January 2003, the evidence did not reveal to a sufficiently high degree—certainly not so as to make it 'clear'—that Miss Greene did not send it (or, for that matter, the earlier e-mails). He said that there was simply no unassailable 'knock-out' evidence, or combination of pieces of evidence, that demonstrated plainly that forgery had occurred.

[22] However, if the test were to be the lesser one, namely that it was more likely than not that Miss Greene could establish at the trial that publication should not be allowed, he would find for her. In this context he quoted a passage from the speech of Lord Nicholls of Birkenhead in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 at [22], [2004] 4 All ER 617 at [22], [2004] 3 WLR 918:

'As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial.'

[23] The judge said that Miss Evans, who appeared for the defendant, had not suggested that Mr Foster was anything other than a convicted criminal. The judge bore in mind that the e-mail was alleged to have been sent on the day after Mr Foster arrived back in Australia, following his deportation from Ireland, and that there was currently no supporting material to indicate that the source of this



a information—whether that person was Mr Foster or someone else—was telling the truth about Miss Greene having dispatched the e-mail of 31 January 2003. He concluded, on the basis of the documents then before the court, that it was more likely than not that the claimant would be able to establish at trial that it was a forgery and should therefore not be published. He said that the improbable timing of the e-mail, coupled with both the lack of any other evidence from the  
b defendant and the claimant's credible denials of authorship, led him to this conclusion. He said that he had reached his decision with considerable reluctance, given the fact that only meagre evidence, untested by cross-examination, had been made available to him, and that he had had to assess it in haste, due to the pressures of time to which we have referred.

c (5) *Counsel's arguments before the judge*

[24] He then summarised the gist of the submissions that had been made to him.

[25] Mr Spearman had argued that following the decision of the House of Lords in the *Cream Holdings* case, in which the speeches of the Appellate  
d Committee had been handed down two days before the hearing, the relevant test to be applied under s 12(3) of the 1998 Act was whether the claimant was able to demonstrate at this stage that she was more likely than not at trial to be able to establish that publication should not be allowed. The judge commented that that argument inevitably conflicted with the rule in *Bonnard v Perryman*, and would create a wholly new test for a judge to apply on an application for an interim  
e injunction in defamation cases.

[26] Anticipating that objection, Mr Spearman submitted that the rule in *Bonnard v Perryman* was not compliant with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act), which required a careful balance to be struck between  
f competing rights on the facts of each particular case. He submitted that it was a hard and inflexible rule which precluded the fair and just performance of that exercise. He was willing to concede that whereas the defendant could invoke art 10 of the convention, the claimant was relying on what he described as the high societal value of the right to her reputation. Even though this was not a case  
g involving competing convention rights, none the less, given the importance of her reputation to Miss Greene, he argued that the rule in *Bonnard v Perryman* accorded inappropriate weight to the right to freedom of expression, particularly given the qualifications set out in art 10(2), and particularly as regards the reputation of others.

[27] Following the decision of the House of Lords in *Campbell v Mirror Group  
h Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232, he submitted that there should be no automatic priority, or presumption of one right in favour of the other, and that the court should evaluate whether it was necessary in any given case to qualify the one right in order to protect the other (see [2004] 2 All ER 995 at [55], [141] per Lord Hoffmann and Baroness Hale of  
j Richmond respectively).

[28] The judge said that, as he understood the position, the key question was whether the approach advocated by Mr Spearman applied in the present case, or whether that approach was limited to cases involving an alleged breach of confidence, or cases in which the courts had to weigh competing convention rights.



[29] Miss Evans argued that the judge was bound by *Bonnard v Perryman*. She added that the House of Lords in the *Cream Holdings* case did not deal with the rule in *Bonnard v Perryman* because breach of confidence, and not defamation, was under consideration in that case. In this context she drew attention to the observations of two of the members of this court in the *Cream Holdings* case [2003] EWCA Civ 103, [2003] 2 All ER 318, [2003] Ch 650 which showed that they considered that this rule was unaffected by their decision in that case.

[30] First, Simon Brown LJ said (at [43]):

'[Counsel] further relies upon the long-established principle in the closely related field of defamation law that where the defendant contends that the words complained of are true and swears that he will plead and seek to prove the defence of justification, the court will not grant an interlocutory injunction unless, exceptionally, it is satisfied that the defence is one which cannot succeed. This is often called the rule in *Bonnard v Perryman* ([1891] 2 Ch 269, [1891-4] All ER Rep 965) and it appears to extend also to the defences of privilege and fair comment. In defamation therefore, it is even harder to obtain interlocutory relief than were the claimant facing the suggested balance of probability test in s 12(3) [of the 1998 Act]. So much the more likely, submits [counsel], that Parliament was intending by s 12(3) to introduce a test at least as stringent as that rather than the lower and less precise threshold test of a real prospect of success, a test so low, indeed, that a failure to meet it would in any event render the claim vulnerable to strike-out by summary judgment under CPR 24.2 and amounts to little more than was previously required by the *American Cyanamid* approach: see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 510, [1975] AC 396 at 407: "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

For her part, Arden LJ said (at [96]):

'The present case is an action for breach of confidence. If a breach of confidence occurred, the second appellant (the Echo) was aware of all the relevant circumstances. This is not a case where defamation is alleged and where the Echo has indicated its intention to prove justification at trial. In such a case, the court will not grant an interim injunction to restrain publication unless it is clear that the plea of justification is bound to fail: see *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965, *Holley v Smith* [1998] 1 All ER 853, [1998] QB 726. Nor is this a case where there is a strong case for publication in the public interest of the alleged confidential material of the nature that was held to exist in *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, [1985] QB 526.'

[31] Miss Evans also quoted a passage from the current edition of *Gatley on Libel and Slander* (10th edn, 2004) pp 797-798 (para 25.19):

'The rule in *Bonnard v Perryman* is long established, straightforward to apply and in harmony with the importance attached by the Convention and the European Court of Human Rights to the right of freedom of expression. Moreover the rule releases the court from the usually impossible task of investigating summarily the merits of the defence of justification which is so often dependent on the credibility of witnesses and the detailed consideration of documents. It is surely improbable that it will be adjudged

a that the burden on a claimant seeking an interim injunction in defamation has been relaxed by s. 12(3) so that he merely has to show a reasonable prospect of success in the face of a defendant's contention that he has a viable defence.'

b (6) *The judge's conclusions on the law*

[32] After reciting counsel's arguments, the judge concluded that he was bound by the clear rule in *Bonnard v Perryman*. He said that it was unequivocal in its terms, and remained undisturbed by later authority (including the *Cream Holdings* case). For this reason he dismissed the claimant's application. As we have said, he went on to grant her a temporary injunction pending her appeal to this court.

c [33] As a postscript to his judgment, the judge added that he considered that this was a paradigm case for the purposes of demonstrating, from a practical viewpoint, that it would be difficult for the court on an application for an interim injunction to investigate whether, at the trial, the plea of justification was more likely than not to fail. A judge would have to decide whether the proposed material was, on a balance of probabilities, likely to be found to be libellous in advance of publication, in circumstances in which it would often be impossible to make that decision satisfactorily. The judge said that it was evident that the rule in *Bonnard v Perryman* had survived for so long not least because it provided a test for the grant of interim injunctions in libel cases that was wholly workable.

e (7) *The effect of the new evidence*

[34] When the appeal was opened in this court we permitted Mr Spearman to adduce new evidence which was not and could not have been placed before the judge on the basis that the defendants would have the opportunity of replying to this evidence, however informally.

f [35] The claimant's new evidence consisted primarily of an interim report by Mr Ian Henderson, a computer expert she had instructed, supported by a supplementary message he sent to the claimant's solicitors just before the hearing. Mr Henderson had been supplied with the e-mail address of origin and receipt which related to the disputed message of 31 January 2003 (for which see g [9], above). He had been instructed to examine the desktop and laptop computers used by Miss Greene in order to establish whether that e-mail (and two other e-mails dated 6 November 2002 and 23 January 2003) was genuine. He explained that he had not been provided with electronic or paper copies of these e-mails and he did not have access to the detailed routing information contained in the header section of the e-mails which can be viewed using specialist software. h Subject to these limitations he had examined all the e-mail records relating to both Microsoft Outlook and Outlook Express on Miss Greene's two computers and found no trace of the alleged e-mails. A study of the AOL e-mail records retained by AOL online as well as the PFC (personal filing cabinet) records saved on the desktop computer also revealed no trace of the alleged e-mails. In the time j available AOL had not itself been able to provide transaction listing records prior to November 2003 which related to Miss Greene's e-mail account.

[36] He had also been unable to find any trace on either of Miss Greene's computers of the e-mail address Mr Foster was said to have been using. He said that this was perhaps not too surprising because he had found no trace of Internet or e-mail activity on 31 January 2003.

[37] In reply to this evidence we were told that a computer expert had inspected three e-mails (including those dated 6 November 2002 and 31 January 2003) on a laptop owned by Mr Foster at his home in Australia. He had had the advantage of being able to complete a 'trace route' on the 'IP address headers', and this indicated that all these e-mails had originated from a server in the Greater London area. The mail servers reported in the header of the e-mail were actual servers, and the times reported by the header which indicated when the e-mails were received were accurate. The e-mail address header from the sender could not be changed, although the sender of the e-mail could be another person who had access to the owner's computer. An inspection of the e-mail header and text showed that the e-mails had not been interfered with from the point of departure to the addressee's mailbox.

[38] The defendant's expert added that although the text of an e-mail may be altered by forwarding or sending the e-mail back to oneself or to a third party, the original header would reflect this change, and there was no sign of such a change in the header information on any of these e-mails.

[39] We were also told that the editor of the Mail on Sunday had not yet had the opportunity to consider the claimant's evidence. If he decided to publish a new article, then on the assumption that this evidence differed from his own evidence, he would include the claimant's account of the matter and would not adopt the allegations as true as the evidence at present stood. He would also highlight Mr Foster's potential unreliability.

[40] However, he regarded the matter as a matter of public interest, not only because of the subject matter but because he had already told his readers that the e-mails were genuine (having put this to the claimant the previous week, who did not challenge them at that time). The question of the authenticity of the e-mails was therefore in the public domain, and it was in the public interest, he said, for this further information to be put before the public.

[41] In the light of the head-on conflict between the evidence of the two computer experts, which cannot be resolved at this early stage of these proceedings, we do not consider that this evidence is strong enough to shift the conclusions the judge made. We find it impossible to hold that it is clear that Miss Greene will succeed in showing that the e-mails are forgeries. There is still no unassailable 'knock-out' evidence, or any combination of pieces of evidence, that demonstrates plainly that forgery has occurred (compare [21], above). On the other hand, Mr Henderson's new evidence tends to strengthen the judge's conclusion that it is more likely than not on the totality of the present evidence that Miss Greene can establish at trial that the e-mails are forgeries.

### PART III

#### (8) *The law of prior restraint in defamation actions: the beginnings*

[42] Blackstone (see [1], above) made a clear distinction between the press's freedom to publish without prior restraint and the post-publication penalties it might incur if it published (p 152) 'what is improper, mischievous or illegal'. After publication the publisher must 'take the consequence of his own temerity'.

[43] In 1792 Fox's Libel Act established that the question 'libel or no libel' was one for the jury to determine, and although the rule was made in a criminal law context it was rapidly adopted in civil litigation as well. In those days the danger

a to press freedom came from the executive and the licensing systems it might introduce, which Blackstone castigated in these terms:

b 'To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.'

c [44] In those days the judges did not have the power of prior restraint. Until the enactment of the Common Law Procedure Act 1854 the judges of the common law courts had no power to grant an injunction, and even after 1854 they never used it in a libel case. The judges of the Court of Chancery, who did possess such a power, had no jurisdiction to try a libel action.

d [45] It was only when the Judicature Acts fused equity with the law, sweeping away the old jurisdictional boundaries, that the courts had to grapple seriously with two new questions. The first was whether they possessed jurisdiction to grant an injunction in a libel case where the defendant averred that he had a defence. The second related to the principles on which they should exercise any jurisdiction they might be found to possess. The story has recently been told by Auld LJ in *Holley v Smyth* [1998] 1 All ER 853 at 861–867, [1998] QB 726 at 737–743, and we derived much benefit from that judgment.

e [46] The rule in *Bonnard v Perryman* was laid down by five judges, including the Lord Chief Justice and the Master of the Rolls, who constituted the majority of the full Court of Appeal in that case. The libel in issue was a very damaging one. North J at first instance said ([1891] 2 Ch 269 at 274) that unless it could be justified at the trial it was one in which a jury would give the plaintiff 'very serious damages'. He went on to say ([1891] 2 Ch 269 at 277–278):

f '... I have this to bear in mind, that, if in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted, whereas it is clear on the authorities that there are cases in which it would be proper to grant it. Then there is this further matter to be considered with reference to the point made, that the matter ought to be tried before a jury. I am satisfied of this, that if the matter was before a jury now, upon the evidence which is before me—that is to say, the evidence of the Plaintiffs uncontradicted, not cross-examined to, and merely resting on the Defendant's evidence in answer to it—I am perfectly satisfied there is not any jury in England who would say there should be a verdict for the Defendant in such a case, and, what is more, if they did, I am quite satisfied it is a case in which a new trial would be directed. This, of course, does not touch what may be the case when the action comes to be tried. There may be evidence before the Court then which would satisfy a jury who tries it that the Defendant has made out a justification. I am merely referring to the materials before me, which are all I can look to now in considering what I am to do in the matter. In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned.'

j [47] In overruling that decision Lord Coleridge CJ quoted with approval what Lord Esher MR had said four years earlier in *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846:



‘... the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document, and to say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise their jurisdiction.’

[48] In the *William Coulson & Sons* case Lindley LJ (concurring, as he was later to concur in *Bonnard v Perryman*)—

‘agreed with the rules laid down by the Master of the Rolls, and he was not prepared to say that the jury might not find that this was no libel, or that the alleged libel was true. The injunction, therefore, ought not to have been granted. Both the Judge at Chambers and the Divisional Court had suggested a form of circular; but it was no part of a Judge’s duty to do so, except for the purpose of putting an end to litigation, and the Court ought not to settle a draft form of what might turn out to be a libel.’

[49] This dictum illustrates an unusual feature of this particular jurisdiction, which is that the judge does not know in advance exactly what the publisher is going to say. Since he cannot determine the question ‘libel or no libel’ at the trial, still less at the pre-trial stage, he must not get himself involved in the process of drafting what the defendant may or may not be permitted to say.

[50] In *Bonnard v Perryman* [1891] 2 Ch 269 at 285, [1891–4] All ER Rep 965 at 969 Lord Coleridge CJ resolved North J’s dilemma by saying that although the courts undoubtedly possessed the requisite jurisdiction, ‘in all but exceptional cases’ they should not issue an interlocutory injunction to restrain the publication of a libel which the defence sought to justify except where it was clear that that defence would fail. He based his approach on the particular need not to restrict the right of free speech in libel cases by interfering before the final determination of the matter by a jury otherwise than in a clear case of an untrue libel. He said ([1891] 2 Ch 269 at 284, [1891–4] All ER Rep 965 at 968):

‘... the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions ... In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it



a upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.'

b (9) *The law of prior restraint in defamation actions: the modern law*

[51] It is necessary to refer only to five modern cases in which the rule in *Bonnard v Perryman* was authoritatively restated. In *Fraser v Evans* [1969] 1 All ER 8 at 10, [1969] 1 QB 349 at 360–361 Lord Denning MR said:

c 'The court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should out ... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication.'

d [52] In *Herbage v Pressdram Ltd* [1984] 2 All ER 769 at 771, [1984] 1 WLR 1160 at 1162 Griffiths LJ restated the effect of the rule and then said:

e 'These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages.'

f [53] He refused to water the principles down. After summarising an argument by counsel which suggested that the combined effect of the Rehabilitation of Offenders Act 1974 and the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 justified a radical departure from the rule, he went on to say:

g 'If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.'

h [54] In *Khashoggi v IPC Magazines Ltd* [1986] 3 All ER 577 at 581, [1986] 1 WLR 1412 at 1417–1418 Donaldson MR applied the rule in a new context, where the defendants had asserted that they would justify what they said at trial by reference to a *Polly Peck* defence (see *Polly Peck (Holdings) plc v Telford* [1986] 2 All ER 84, [1986] QB 1000). He said:

j 'I cannot see why [the *Bonnard v Perryman* principle] should not be applied. Quite apart from any question of public interest in the freedom of the press, there is a much wider principle which covers it, and that is this. The injunctive powers of the court can only be invoked in support of a right or in

defence of an interest. If the *Polly Peck* defence were to succeed [the plaintiff] would have no right. She therefore cannot expect to have it defended. That does not of course answer the question which arises as to how likely she is to succeed. That is a problem which always arises in libel and elsewhere. The point is that *Bonnard v Perryman*, apart from its reference to freedom of speech, is based on the fact that courts should not step in to defend a cause of action in defamation if they think that this is a case in which the plea of justification might, not would, succeed.'

[55] By now it was firmly established by this court that the principles underlying the grant of interlocutory injunctions which Lord Diplock laid down in the *American Cyanamid* case did not apply to cases covered by the rule in *Bonnard v Perryman*. This was reaffirmed by Lord Denning MR in *Herbage v Times Newspapers* (1981) Times, 30 April. In that case Sir Denys Buckley, who had a great understanding of practice and procedure in relation to equitable remedies, observed:

'the question what meaning the words complained of bore was primarily one for the jury. Suppose the words bore the second meaning alleged and an injunction were granted restraining further publication, if application were made to commit the defendants for contempt of court for breach of that injunction, the judge hearing the application would have to form a view as to whether there had been a breach of the injunction and decide whether the words used implied that Mr Herbage had been made bankrupt and discharged without paying his debts in full. It could not be right in a defamation action to grant an action of that kind. *There were special circumstances in defamation actions.*' (Our emphasis.)

[56] In *Holley v Smyth* [1998] 1 All ER 853 at 872, [1998] QB 726 at 749, where the potency of the rule was reaffirmed, Sir Christopher Slade, another experienced Chancery judge, said:

'I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is clearly untrue. In my judgment, however, that is a discretion which must be exercised in accordance with established principles.'

(10) *The law of prior restraint in defamation actions: the rationale of the rule*

[57] This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Donaldson MR in *Khashoggi's* case, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth

a lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well).

PART IV

b (11) *The effect of the Human Rights Act 1998*

[58] But Mr Spearman says that the 1998 Act has changed all this. He relies in part on the express effect of s 12(3) of the Act. And if he is wrong about that, he relies on s 6 of the Act which inhibits a court from acting in a way which is incompatible with a convention right. He says that his client has a right to a reputation which is protected by art 8 of the convention, and that the rigidity of c the rule in *Bonnard v Perryman* runs roughshod over that right, giving a court no power to weigh competing rights in the balance and give a proportionate response.

(12) *Section 12(3) of the 1998 Act*

d [59] We can deal with the first of these points quite quickly. Section 12 of the Act is entitled 'Freedom of expression' and sub-s (1) makes it clear that it applies 'if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression'. This language does not suggest that Parliament intended within this very section to whittle e Mr Spearman told us that this was the effect of s 12(3) which provides:

'No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'

f [60] As Fulford J observed (see [28]–[29], above), in *Cream Holdings Ltd v Banerjee* [2003] 2 All ER 318, [2003] Ch 650, the majority of this court took it for granted that the rule in *Bonnard v Perryman* was still good law notwithstanding the enactment of s 12 of the 1998 Act, and although the House of Lords differed from their approach to the meaning of s 12, it did not avert to this aspect of the matter at all. That case was concerned with an entirely different subject matter (the g protection of confidential information). As Lord Nicholls observed ([2004] 4 All ER 617 at [18]): 'Confidentiality, once breached, is lost for ever', so that the granting or withholding of a pre-trial injunction is of critical importance to a claimant. But before explaining what the word 'likely' meant in the context of s 12(3) he said (at [15]):

h 'When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the convention, guaranteeing the right to respect for private life, was among the convention rights to which the legislation would give effect. The concern was that, applying the j conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under art 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a

higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a “serious question to be tried” or a “real prospect” of success at the trial.’

[61] This has got nothing at all to do with practice in defamation cases, where as we have observed (at [55], above) the *American Cyanamid* guidelines are not applied. There are ‘special circumstances in defamation actions’, as Sir Denys Buckley put it in *Herbage v Times Newspapers* (1981) *Times*, 30 April). In a section of an Act of Parliament which is expressly concerned with the protection of freedom of expression and not with undermining it, Parliament cannot be interpreted as having abrogated the rule in *Bonnard v Perryman* by a side wind. In any event the very language of s 12(3) does not require such an interpretation. Nor do we consider that s 12(4) has any bearing on questions relating to prior restraint in the context of the case with which we are concerned.

[62] First principles in statutory interpretation would also rule out the dismantling of judge-made law by stealth (in the absence of necessary implication). In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814, [1975] AC 591 at 614, Lord Reid said:

‘There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the “mischief”. Of course it may and quite often does go farther. But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for.’

[63] In *Re F (a minor) (publication of information)* [1977] 1 All ER 114 at 131, [1977] Fam 58 at 99, a case concerned with the interpretation of s 12(1) of the Administration of Justice Act 1960, Scarman LJ said:

‘The words, in their context, need mean no more than that there is a contempt in the absence of a defence recognised by law. If Parliament had intended to treat publication of information relating to proceedings before a court sitting in private as a contempt irrespective of circumstances, I would have expected express provision to that effect. Circumstances can and do arise in which Parliament must have intended the old law to continue, for example, where the court authorises publication or where by the passage of time “the rule of publicity [is] resumed” (Lord Shaw, *Scott v Scott* [1913] AC 417 at 483, [1911–13] All ER Rep 1 at 33, 34). Similarly, if, as I believe, the pre-existing law recognised a defence that the publisher neither knew nor ought to have known that the information published related to proceedings before a court in private, one would have expected express provision if such a defence was to be taken away.’

[64] More recently, in *R (on the application of Rottman) v Comr of Police for the Metropolis* [2002] UKHL 20 at [75], [2002] 2 All ER 865 at [75], [2002] 2 AC 692, a case concerned with the question whether any part of the police’s common law powers of search and seizure had survived the enactment of the Police and Criminal Evidence Act 1984 (PACE) Lord Hutton said:

a 'It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication.'

b [65] Mr Spearman submitted that this well-established principle did not apply to constitutional enactments like the 1998 Act, but the House of Lords had no compunction about applying it in order to preserve the state's power to search a citizen against his will, overruling a Divisional Court, of which Brooke LJ was a member, which had believed that the purpose of PACE was to clarify and codify what the police might or might not lawfully do in this very sensitive area.

c [66] We therefore have no hesitation in holding that there is nothing in s 12(3) of the 1998 Act that can properly be interpreted as weakening in any way the force of the rule in *Bonnard v Perryman*.

(13) *Section 6 of the 1998 Act*

d [67] Section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. It is well known that by s 6(3)(a) the expression 'public authority' is defined so as to include a court within the scope of its meaning.

e [68] For the purposes of this judgment we are content to assume that a person's right to protect his/her reputation is among the rights guaranteed by art 8 of the convention (see *Radio France v France* App No 53984/00 (30 March 2004, unreported) at para 31). In its judgment in that case the European Court of Human Rights recognised this right as an element of the right to respect for private life. (Compare Lord Hoffmann's observations to similar effect in *Wainwright v Home Office* [2003] UKHL 53 at [16]–[18], [2003] 4 All ER 969 at [16]–[18], [2003] 3 WLR 1137.)

f [69] Against this background Mr Spearman showed us a number of recent cases which demonstrate the techniques to be adopted where two convention rights are in apparent conflict. That this is the case in the field of defamation was made very clear by Cooke P in *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148 at 156, in which he said:

g 'The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other.'

h [70] More recently, in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 612, [2001] 2 AC 127 at 190 Lord Nicholls said: 'My Lords, this appeal concerns the interaction between two fundamental rights: freedom of expression and protection of reputation.'

j [71] Mr Spearman argued that a rights-based approach requires a careful balancing at every stage of every case between the competing rights. He relied in this context on passages in the speeches in the House of Lords in *Campbell v Mirror Group Newspapers Ltd* [2004] 2 All ER 995 (see Lord Nicholls at [19]–[20], Lord Hoffmann at [55]–[56], Lord Hope of Craighead at [105]–[111] and Lady Hale at [139]–[142]).



[72] Mr Caldecott QC, who appeared for the defendants, submitted that it is at the trial of a defamation action that English law shows itself appropriately solicitous of the claimant's right to a fair reputation. At the trial the burden lies on defendants to prove that their defamatory statement was true, or that it represented fair comment on a matter of public interest, or that it was made on an occasion that attracted privilege. If they fail to do so, they have to pay the penalty for infringing the claimant's right, and the claimant thereby sees his/her reputation vindicated in a very public way. Even if the case is settled before trial, rules of court uniquely allow a statement to be made in open court by way of vindication.

[73] At the pre-trial stage, he argued, the position is different. As Stuart-Smith LJ said in *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188 at 202, [1993] 1 WLR 1489 at 1502:

'no one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false. In defamation the falsity of the libel or slander is presumed; but justification is a complete defence.'

[74] If a claimant were able to stop a defendant from exercising its art 10 right merely by arguing on paper-based evidence that it was more likely than not that the defendant could not show that what it wished to say about the claimant was true, it would seriously weaken the effect of art 10. In *Observer v UK* (1992) 14 EHRR 153 at 191 (para 60) the European Court of Human Rights said:

'the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.'

[75] Scoops, as Mr Caldecott observed, are the lifeblood of the newspaper industry. He might have added that stale news is no news at all. If Mr Spearman was correct, people with a fair reputation they do not deserve could stifle public criticism by obtaining injunctions simply because on necessarily incomplete information a court thought it more likely than not that they would defeat a defence of justification at the trial.

[76] In our judgment Mr Caldecott's submissions are well founded. As Donaldson MR observed in *Khashoggi v IPC Magazines Ltd* [1986] 3 All ER 577, [1986] 1 WLR 1412, once a claimant's right to a fair reputation is put in issue it is the function of the trial, and the duty of the jury, to determine whether he/she does have a right to be vindicated. One cannot speak sensibly of the violation of the right until it is established at the trial, and at the trial the rules of evidence will favour the claimant.

[77] In the passage quoted at [31], above the editors of the current edition of *Gatley* (p 797 (para 25.19)) correctly refer to—

'the usually impossible task of investigating summarily the merits of the defence of justification which is so often dependent on the credibility of witnesses and the detailed consideration of documents.'

a The judicial authors of the rule in *Bonnard v Perryman* recognised this phenomenon when they created the rule in the first place. This court recognised it a generation ago when it refused to apply the *American Cyanamid* principles in a defamation action. And in our judgment there is nothing in the convention that requires the rule to be done away with.

b [78] In cases involving confidential documents, the confidentiality of the documents will be lost completely if an injunction against disclosure is not granted when appropriate. In cases involving national security, great damage may similarly be done if an injunction is not granted when appropriate. In a defamation action, on the other hand, while some damage may be done by permitting the publication of what may later turn out to be false, everyone knows that it is at the trial that truth or falsehood will be tested and the claimant vindicated if the defendant cannot prove that the sting of the libel is justified or that he has some other defence the law will recognise. The damage that may on occasion be done by refusing an injunction where a less strict rule would facilitate its grant pales into insignificance compared with the damage which would be done to freedom of expression and the freedom of the press if the rule in *Bonnard v Perryman* was relaxed.

[79] Since argument in this case was completed, the members of the Appellate Committee of the House of Lords have delivered their opinions in the case of *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, [2004] 4 All ER 683, [2004] 3 WLR 1129. That appeal was concerned with the appropriateness of an injunction which restrained the publication of the name of a defendant and her deceased child in the context of the reporting of a pending criminal trial in which a mother is charged with murdering her child. The purpose of the injunction was to protect the welfare of the mother's younger child.

f [80] In his speech, with which the other members of the House of Lords agreed, Lord Steyn said:

[17] The interplay between arts 8 and 10 has been illuminated in the House of Lords in *Campbell v Mirror Group Newspapers Ltd* ([2004] 2 All ER 995). For present purposes the decision of the House on the facts of *Campbell's* case and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

#### j VI. THE GENERAL RULE

[18] In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule.

The duty of the court is to examine with care each application for a departure from the rule by reason of rights under art 8.'

[81] On the facts of that case Lord Steyn said, in effect, that the art 8 rights of the younger child paled into insignificance when compared with the importance to be attached to the freedom of the press to report a criminal trial. Similarly, the relevant art 8 rights of the claimant in the present case cannot be accorded great weight (before the trial of this action takes place) when compared with the importance to be attached to the freedom of the press to report matters of public interest, for the reasons already set out in this judgment. Once again we need to stress the distinction between a defamation case (where the claimant's right to a reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality.

[82] For these reasons we decided to dismiss this appeal.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

# National Car Parks Ltd v Baird (Valuation Officer) and another

[2004] EWCA Civ 967

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, CLARKE AND DYSON LJJ

22, 23 JUNE, 22 JULY 2004

*Rates – Proposal for alteration of current valuation list – Effective date of alteration – Local Government Finance Act 1988, ss 41(1), 55.*

Under s 41(1)<sup>a</sup> of the Local Government Finance Act 1988 the local valuation officer was required to 'compile, and then maintain' non-domestic rating lists. The first list was to be compiled on 1 April 1990 and subsequent lists on 1 April in every subsequent fifth year. Section 55<sup>b</sup> of the 1988 Act made provision for the alteration of lists and authorised the making of regulations about their alteration by valuation officers. The appellant owned properties in Manchester and in London which were included in their respective lists. In August 1990 it proposed alterations to the lists reducing the values of those properties. Under reg 11<sup>c</sup> of the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 a valuation officer was obliged within six weeks to alter the list where the proposer and the valuation officer agreed on an alteration of the list other than on terms contained in the proposal and that agreement was signified in writing and reg 12<sup>d</sup> provided that where the valuation officer did not agree with the proposal, it was not withdrawn, and there was no agreement as provided for in reg 11, then the disagreement had to be referred within a fixed period to the valuation tribunal. In 1994 values for both properties were agreed which were less than the original value but greater than the terms of the proposal. Because of the operation of provisions for transitional relief it would have been financially beneficial for the appellant, if the alterations had taken effect from 1 April 1992. Accordingly, it withdrew the August 1990 proposals, and formally requested the valuation officers to alter the lists. Such an alteration made by a valuation officer of his own initiative at any time before 9 July 1994 would have taken effect from 1 April 1992. However, the lists were not altered to show the agreed assessments until after 9 July 1994 and the effect of an amendment to the 1993 regulations was that the alterations made by the valuation officer of his own initiative after 9 July 1994 took effect from 1 April 1990. Transitional relief from 1990 to 1992 was therefore not available to the appellant. In November 1994 the appellant proposed further

<sup>a</sup> Section 41, so far as material, provides: '(1) In accordance with this Part, the valuation officer for a billing authority shall compile, and then maintain, lists for the authority (to be called local non-domestic rating lists).'

<sup>b</sup> Section 55, so far as material, is set out at [6], below

<sup>c</sup> Regulation 11, so far as material, is set out at [15], below

<sup>d</sup> Regulation 12, so far as material, provides '(1) Where the valuation officer is not of the opinion that a proposal is well-founded, and (a) the proposal is not withdrawn, and (b) there is no agreement as provided in regulation 11, the disagreement shall, no later than the expiry of the period of three months beginning on the day on which the proposal was served on him, be referred by the valuation officer, as an appeal by the proposer against his refusal to alter the list, to the relevant valuation tribunal.'

alterations to the lists so as to show the date from which the alterations as to value took effect as 1 April 1992. The valuation officers did not agree and the respective valuation tribunals dismissed the appellant's appeals. The Lands Tribunal dismissed its appeals and it appealed to the Court of Appeal, contending (i) that a valuation officer was under a duty, imposed by s 41(1) of the 1988 Act to maintain accurate non-domestic rating lists, that when he became aware of some inaccuracy he was bound to alter the list and there was a general expectation that he would do so, that that duty and expectation gave rise to a correlative right to any person with a sufficient interest such that he should not be deprived of it by a subsequent alteration in the law in the absence of a clear intention to do so; or (ii) that a valuation officer was under a duty to alter the list within a reasonable time of becoming aware of its inaccuracy.

**Held** – It was impossible to imply into the general duty prescribed by s 41(1) of the 1988 Act a specific obligation to alter the list at the time of the withdrawal by the valuation officer of an appeal pending or at any other time by reference to such a withdrawal. Such an implication would be inconsistent with the public and continuing nature of the valuation officer's duty and the purpose and terms of s 55 of the 1988 Act and the regulations made thereunder. Nor was any obligation to alter the list within a reasonable time of the agreements or the withdrawal of the appeals to be implied. The appellant had no statutory or contractual entitlement to any alteration as all the remedies provided by regs 11 and 12 of the 1993 regulations had been deliberately foregone. The valuation officer was, in the performance of his public and continuing duty, obliged to have regard to all evidence and the interests of all ratepayers and the public generally. Accordingly, it was not possible to graft on to the obligation to maintain an accurate list any temporal element or requirement as to when it had to be altered. It followed that the appellant was not entitled to an alteration of the list at any particular time, nor to an alteration with effect from some date different from the date prescribed by the regulations at the time the alteration was actually made. In those circumstances the appellant could establish no right to any alteration of the list before 9 July 1994 or any right to insist that the alterations made after 9 July 1994 should have effect from any date other than that prescribed by the regulations then in force. Nor could it establish any expectation to either effect. In consequence the appellant had no right to have the rating list altered by the insertion of the date 1 April 1992 for the date 1 April 1990 and the appeal would, accordingly, be dismissed (see [42], [45]–[50], [54]–[56], [66], [72]–[74], below).

### Notes

For the time from which alterations in the local non-domestic rating lists are to have effect, see 39(1) *Halsbury's Laws* (4th edn reissue) para 738.

For the Local Government Finance Act 1988, ss 41, 55, see 36 *Halsbury's Statutes* (4th edn) (2002 reissue) 1403, 1426.

### Cases referred to in judgments

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.

*Marks and Spencer plc v Fernley (Valuation Officer)* [1999] RA 409, CA.

*Preston v IRC* [1985] 2 All ER 327, [1985] AC 835, [1985] 2 WLR 836, HL.

*R v East Sussex CC, ex p Tandy* [1998] 2 All ER 769, [1998] AC 714, [1998] 2 WLR 884, HL.



- a *R (on the application of Corus UK Ltd) v Valuation Office Agency* [2001] EWHC Admin 1108, [2002] RA 1.
- R (on the application of Noorkoiv) v Secretary of State for the Home Dept* [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] 1 WLR 3284.
- Ramsay (WT) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.

b **Cases referred to in skeleton arguments**

- A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, [1983] 2 AC 629, [1983] 2 WLR 735, PC.
- Chief Adjudication Officer v Maguire* [1999] 2 All ER 859, [1999] 1 WLR 1778, CA.
- c *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.
- McKerr, Re* [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807.
- Moray CC* 1962 SLT 236, Ct of Sess, OH.
- R (Bibi) v Newham London BC, R (Al-Nashed) v Newham London BC* [2001] EWCA Civ 607, [2002] 1 WLR 237.
- d *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, [1990] 1 WLR 1545, DC.
- R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, CA.
- Stretch v UK* (2004) 38 EHRR 12, [2003] ECHR 44277/98, ECt HR.
- Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.
- e

**Appeal**

- National Car Parks Ltd (NCP) appealed, with permission of Carnwath LJ given on 31 October 2003, from the decision of the Lands Tribunal (President George Bartlett QC) on 21 August 2003 ([2003] RA 289) dismissing its appeals against (i) the decision of the Manchester Valuation Tribunal on 13 May 1996 dismissing NCP's proposal served on Andrew Donald Baird, a valuation officer, that the effective date for the non-domestic rating list to be altered, in relation to a car park at Watson Street, Manchester, was 1 April 1992; and (ii) the decision of the London (South West) Valuation Tribunal on 16 December 1996 dismissing NCP's proposal served on Peter Robin Woolway, a valuation officer, that the effective date for the non-domestic rating list to be altered, in relation to a car park at the Olympia Hilton Hotel, 380–386 Kensington High Street, London, was 1 April 1992. The facts are set out in the judgment of Sir Andrew Morritt V-C.
- f
- g

- Peter Village QC and Lisa Busch* (instructed by JP Scrafton) for NCP.
- h *David Holgate QC and Nathalie Lieven* (instructed by the Solicitor of Inland Revenue) for the valuation officers.

*Cur adv vult*

- j 22 July 2004. The following judgments were delivered.

**SIR ANDREW MORRITT V-C.**

**INTRODUCTION**

[1] The Local Government Finance Act 1988 introduced a new system for rating non-domestic properties. In essence it provided, by s 41(1), for the

compilation and maintenance by the valuation officer of quinquennial local non-domestic rating lists, the first of such lists to be compiled on 1 April 1990. The 1988 Act made provision both for alterations to the list and for transitional relief. The interaction of these alternatives was such that for the years 1990–1992 it could be more beneficial for a ratepayer to obtain the transitional relief than a reduction in value.

[2] National Car Parks Ltd (NCP) was the owner of car parks at Watson Street, Manchester (the Manchester property) and 380/386 Kensington High Street, London (the Kensington property). In August 1990 it proposed alterations to the lists so as to reduce the values of those properties to £1 each. In January and April 1994 NCP agreed with the respective valuation officers that the values to be shown on the list should be £260,000 for the Manchester property and £18,600 for the Kensington property. On 9 July 1994 the regulations which governed the date on which such alterations would take effect were amended. Accordingly the alterations when made in late July and August 1994 took effect from 1 April 1990, as opposed to 1 April 1992. The consequence was that transitional relief for the years 1990–1992 was not available in respect of either the Manchester property or the Kensington property.

[3] In November 1994 NCP proposed a further alteration to the respective non-domestic rating lists so as to show the date from which the alterations as to value took effect as 1 April 1992. The valuation officers did not agree. The appeals of NCP to the respective valuation tribunals were dismissed in April and September 1996. NCP appealed to the Lands Tribunal. On 21 August 2003 the President of the Lands Tribunal (Mr George Bartlett QC) dismissed those appeals ([2003] RA 289). NCP now appeals to this court. It seeks an order, in effect, requiring the lists to be altered with effect from 1 April 1992, rather than 1 April 1990, notwithstanding the provisions of the amended regulations. It contends that (1) the respective valuation officers were bound by s 41(1) of the 1988 Act to alter the lists in accordance with the agreements as to value reached in January and April 1994 in accordance with the regulations then in force, ie with effect from 1 April 1992, (2) NCP had a legitimate expectation that the valuation officers would do so, and (3) the amendment to the regulations effected on 9 July 1994 did not defeat the right of NCP corresponding to the valuation officers' duty or the legitimate expectation of NCP because of both the presumption against retrospectivity and the provisions of ss 16 and 23 of the Interpretation Act 1978. I will deal with these and other submissions made to this court in due course but first it is necessary to explain the statutory framework in some detail and the facts of the individual cases.

#### THE STATUTORY FRAMEWORK

[4] The 1988 Act introduced a new system of property taxation. It divided all property into two categories, domestic and non-domestic. Domestic property was valued in accordance with bands for the purposes of the community charge and later the council tax. The liability of the occupant is arrived at by multiplying the value of the band by the rate of the community charge set and declared by the relevant local authority. The proceeds of that rate are collected by the local authority and retained for its own use. By contrast the non-domestic rate is arrived at by applying to its annual rental value, as shown on the list, a national multiplier set by central government. The product is collected by the local authority and accounted for to central government. This appeal concerns the non-domestic rating system.

a [5] By s 41 of the 1988 Act the local valuation officer is required to compile and then maintain lists to be called non-domestic rating lists. The first list was to be compiled on 1 April 1990 and subsequent lists on 1 April in every subsequent fifth year. The list so compiled comes into force on the day on which it is compiled and remains in force until the next one is compiled five years later. Section 42 prescribes what the list must show for each day in each financial year for each  
b relevant non-domestic property. Section 43 imposes the liability on the occupant. The list is open to inspection by the public in accordance with the provisions of Sch 9, para 8.

c [6] Section 55 makes provision for the alteration of lists. It authorises the Secretary of State to make regulations about the alteration by valuation officers of lists which have been compiled under that part of the 1988 Act whether or not still in force. Subsections (3)–(7) apply for the purposes of sub-s (2) so as specifically to authorise regulations of a particular nature. Specific matters so dealt with include the conditions under which a valuation officer may alter the list (sub-s (3)), who may make proposals for an alteration, how and when (sub-s (4)) and for appeals to a valuation tribunal in case of disagreement  
d (sub-s (5)). Subsection (6) provides:

e ‘The regulations may include—(a) provision as to the period for which or day from which an alteration of a list is to have effect (including provision that it is to have retrospective effect); (b) provision requiring the list to be altered so as to indicate the effect (retrospective or otherwise) of the alteration ...’

f [7] Section 57 provided that Sch 7A, which contained special provisions for the years 1990–1995, should have effect. The Non-Domestic Rating (Transitional Period) Regulations 1990, SI 1990/608, made under para 10 of that schedule contain the details of the transitional relief for the years 1990–1995 which, depending on the figures, might give rise to a lower liability than a reduction in value. They were clearly explained by Sullivan J in *R (on the application of Corus UK Ltd) v Valuation Office Agency* [2001] EWHC Admin 1108 at [1]–[16], [2002] RA 1 at [1]–[16] but are not material for the purposes of this appeal.

g [8] As indicated in s 55 detailed provisions with regard to alterations to the lists were made in regulations promulgated by the Secretary of State in exercise of the power conferred on him by that section. The relevant regulations for the purposes of this appeal are the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993, SI 1993/291 and the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1994, SI 1994/1809.  
h Nevertheless it is necessary to note some provisions of the earlier regulations, namely the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1990, SI 1990/582, the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1990, SI 1990/769, the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) (No 2) Regulations 1990, SI 1990/1822, the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) (No 3) Regulations 1990, SI 1990/2025 and the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1992, SI 1992/611.  
j

[9] The 1990 regulations in reg 4 prescribed the time from which an alteration to the list was to take effect in a number of circumstances; but it made no provision for determining when an alteration to the list, made to correct an

inaccuracy in the list on the date on which it was compiled, should take effect. The omission was evidently discovered in time to make the 1990 (amendment) regulations, which came into force on the same day as the principal regulations, 1 April 1990. So far as relevant reg 2 of the 1990 (amendment) regulations provided:

‘(2) In regulation 4 (time from which alteration is to have effect), after paragraph (6) there shall be added—

“(6A) An alteration made to correct an inaccuracy in a list on the day it was compiled shall have effect from that day ...”

This provision was, however, subject to reg 6 of the 1990 regulations, which provided:

*‘Limit to start of year.*—No alteration such as is described in regulation 4 other than—(a) an alteration in pursuance of a proposal disputing the accuracy of a previous alteration, (b) an alteration to enter a completion day determined under Schedule 4A to the Act, or (c) an alteration required by order of a tribunal under Part V of these Regulations, shall have effect from a day earlier than the first day in the year in which the alteration is made.’

[10] As the President observed ([2003] RA 289 at 297 (para 8)) where a ratepayer made a proposal to reduce the value shown in the list for his hereditament, or if the valuation officer altered the list so as to reduce such value, the alteration would only take effect on the first day of the year in which the alteration was made, notwithstanding that it was made in order to correct an inaccuracy in the list on the day it was compiled. The only relevant exceptions to this were an alteration in pursuance of a proposal disputing the accuracy of a previous alteration (para (a)) or an alteration required by order of a valuation tribunal on appeal (para (c)).

[11] Regulation 4 of the 1990 (amendment) (no 2) regulations, which came into force on 27 September 1990, replaced reg 6 of the original regulations. The new reg 6 provided:

‘(1) No alteration such as is described in regulation 4 other than an alteration—(a) in pursuance of paragraphs (3) and (4) (completion notices), or (b) made in pursuance of the order of a tribunal under Part V of these Regulations shall have effect from a day earlier than the first day in the relevant year.

(2) Where the alteration is made in pursuance of a proposal other than a proposal disputing the accuracy of a previous alteration to the list, the relevant year is the year in which the proposal was made.

(3) Where the alteration is made in pursuance of a proposal disputing the accuracy of a previous alteration to the list, the relevant year is the year in which the disputed alteration was made.

(4) In any other case, the relevant year is the year in which the alteration is made.’

[12] As the President observed (at 298 (para 10)) an alteration made to correct an inaccuracy in the list on the day it was compiled, if made by the valuation officer under his general power to maintain the list, would take effect on the first day of the year in which the alteration was made; but an alteration made in pursuance of a proposal (other than one disputing the accuracy of a previous



a alteration) would take effect on the first day of the year in which the proposal was made.

[13] The replaced reg 6 was itself replaced by reg 4 of the 1992 regulations with effect from 1 April 1992. As nothing turns on the terms of the amendment I will not refer to them further.

b [14] The 1990 regulations as so amended were replaced by the 1993 regulations. Regulation 2 contained definitions of, amongst other words or expressions 'interested person', 'proposal' and 'relevant authority'. Regulation 3 provided that 'alteration' means 'alteration of a list in relation to a particular hereditament, and "alter" shall be construed accordingly'. Regulation 4 set out in some detail who might make a proposal for an alteration to the list, when and how. Regulation 5 specified the form of such a proposal, reg 6 required the valuation officer to acknowledge its receipt and, by reg 7, to give notice if he considered it to be invalid. Regulation 8 prescribed the procedure then to be observed. Regulation 9 dealt with what was to be done if the valuation officer agreed with the proposal. In that event the valuation officer is to serve notice on the proposer, and the ratepayer if different, that he proposes to alter the list

c

d accordingly and to do so within six weeks of giving such notice.

[15] Regulation 10 enables a proposer, subject to conditions, to withdraw his proposal. Regulation 11 deals with the case where all persons interested, including the proposer and the valuation officer, 'agree on an alteration of the list in accordance with this Part in terms other than those contained in the proposal, and that agreement is signified in writing'. In such a case the valuation officer is obliged within the next six weeks to alter the list to give effect to the agreement and the proposal is treated as having been withdrawn.

e

[16] Regulation 12 provides that where the valuation officer does not agree with the proposal, the proposal is not withdrawn and there is no agreement as provided in reg 11 then the disagreement must be referred by the valuation officer to the relevant valuation tribunal as an appeal by the proposer against his refusal to alter the list. Such referral is to be made within six months from service of the proposal on the valuation officer.

f

[17] Regulations 13, 15 and 16, replacing respectively regs 4, 6A and 6B of the 1990 regulations, deal with the time from which the alteration is to have effect.

g So far as relevant they provide:

'13.—(1) This regulation has effect subject to regulations 15 ... and 44 ...

(7) An alteration made to correct an inaccuracy in a list on the day it was compiled shall have effect from that day.

h (8) An alteration made to correct an inaccuracy in a list (other than an alteration which falls to take effect as provided in the foregoing provisions of this regulation) shall have effect from the day on which the list became inaccurate ...

15.—(1) Where, in relation to an alteration which falls to be made on or after 1st April 1992, other than an alteration—... (c) made in pursuance of the order of a tribunal under Part VI of these Regulations, the day determined in accordance with regulation 13 as the day from which it has effect precedes 1st April 1992, the alteration shall have effect, subject to paragraph (2), from 1st April 1992.

i

(2) Where the alteration—(a) is made in consequence of a proposal made before 1st April 1992, and (b) would have had effect, had the former



regulation 6 continued in force, from a day earlier than 1st April 1992, the alteration shall have effect from that earlier day ...

(4) In this regulation and regulation 16 below, "the former regulation 6" refers to regulation 6 of the 1990 Regulations before the substitution made by regulation 4 of the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1992.'

The 'former regulation 6' is that which I have quoted in [11], above. Regulation 17 provided that where an alteration is made 'the list shall show the day from which the alteration is to have effect in pursuance of this part'.

[18] As the President observed (at 300 (para 14)), since it is clear that the object of these regulations is to make the same provision as the equivalent regulations in the 1990 regulations as amended, it is necessary to read into reg 15(2)(b), after the reference to the former reg 6 continuing in force, the additional words, 'and if this regulation [ie reg 15] had not been made and if in the former reg 6 the reference to reg 4 was a reference to reg 13 of these regulations'. The President continued:

'The effect of regs 13 and 15 in each of the present cases, before the 1994 amendment regulations, therefore, was that, if the valuation officer had altered the list so as to give effect to the agreed assessment, the alteration would have taken effect on the 1st April 1992 (under reg 13(7) and reg 15(1)); and, if the list had been altered in consequence of the appellant's proposal of the 23rd (or 5th) August 1990, the alteration would have taken effect on the 1st April 1990 (under reg 13(7) and reg 15(2)).'

[19] Part VI of the 1993 regulations deals with appeals to valuation tribunals. Regulation 34 provides that an appeal may be withdrawn by the valuation officer but only with the written consent of all the other parties to it. By reg 34(4) an appeal is deemed to have been withdrawn where after its referral the valuation officer alters the list in accordance with the proposal or there is an agreement within reg 11. Regulation 44(1) provides that the tribunal may, subject to conditions not material to this appeal, require a valuation officer, in accordance with their decision, by order to alter a list in accordance with any provision made by or under the 1988 Act. In that event the valuation officer is obliged, by sub-s (3), to comply within six weeks of the order. By reg 45 a tribunal may on certain specified grounds review or set aside its own decision. By reg 47 provision is made for an appeal against an order of the tribunal on appeal under reg 12 to be made to the Lands Tribunal. Paragraph (5) entitles the Lands Tribunal to confirm, vary, set aside, revoke or remit the decision or order of the tribunal and to make any other order which the tribunal might have made.

[20] Thus under the 1993 regulations there were four methods by which the list might be altered, namely (i) acceptance of a proposal under reg 9, (ii) to give effect to a written agreement in accordance with reg 11, (iii) pursuant to an order of the valuation tribunal or the Lands Tribunal on appeal under regs 44(1) or 47(5), and (iv) by the valuation officer on his own initiative pursuant to s 41(1) of the 1988 Act. In the first three cases the time prescribed as the time from which the alteration was effective was 1 April 1990 in cases (i) and (ii) in accordance with regs 13(7) and 15(2) and in case (iii) in accordance with regs 13(7) and 15(1)(c). In the fourth case the effective date of the alteration was 1 April 1992 because of the combined effects of regs 13(7), 15(1) and former reg 6.

a [21] The Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1994, SI 1994/1809 were made on 7 July 1994 and came into force two days later on 9 July 1994. They provided for the amendment of regs 13 and 15 of the 1993 regulations. The relevant amendments are those made to reg 15. The 1994 regulations, so far as material, provided:

b '3. Amendments to regulation 15.—(1) Regulation 15 of the Non-Domestic Rating (Alteration of Lists and Appeals) Regulations 1993 shall be amended in accordance with the following paragraphs.

(2) After paragraph (1)(c), insert—

"or (d) an alteration to which paragraph (3E) applies (a 'relevant alteration')," ...

c (4) After paragraph (3), insert—

"... (3E) This paragraph applies to an alteration made—(a) so as—(i) to reduce the rateable value shown in a list for a hereditament; or [(ii)–(iv)] or (b) ..."

d [22] The effect of these amendments, as helpfully summarised by the President (at 301 (para 16)), was—

e [to extend] [t]he exclusions in reg 15(1) from the 1st April 1992 rule ... to include (d), alterations falling within a new para (3E). One of the alterations referred to in (3E) was an alteration made so as to reduce the rateable value shown in the list for a hereditament (para (3E)(a)(i)). From the 9th July 1994 on, therefore, where the valuation officer made an alteration to correct an inaccuracy in the 1990 list on the day it was compiled and the alteration reduced the rateable value as shown in the list, the alteration took effect, pursuant to reg 13(7), on the 1st April 1990.'

#### f THE FACTS

##### *The Manchester property*

g [23] As the President recorded, there was no dispute as to primary fact. In relation to the Manchester property they are set out in the following terms (at 302–303):

h '19. The Manchester hereditament was entered in the rating list that came into force on the 1st April 1990 as "Car Park, Former Warehouse and Railway Land, Watson Street, Manchester M2" with an assessment of £343,500 rateable value. It comprised the converted lower floors of a multi-storey warehouse together with an extensive area of open land to the rear, all occupied as a public car park. On the 23rd August 1990 J Trevor & Sons served on the valuation officer a proposal to alter the entry in the list by reducing the assessment to £1.

i 20. The appeal resulting from this proposal was due to be heard by the Manchester South Valuation Tribunal on the 31st January 1994. Negotiations with a view to a resolution of the appeal took place between Mr Lilley [of J Trevor & Sons, the agent for NCP] and Mr Todd [the valuation officer] during December 1993 and January 1994, and a meeting between them took place in Manchester on the 17th January 1994. On the 26th January 1994 Mr Todd and Mr Steven Cooper of J Trevor & Sons had a meeting at the subject premises and agreed that the useable capacity of the

public car park was 1,042 spaces. The next day, the 27th January 1994, Mr Lilley and Mr Todd spoke on the telephone and agreed that the proper assessment was £260,000 rateable value. Mr Lilley's agreement to this figure was subject to the approval of his client, and later that day Mr Lilley spoke to Mr Birks and received his instructions to accept the reduction, subject to the operation of the transitional relief provisions. Mr Lilley carried out the necessary calculations and these showed that it would be financially beneficial if the August 1990 proposal were to be withdrawn and he were to request the valuation officer to alter the assessment in the list to £260,000 with effect from the 1st April 1992. Mr Lilley then telephoned the clerk to the valuation tribunal to notify him of his instructions to withdraw the appeal.

21. Despite Mr Lilley's attempted withdrawal of the appeal, the valuation tribunal on the 31st January 1994 considered it. On the 3rd February 1994 it issued a decision determining that the assessment should be reduced to £260,000 with effect from the 1st April 1990. On the 18th and 23rd February 1994 Mr Lilley wrote to the clerk of the valuation tribunal asking that the decision be set aside under reg 45 of the 1993 regulations. Since there was no objection to this from the valuation officer the valuation tribunal issued a certificate on the 8th March 1994 setting aside the decision. On the 10th March 1994 J Trevor & Webster (as the firm was now called) wrote to the valuation officer formally withdrawing the appeal and requesting him to alter the list to show an assessment of £260,000 with effect from the 1st April 1992. On the 22nd April 1994 Mr Todd left the Manchester office to take up new duties in the City of London. Before leaving he had made arrangements for the list to be altered in accordance with the request in the letter of the 10th March 1994. On the 28th April 1994 the valuation officer gave his notice to the valuation tribunal withdrawing the appeal.

22. The valuation officer did not in fact alter the list to show the agreed assessment of £260,000 until the 30th August 1994. By that time the 1994 amendment regulations had been made and had come into force (on the 9th July 1994), so that the alteration showed as the effective date, in accordance with the amended regulations, the 1st April 1990. What had happened following Mr Todd's departure was that the valuation officer's clerical staff had on the 9th May 1994 prepared a form, form VO 7001 (referred to as a "pink"), in relation to the appeal hereditament, annotating it with the remark "Please review as per SDT [ie Mr Todd]". Mr Brankin, who had assumed Mr Todd's responsibilities for car parks, did not feel that he could simply accept Mr Todd's valuation despite the fact that it had been agreed with Mr Lilley. He considered that he needed to familiarise himself with the type of property concerned, the local level of rateable values, valuation tribunal decisions and the history of the case. He could not do this immediately and it was not until the 5th August 1994 that, having done the necessary research, he authorised the reduction to the agreed figure of £260,000. The clerical staff made the alteration on the 30th August 1994.

[24] In summary, the value of the Manchester property was agreed on 27 January 1994. If that agreement had been in writing, as envisaged in reg 11 of the 1993 regulations, then the appeal would have been deemed to have been withdrawn (reg 34(4)), the original proposal would be treated as having been withdrawn (reg 11(1)(b)) and the valuation officer would have been obliged to

a make the alteration not later than 10 March 1994. An alteration within that period would have taken effect from 1 April 1990 in accordance with regs 13(7) and 15(2). But an alteration made by the valuation officer of his own initiative at any time before 9 July 1994 would have taken effect from 1 April 1992 in accordance with reg 15(1). The effect of the amendment made by the 1994 regulations was to alter the latter date to 1 April 1990.

b *The Kensington property*

[25] The details with regard to the Kensington property are set out in paras 24 and 25 of the decision of the President in the following terms (at 303–304):

c '24. The hereditament in the Kensington and Chelsea appeal was included in the rating list that came into force on the 1st April 1990 as "Car Park and Premises, Nos 380–386 Kensington High Street, London W14 8NL" with an assessment of £60,000 rateable value. On the 5th August 1990 Montagu Evans, as agents for [NCP], served on the valuation officer a proposal to alter the entry by reducing the assessment to £1. The appeal relating to this  
d proposal was due to be heard by the London (South West) Valuation Tribunal on the 13th April 1994. Discussions between Mr Mason [of Montagu Evans] and Mr Maudsley [a senior valuer] took place between the 11th March and the 8th April 1994, and on the latter date they reached agreement that the assessment should be reduced to £18,600. They also reached agreement on the assessments of other NCP car parks, and  
e following their discussion Mr Maudsley faxed to Mr Mason agreement (or, where appropriate, withdrawal) forms.

25. On the 12th April 1994 Mr Mason wrote to the valuation officer enclosing signed withdrawal forms in respect of three of the NCP car parks. He also invited him to treat the letter itself as notice of withdrawal of  
f appeals on the subject hereditament and five other NCP car parks and to "serve notices at the figures agreed between us retrospective to the 1st April 1992". The appeal relating to the subject hereditament was withdrawn on the 6th May 1994 by notice given by the valuation officer to the clerk of the valuation tribunal. On the 27th July 1994 (by which time the 1994 amendment regulations were operative) the valuation officer issued a notice  
g stating that he had altered the list by reducing the assessment of the subject hereditament to £18,600 with effect from the 1st April 1990. This alteration was challenged by a proposal served on the 17th November 1994, which contended that the effective date should be amended to the 1st April 1992. The appeal was heard by the valuation tribunal, which dismissed it on the  
h 16th September 1996, and [NCP] now appeals against the valuation tribunal's decision.'

[26] As in the case of the Manchester property, if the agreement as to value had been signified in writing as envisaged by reg 11 then the appeal and the  
j proposal would have been deemed to be withdrawn and the valuation officer would have been obliged to alter the list in accordance with that agreement on or before 20 May 1994. Such an alteration would have taken effect from 1 April 1990 pursuant to regs 13(7) and 15(2). But, as before, an alteration made by the valuation officer of his own initiative at any time before 9 July 1994 would have taken effect from 1 April 1992 in accordance with reg 15(1) but at any time thereafter with effect from 1 April 1990 as required by the 1994 regulations.



## IN RESPECT OF BOTH PROPERTIES

[27] The President set out (at 304 (para 26)) the evidence as to what was required administratively for an alteration to be made. As there is no suggestion that the court should recognise or deem an alteration at any time before those in fact made on 5 August and 27 July 1994 respectively it is not necessary to refer to that evidence further. But the President observed (at 304 (para 27)):

‘There was no dispute as to the facts that I have set out. There was, however, dispute as to whether in each case, as [NCP] claimed, these facts showed that there was an understanding that the valuation officer would alter the list so as to show the agreed value with effect from the 1st April 1992 and that he would do so within a reasonable time. I return to this matter later.’

[28] The President returned to that matter (at 310 (para 40)) where he found that—

‘It is, of course, clear that in each case the valuation officer was aware of why it was that [NCP]’s agents wished to pursue the course of withdrawing the proposals and looking to the valuation officer to make alterations at the assessments agreed under his general statutory power. It is also clear that the valuation officer, with whom agreement had been reached on value, was happy to go along with this procedure. The evidence does not, however, show in either case that there was any agreement or understanding between the parties that the valuation officer would alter the list to show the assessment that had been agreed with effect from the 1st April 1992, whether or not that remained the correct date under the applicable regulations when the alteration was made.’

[29] The President considered (at 311 (para 43)) the evidence of Mr Maudsley in relation to the Kensington property that the choice of effective date was dictated by the legislation then in force and the common understanding that 1 April 1992 was the correct date for any alteration made by the valuation officer of his own motion. He found that a similar understanding informed the dealings between the agent for NCP and the valuation officer in the case of the Manchester property too. The President added:

‘The nature of the procedure that [NCP] was looking to the valuation officer to carry out was to alter the list to the agreed assessment in the exercise of his general duty to maintain the list and in accordance with the regulations. Amendment of the regulations was by then a not infrequent occurrence, and it seems to me inconceivable that the valuation officer could be taken to be undertaking to alter the list with effect from the 1st April 1992 even if, at the time he altered it, the regulations as then existing required him to apply some other effective date.’

[30] The appeal to this court from the decision of the President lies on a point of law only (see s 3(4) of the Lands Tribunal Act 1949). Accordingly this appeal must be considered in the context that the only agreement or understanding was that any alteration made by the valuation officer would take effect from the day prescribed by the regulations in force at the time it was made.



## THE PRESIDENT'S DECISION

a [31] The President considered (at 312–315 (paras 45–51)) whether the valuation officer was under any duty to alter the list. He rejected (at 312–313 (para 47)) the suggestion that any such duty arose under reg 9. He rejected (at 313–314 (para 49)) the contention that the general duty contained in s 41(1) of the 1988 Act could be treated as the statutory foundation for specific duties and rights in relation to the alteration of the lists. He considered that that function was performed by s 55 and the regulations made thereunder. The President pointed out (at 314 (para 50)) that NCP had abandoned its rights under the regulations by withdrawing its appeals and thereby sought to have an incorrect assessment kept in the list in order to secure an adventitious benefit.

b [32] The conclusion of the President on this part of the case is expressed in these terms (at 314–315 (para 51)):

‘There is, in any event, a further objection to [NCP’s counsel’s] contention. It was not his case that there was an agreement between the parties that the valuation officer would alter the list to show the agreed assessment with effect from the 1st April 1992. He said rather that there was an understanding that this would be done, and that [NCP] had a right that it would be done that accrued on the withdrawal of the appeal. But whether it is expressed as an agreement or an understanding giving rise to rights and obligations, there is, in my view, a fundamental objection to the argument. The valuation officer’s duty under s 41(1) to maintain an accurate list is a duty owed not to an individual ratepayer but to the public at large. It is a duty, therefore, that cannot be qualified by any agreement or arrangement or understanding between the valuation officer and a ratepayer. The agreement on value could not give rise to any duty on the valuation officer’s part to alter the list to show that value. It could only provide evidence of what the correct value was; so that if, for instance, before the valuation officer altered the list, further evidence became available that suggested that some other value was correct, the valuation officer would not be obliged—indeed he would not be entitled—to ignore this further evidence.’

e [33] The President had earlier rejected the submission that any such obligation had to be performed within a reasonable time. He said (at 311–312 (para 44)):

‘I cannot accept the submission that the valuation officer was under any duty or obligation to alter the list within a reasonable time. Such a requirement cannot, in my judgment, be read into the very general terms of his duty under s 41 to maintain the list, and there is no basis for importing some contractual obligation to qualify his statutory duty. It is possible that he could not delay so long in making the alteration that it would be “conspicuously unfair” and thus an abuse of power (see the *Corus* case [2002] RA 1 at [54]), but it seems to me impossible to say that a delay of the number of months that occurred in these cases could be characterised as an abuse of power. It is only because the regulations had been amended in a way that was adverse to [NCP] before the alterations were made that they now complain. It is not suggested, however, that either valuation officer deliberately delayed so that the 1994 amendment regulations might be made and might come into force before the alterations were made.’

[34] The President pointed out (at 315 (para 52)) that as he had rejected the submission that the valuation officer was under an obligation capable of giving rise to a co-relative right in NCP the issue of retrospectivity and the effect of ss 16 and 23 of the 1978 Act did not arise. He rejected (at 315 (para 53)) the contention that NCP had any legitimate expectation that the list would be altered with effect from 1 April 1992 irrespective of what the regulations required on the grounds that there was no such expectation and if there had been it was not legitimate. Finally (at 316 (para 54)), he referred to a contention of the valuation officer based on the provisions of reg 44 of the 1993 regulations and the decision of this court in *Marks & Spencer plc v Fernley (Valuation Officer)* [1999] RA 409. He expressed no final view on it because it was not necessary to do so in the light of the provisions of reg 13(7).

#### THE ARGUMENTS

[35] Counsel for NCP submits that a valuation officer is under a duty, imposed by s 41(1) of the 1988 Act, to maintain accurate non-domestic rating lists. When the valuation officer becomes aware of some inaccuracy then he is bound to alter the list and there is a general expectation that he will. Counsel submits that this duty and expectation give rise to a co-relative right to any person with a sufficient interest such that he should not be deprived of it by a subsequent alteration in the law in the absence of a clear intention to do so.

[36] Further or alternatively counsel for NCP submits that the valuation officer was under a duty to alter the list within a reasonable time of becoming aware of its inaccuracy and neither the valuation tribunal, nor the Lands Tribunal nor this court has power to defeat the claim of NCP based on the common understanding of the parties.

[37] In relation to the facts of these cases he submits that the agreements as to value made between the agents for NCP and the valuation officers demonstrated that the rating lists were inaccurate so that the valuation officers were obliged to alter them so as to show the agreed values. He contends that this obligation arose when the appeals and proposals were withdrawn and that there was a general practice and expectation that the valuation officers would do so. The 1994 regulations were not intended to have retrospective effect so as to qualify or change the date from which the alteration the valuation officer was obliged to make was effective. Accordingly, so counsel submits, the date 1 April 1990, specified by the valuation officer when he made the alterations in late July or August 1994 is wrong and should be altered to 1 April 1992.

[38] He emphasises that ratepayers are to be taxed according to clear words, not by reference to any presumed intendment of the law. He points out that ratepayers in general and NCP in particular are entitled to arrange their affairs to avoid or reduce their liabilities. For both propositions he relies on the well-known decision of the House of Lords in *WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300. He uses these principles to criticise the President when he referred to the 1993 regulations as anomalous and the benefit NCP sought to derive from them as adventitious.

[39] Counsel for the valuation officers did not challenge either of these principles but maintained that the President's comments were justified. Nor did he challenge the general proposition that the valuation officers have a continuing duty to maintain an accurate rating list. He accepted that in appropriate cases the valuation officer might alter the list otherwise than in response to a proposal made in accordance with s 55 and the regulations made thereunder but he did not

a accept that the valuation officer was under any duty to alter the list at any particular time or with effect from any date other than that prescribed by law at the time the alteration was made.

[40] Basing himself on the last-mentioned proposition he contended that it was essential for NCP to establish some temporal element or requirement as to when the alteration had to be made. He pointed out that a requirement that the alteration had to be made at the time the appeals/proposals were withdrawn or within a reasonable time thereafter were both contrary to the provisions of the 1988 Act and the regulations made thereunder. He submitted that even if some such temporal element or requirement could be found then it might found an action for damages for breach of a statutory duty; what it could not achieve would be a right to have the list altered otherwise than in accordance with the law at the time of the alteration. Counsel for the valuation officers submitted that even if NCP had the right for which it contended the 1994 regulations could and did abrogate it.

[41] Other points were raised in argument to which I shall refer later if necessary.

d CONCLUSIONS

[42] There is no doubt that the valuation officers are under a statutory duty to maintain accurate rating lists. That is what s 41(1) of the 1988 Act provides. But, as s 41(1) also provides, that duty is to be performed in accordance with Pt III of the 1988 Act. Part III includes s 55 and the regulations made thereunder and those regulations, as prescribed by reg 3, apply to any alteration whether effected pursuant to a proposal or by the valuation officer on his own initiative. Specifically, reg 13 prescribes the time from which an alteration is to take effect whether or not made pursuant to a proposal. In my view the President was correct when (at 313–314 (para 49)) he rejected the suggestion that s 41(1), as opposed to s 55 and the regulations, was the statutory foundation for specific duties and rights.

[43] No doubt, as the parties agreed, a valuation officer is amenable to judicial review to compel him to perform his duties. If he abuses his powers or exercises them in an irrational or unfair manner or refuses to exercise them at all then any person with a sufficient interest may obtain an order by way of judicial review setting aside what he has done or requiring him to do what he ought to do. None of those grounds is alleged in this case. I do not suggest that it is impossible for a ratepayer for whom the remedy by way of proposal and agreement or appeal, as prescribed by regs 4–12, is available to enforce such duties by way of judicial review. But the 1988 Act provides for a remedy by way of proposal and agreement or appeal. Further the remedy of judicial review is discretionary. A ratepayer who, having followed the route of proposal and appeal, deliberately abandons his appeal and refrains from recording the agreed values in writing eschews the specific rights afforded to him by regs 11 and 12. I consider that it is most unlikely that the court would permit such a ratepayer to bypass the specific provisions of the 1988 Act and the regulations and make an order by way of judicial review requiring the valuation officer to alter the list in accordance with the oral agreement; in particular where the purpose of seeking the order of the court is to maintain on the list for the period 1 April 1990–31 March 1992 what is agreed to be a wrong value. It is noticeable that NCP did not try; instead it made a further proposal for an alteration as to the date and then appealed as permitted by reg 12.

[44] NCP does not contend that the valuation officer was contractually bound to alter the list in accordance with the agreements. As the President pointed out (at 313 (para 48)) the agreements were only evidence of value. The valuation officer would, in performance of his duty to ratepayers generally, be obliged to consider any other evidence brought to his attention from time to time. It is, in my view, impossible to imply into the general duty prescribed by s 41(1) a specific obligation to alter the list at the time of the withdrawal by the valuation officer under reg 34 of an appeal pending in accordance with reg 12 or at any other time by reference to such a withdrawal. Such an implication would be inconsistent with the public and continuing nature of the valuation officer's duty and the purpose and terms of s 55 and the regulations made thereunder. a  
b

[45] For similar reasons I am unable to see any justification for the implication of an obligation to alter the list within a reasonable time of the agreements or the withdrawal of the appeals. NCP had no statutory or contractual entitlement to any alteration because the remedies provided by regs 11 and 12 were deliberately foregone. The valuation officer was, in the performance of his public and continuing duty, obliged to have regard to all evidence and the interests of all ratepayers and the public generally. c  
d

[46] Accordingly I would accept the submission of counsel for the valuation officers that it is not possible to graft on to the obligation to maintain an accurate list any temporal element or requirement as to when it must be altered. It follows that NCP was not entitled to an alteration of the list at any particular time, or, as I think, at all. Nor could it be entitled to an alteration with effect from some date different from the date prescribed by the regulations at the time the alteration was actually made. It is not suggested that the alterations should be deemed to have been made at any earlier time than they were in fact made. e

[47] In all these circumstances NCP cannot establish any right to an alteration of the list before 9 July 1994 or any right to insist that the alterations made after 9 July 1994 should have effect from any date other than that prescribed by the 1993 regulations as amended by the 1994 regulations then in force. Nor, in my view, can NCP establish any expectation to either effect. There is no finding of any expectation that the alteration would be made at any particular time or that when made it would be effective from any date other than that prescribed by the regulations then in force. f

[48] In the light of these conclusions NCP had no right, accrued or otherwise, capable of being abrogated by the 1994 regulations. Accordingly no questions of retrospectivity or of the application of ss 16 and 23 of the 1978 Act arise. Nor is it necessary to deal with the other points on which one or other party relied. But the consequence is that NCP has no right to have the rating list altered by the insertion of the date 1 April 1992 for the date 1 April 1990 as shown. It follows that, in my view, the decision of the President was correct and this appeal should be dismissed. g  
h

#### CLARKE LJ.

[49] I agree that the appeal should be dismissed. I agree with both Sir Andrew Morritt V-C and Dyson LJ that the valuation officers were not in breach of their duty under s 41 of the Local Government Finance Act 1988. In particular I agree with them that they were not under a duty to amend the list within a reasonable time, either by the express terms of the 1988 Act or by necessary implication from them. j



a [50] I also agree with them that the appellants had no legitimate expectation that the valuation officer would alter the list before 9 July 1994. In so far as it might be said that the understanding gave rise to a legitimate expectation that the valuation officer would alter the list in the light of it, I agree that they had no legitimate expectation that he would alter the list otherwise than in accordance with the law at the date of the alteration. I do not think that the appellants have  
b shown that they had any such expectation in fact and, even if they had such an expectation, it would not to my mind have been a legitimate expectation.

[51] It does seem to me on the facts found that there would or might have come a time when the valuation officer in each case would have been in breach of his duty to maintain an accurate list if he had not altered it. Thus, if he had been asked to alter the list in the light of the understanding which had been  
c reached and had refused to do so without adequate reasons, he would have been in breach of duty. Alternatively, if he had simply done nothing, his failure to act would at some stage have amounted to a breach of his duty to maintain an accurate list.

[52] I agree with Dyson LJ that the problem is how to decide when that  
d moment would have come. I also agree with him that all depends upon the circumstances. The precise formulation of the test is a matter of some difficulty. I agree with Dyson LJ's general approach, although fortunately it is not necessary to formulate a precise test on the facts of this case because it seems to me that, for the reasons given by him, there was no such delay as to amount to a breach of  
e duty on the facts found here. The points which have particularly struck me in this regard are that there was no obvious urgency in altering the list. The appellants did not press the valuation officer to do so, no doubt because it did not occur to them at the time that there was any urgency. No one contemplated that the law would be altered as it was. It might, I suppose, equally have been altered the other way. The alteration was simply an administrative matter to be attended to  
f in due course which would have retrospective effect in accordance with the law as it happened to be at the date of the alteration.

[53] In all the circumstances I agree that the delays were not such as to amount to a breach of duty by whatever test might be adopted. There was no unfairness on the part of the valuation officers, let alone conspicuous unfairness in the sense  
g touched upon by Sullivan J in *R (on the application of Corus UK Ltd) v Valuation Office Agency* [2001] EWHC Admin 1108 at [53], [54], [2002] RA 1 at [53], [54]. There was certainly no abuse of power.

[54] In my opinion, however the case is put that there was no breach of duty on the part of either valuation officer and the appeal should be dismissed. I would  
h only add by way of postscript that, given those conclusions, it has not been necessary to consider what remedies might have been available to the appellants if there had been a relevant breach of duty.

#### DYSON LJ.

i [55] The issue that arises on these appeals is whether the valuation officer in each case acted unlawfully in failing to correct the rating list before 9 July 1994, and whether, therefore, the President of the Lands Tribunal (George Bartlett QC) should have allowed the appeals and held that the effective date for the alterations was 1 April 1992, and not 1 April 1990.

[56] I agree that the President was right to reject the appeal in so far as it was based on legitimate expectation. As he said ([2003] RA 289 at 315 (para 53)), there



was no express promise by either valuation officer that the list would be altered as agreed with effect from 1 April 1992 even though the regulations might be altered to prescribe a different date, and any regular practice on the part of valuation officers in altering lists could on the facts of these cases only be a practice to make alterations in accordance with the law. a

[57] I wish only to add a few words of my own on the question whether the valuation officers acted in breach of statutory duty in failing to alter the rating list in either case until after the Non-Domestic Rating (Alteration of Lists and Appeals) (Amendment) Regulations 1994, SI 1994/1809 came into force on 9 July 1994. The starting point is that s 41(1) of the Local Government Finance Act 1988 provides that valuation officers are under a duty to compile and then maintain rating lists. Section 41(4) provides that '[b]efore a list is compiled the valuation officer must take such steps as are reasonably practicable to ensure that it is accurately compiled on 1 April concerned'. The duty is therefore to compile and maintain an accurate list. The issue that arises is whether on the facts of these two cases the valuation officer was in breach of that duty, and, if so, whether the breach occurred before 9 July 1994. b

[58] A statute may, expressly or by necessary implication, prescribe the time when a duty must be performed. But what is the position where a statute does not so prescribe the time for performing a duty? In my view, comparisons with the law of contract are inappropriate. Where a party undertakes by contract to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law will imply a term that the act should be performed within a reasonable time (see *Chitty on Contracts* (29th edn, 2004) vol 1, p 1246 (para 21-020)). Such a term will be implied because it represents the unexpressed intention of the parties or is necessary to give business efficacy to the contract. But contracts are fundamentally different from statutes, and no proper analogy can be drawn between implying a term into a contract and interpreting a statute. No authority was cited to us in support of the general proposition that where a statute imposes a duty on a person, but is silent as to when the duty should be performed, it should be interpreted as meaning that the duty will be performed within a reasonable time, and I would not accept this proposition as being correct in law. c

[59] It is a well-established principle of public law that it is unlawful to exercise a statutory power (or to refuse to exercise a statutory power) in circumstances of unfairness amounting to an abuse of power: see, for example, *Preston v IRC* [1985] 2 All ER 327, [1985] AC 835. Where unlawfulness of this kind occurs, the court will go on to consider whether in the exercise of its discretion it should grant judicial review. But where the issue is whether there has been a failure to perform a statutory duty, I think that it is by no means always relevant to ask whether the failure involves unfairness amounting to an abuse of power, or indeed whether the failure is unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). Two examples will suffice to demonstrate this point. First, if a person says that he or she will not perform the statutory duty *at all*, it is obviously unnecessary to show that there has been unfairness amounting to an abuse of power in order to establish that the failure to perform the duty is a breach of duty. Secondly, if a statute imposes a duty to do X on a specific date, it is clear that failure to do X on that date is a breach of statutory duty, and it is neither necessary d

a nor apt to consider whether such failure involves unfairness amounting to abuse of power.

b [60] On the other hand, if the statute imposes a duty to do X, but does not specify expressly or by necessary implication when X must be done, then the court has to decide whether the statute allows any, and if so what, flexibility or margin of appreciation to the person charged with the statutory duty as to the time when or within which he or she may do X. If the statute is interpreted as allowing some time for the performance of the duty, then in determining whether the time taken has been so long as to give rise to a breach of the duty, it may be helpful to consider whether the delay has involved unfairness amounting to an abuse of power. Delay which has that effect will almost certainly be a sufficient condition for a breach of statutory duty, but in my view it should not be regarded as being a necessary condition.

d [61] Rather than asking the broad question whether a failure to perform a statutory duty involves unfairness amounting to an abuse of power, I consider that a more structured approach should be applied. In my view, there is no simple answer to the question how the court should determine whether a failure to perform a statutory duty is unlawful where the statute is silent as to when the duty should be performed. The answer will depend on all the circumstances of the case. Relevant factors will at least include (i) the subject matter of the duty and the context in which it falls to be performed, (ii) the length of time taken to perform the duty, (iii) the reasons for any delay, and (iv) any prejudice that is, or may be, caused by the delay.

e [62] The subject matter of the duty and the context in which it falls to be performed are very important. If the duty concerns life or limb and/or the liberty of the subject, the court will be reluctant to allow substantial delay for the performance of the duty. In particular, the court is unlikely to be sympathetic in such a case to the argument that the failure to perform the duty is justifiable (and therefore not unlawful) on grounds of lack of resources. Thus, for example, in *R (on the application of Noorkoiv) v Secretary of State for the Home Dept* [2002] EWCA Civ 770, [2002] 4 All ER 515, [2002] 1 WLR 3284, it was held that there could be no reliance on administrative necessity or lack of resources to excuse a failure to perform the obligation in art 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to avoid delay in the determination of a person's detention. In such cases, the subject matter of the duty is so important that the court will expect the duty to be performed expeditiously if the statute is silent as to when it should be performed. But where the duty only concerns property or other economic interests, then the court may be willing to allow more time for performance of the duty before it characterises a failure to perform as a breach of duty and, therefore, unlawful.

h [63] The relevance of length of delay is obvious. Even in a case which only affects property interests, and where little or no prejudice can be shown, there is likely to come a time when the failure to perform the duty is a breach of duty and unlawful.

j [64] The reasons for the delay must also be taken into account. If the duty has not been performed simply through oversight, the court is more likely to decide that there has been a breach of duty than where rational reasons are advanced to explain the delay. Lack of resources may in some circumstances be regarded as a good reason for delay so as to defeat an allegation of breach of duty. As a general

rule, however, lack of resources may not be treated as a relevant reason for failing to perform a statutory duty expressed in objective terms which allow no discretion: see, for example, *R v East Sussex CC, ex p Tandy* [1998] 2 All ER 769, [1998] AC 714, where it was held that a local authority was not permitted to avoid performing the duty to arrange for 'suitable education' on the ground that it preferred to use its available resources for other purposes. But lack of resources may be a sufficient reason in other circumstances. With particular reference to the duty of the valuation officer to compile and maintain an accurate rating list, Sullivan J pointed out in *R (on the application of Corus UK Ltd) v Valuation Office Agency* [2001] EWHC Admin 1108 at [47], [2002] RA 1 at [47]:

'That duty has to be discharged in the real world, where there are finite resources, and only 24 hours in the valuation officer's day. He may have to give priority to certain known inaccuracies, and defer consideration of other matters which possibly require alteration.'

[65] Prejudice is related to, but distinct from, the subject matter of the duty. The court is less likely to treat the failure to perform a duty with expedition as a breach of duty where the delay causes little or no prejudice than where it causes serious prejudice. It is self-evident that delay in performing a duty which affects liberty or life and limb is always likely (at least potentially) to cause serious prejudice. The prejudice likely to be caused by delay which only affects property or other economic interests will vary from case to case. Where the prejudice is or may be serious, the court will expect the duty to be performed more expeditiously than in circumstances where delay is unlikely to cause any significant prejudice.

[66] So much for the general approach. The statutory regime with which these appeals are concerned does not, in circumstances such as occurred in these cases, prescribe the time for altering a rating list once it has ceased to be accurate. There is no relevant express provision, nor in my view does any such provision arise by necessary implication. I agree with Sir Andrew Morritt V-C that it is not possible to graft on to the statutory obligation to maintain an accurate list any temporal element or requirement as to when the duty should be performed. It follows that the question that arises is how the general approach that I have described should be applied to the facts of the present cases.

[67] The subject matter is one which does not of itself demand the expeditious performance of the duty. It concerns property interests and not life and limb or the liberty of the subject.

[68] As regards the length of the delay, it is important to bear in mind that valuation is an art, not a science, and often raises complex and difficult questions which may take time for the valuation officer to resolve. The valuation officer must have regard to the need for consistency when dealing with the list. A decision which relates to one hereditament will have implications for other hereditaments. These factors must be taken into account when the court considers whether the valuation officer has acted unlawfully in failing to act with sufficient expedition to alter the list.

a [69] The President dealt briefly with the issue of delay at para 44 of his decision ([2003] RA 289 at 311–312) which Sir Andrew Morritt V-C has cited at [33], above. He set out the relevant facts at 302–303 (paras 19–22) (Manchester) and at 303–304 (paras 24–25) (Kensington). The delay in relation to Kensington and Chelsea was from 6 May 1994 (the date of the withdrawal of the appeal) until 27 July 1994. In relation to Manchester, the delay was from 10 March 1994 (the date of the withdrawal of the appeal) until 30 August 1994. Mr Village QC submits that in each case the delay was ‘inordinate’. He says that there is no explanation for the delay at Kensington and Chelsea. In relation to the delay at Manchester, he submits that it was unreasonable for Mr Brankin not simply to accept what had been agreed by Mr Todd with Mr Lilley, so that the explanation for the delay is unacceptable.

c [70] I acknowledge that there were considerable delays in both cases, and that if the length of delay is looked at in isolation and without regard to the other factors, National Car Parks Ltd (NCP) have advanced a cogent case for holding that a breach of duty had occurred by 9 July 1994 in both cases. If the subject matter of the duty had concerned the life or limb or the liberty of the subject, or there was an obvious risk that delay would cause significant prejudice to NCP, then it would have been difficult not to conclude that the delays were greater than contemplated by the legislation, even allowing a reasonable margin of appreciation to the valuation officers in each case. In the circumstances of Kensington and Chelsea, there is no explanation for the delay at all. As regards Manchester, if the circumstances had demanded urgent attention, it is strongly arguable that notwithstanding the departure of Mr Todd, Mr Brankin should have acted with considerably greater expedition than he did.

e [71] I turn finally to the question of prejudice. It is important to note that NCP does not assert that, apart from the effect of the introduction of the 1994 regulations, the delay caused it or anyone else to suffer prejudice. Although the President found (at 311 (para 43)) that amendment of the regulations was by 1994 a ‘not infrequent occurrence’, there is no evidence to suggest that the 1994 regulations were in the contemplation of any of the parties during the relevant period. It is a striking feature of this case that after the withdrawal of the two appeals, NCP did not press either of the two valuation officers to alter the lists. This was because, apart from the effect of the unforeseen 1994 regulations, the alteration of the lists was of no immediate or urgent fiscal significance to NCP. It was not reasonably foreseeable that a delay in the performance of the statutory duty such as occurred in these two cases would cause prejudice to NCP.

h [72] Taking all these factors into account, I am in no doubt that there was no breach of statutory duty in either of these cases. In reaching this conclusion, I would emphasise in particular the fact that the subject matter of the duty only affects economic interests, and that it was not in the reasonable contemplation of the valuation officers or NCP that failure to alter the lists before 9 July 1994 would cause NCP, or anyone else, to suffer prejudice. In these circumstances, it is reasonable to allow the valuation officers a fairly generous margin of time for the performance of their duty. Having regard to the two paramount factors to which I have referred, but also to the fact that there are always many demands on the resources available to valuation officers, I do not consider that the delays that occurred were so great as to give rise to a breach of duty in either case.

[73] I would also give a negative answer to the question: did the failure to alter the lists by 9 July 1994 involve unfairness amounting to an abuse of power? This serves to reinforce the conclusion that I have reached for the reasons that I have given. a

[74] I too would dismiss the appeal.

*Appeal dismissed.* b

Celia Fox Barrister.



# Omilaju v Waltham Forest London Borough Council

[2004] EWCA Civ 1493

COURT OF APPEAL, CIVIL DIVISION

MAY, DYSON AND WALL LJ

26 OCTOBER, 11 NOVEMBER 2004

*Unfair dismissal – Constructive dismissal – Test to be applied in determining whether employee constructively dismissed – Employee resigning and complaining of series of actions by employer – Whether finding of constructive dismissal precluded where final act of employer precipitating resignation was reasonable conduct by employer.*

The employee was employed by the council. Between February 1998 and August 2000 he had issued five sets of proceedings in the employment tribunal. The council had a rule that employees who took employment proceedings against it were required to apply for special unpaid or annual leave to attend tribunal hearings. It refused to pay the employee's full salary during July and August 2001 when he had been absent without leave attending the tribunal hearing. The employee resigned in September 2001, stating in his resignation letter that the refusal to pay his full salary was an act that had destroyed his trust and confidence in his employer and was 'the last straw in a series of less favourable treatments that I have been subjected to over a period of years'. Later that month the tribunal dismissed all his claims. He then issued further proceedings against the council. The tribunal dismissed six of the complaints, including a claim that he had been constructively dismissed, but upheld a complaint that he had been the subject of victimisation. On his appeal the Employment Appeal Tribunal considered the nature of a final action in a series of actions by an employer, where the final action was 'the last straw' as far as an employee was concerned. It allowed the employee's appeal against the decision that he had not been constructively dismissed, and directed that the case be remitted to the same tribunal to answer the question whether the previous acts of the council, including the victimisation, together with the final act in refusing to pay his salary, cumulatively constituted a fundamental breach of the employee's contract. The council appealed. The appeal raised the question of what was the necessary quality of a 'final straw', if it were to be successfully relied on by the employee as a repudiation of the contract of employment.

**Held** – A final straw, not itself a breach of contract, could result in a breach of the implied term of trust and confidence. The quality that a final straw had to possess was that it was an act in a series whose cumulative effect amounted to a breach of the implied term. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant. It was not necessary to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. The only question was whether the final straw was the last in a series of acts or incidents which cumulatively amounted to a

repudiation of the contract by the employer. In the instant case the tribunal had been fully aware of the circumstances in which the employee had not been paid. They had been entitled to decide that, taking an objective view of all the circumstances, the failure to pay had not been a final straw, and that they could reach that decision without considering in detail the nature and effect of the earlier acts. The appeal would therefore be allowed (see [19], [20], [27], [30], [35]–[38], below).

*Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347 and *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 considered.

Decision of the Employment Appeal Tribunal [2004] 3 All ER 129 reversed.

## Notes

For constructive dismissal, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 478.

## Cases referred to in judgments

*Lewis v Motorworld Garages Ltd* [1985] IRLR 465, [1986] ICR 157, CA.

*Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

*Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA.

*Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, [1981] ICR 666, EAT; *affd* [1982] IRLR 413, [1982] ICR 693, CA.

## Appeal

Waltham Forest London Borough Council appealed, with the permission of the Employment Appeal Tribunal (Judge Prophet, J Shrigley and D Welch), from its decision on 31 March 2004 ([2004] 3 All ER 129): (i) allowing the appeal of Folu Omilaju from the decision of the Stratford Employment Tribunal (Chair: Ms Gilbert, Mr Edwards and Mrs Cushing) in March 2003 dismissing Mr Omilaju's complaint of constructive dismissal against the council, his former employer; and (ii) remitting the matter to the tribunal. The facts are set out in the judgment of Dyson LJ.

Noah Weiniger (instructed by Satish Mistry) for the council.  
Fred Edward Jnr for Mr Omilaju.

*Cur adv vult*

11 November 2004. The following judgments were delivered.

**DYSON LJ** (giving the first judgment at the invitation of May LJ).

## INTRODUCTION

[1] Mr Omilaju was employed by the London Borough of Waltham Forest (the council) in its housing department between September 1992 and August 2001. He commenced employment as a span 6 arrears officer. By the time his employment ended he was an SO2 grade housing officer. Between 28 February 1998 and 18 August 2000, he issued five sets of proceedings against the council

a in the Stratford Employment Tribunal (the ET). He alleged unlawful direct discrimination, and race discrimination through victimisation and interference with trade union activity. These proceedings were consolidated and all his claims were dismissed by the ET on 24 September 2001. The council refused to pay his full salary during July and August 2001 when he was absent from work without leave attending the ET hearing. The council has at all material times had in place a rule that employees who take employment proceedings b against it are required to apply for special unpaid or annual leave to attend a tribunal hearing. Mr Omilaju could have applied for such leave in the present case, but he did not do so.

[2] By a letter dated 7 September 2001, he resigned from his employment. He wrote:

c 'Following my senior managers' recent less favourable act and victimisation against myself by refusing to pay my full July and August salary by reason of my employment tribunal hearing against the Council for racial discrimination, harassment and victimisation, I see this act not only as a breach of the expressed terms of my contract of employment but d also an act that has destroyed my trust and confidence in my employer and its senior management.'

[3] He went on to say that he saw this as 'the last straw in a series of less favourable treatments that I have been subjected to over a period of years'. He e then proceeded to identify some of his complaints in the letter.

[4] On 25 October 2001, he issued further ET proceedings against the council. He made seven complaints. Following an eight-day hearing in March 2003, the ET (Ms Gilbert as chairman and Mr Edwards and Mrs Cushing as lay members) dismissed six of the complaints, including a claim that he had been f constructively unfairly dismissed. But they upheld the complaint that he had been the subject of victimisation in relation to a reference given by the council to Kush Housing Association Ltd (Kush).

[5] Mr Omilaju appealed against this decision. Only two of his nine grounds of appeal were allowed to proceed to a full hearing of the Employment Appeal Tribunal (the EAT). These were (ground (viii)):

g 'Considering the employment tribunal's own various findings at para 90 (and also paras 83–87, 36–39 and 40) whether the employment tribunal misapplied the law as well as applying the wrong test under the doctrine of "last straw" when they held that there were sufficient breaches of the implied term of trust and confidence in which the appellant was entitled to h resign but that his claim failed because "the last straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the appellant's contract and the terms incorporated in it".'

j And (ground (ix)):

'Whether, on the employment tribunal's own findings of fact, there were sufficient findings entitling the appellant in law to resign apart from the last straw principle.'

[6] The EAT (Judge Prophet, Mr Shrigley and Mr Welch) ([2004] 3 All ER 129) allowed Mr Omilaju's appeal against the ET's decision that he had not been constructively dismissed, and directed (at 134 (para 17)) that the case be remitted to the same ET to answer the question—

'whether the previous acts of the employer, including the matter of the [Kush] reference, together with the final act in refusing to pay his salary for days spent at the employment tribunal, *cumulatively* constituted a fundamental breach of Mr Omilaju's contract of employment.'

The EAT said (para 19):

'This appeal has caused us to consider the following question: "Whether there can be a constructive dismissal in a situation where, whatever may have previously occurred, the final act which precipitated resignation is found by the employment tribunal to be reasonable conduct by the employer." We therefore grant Mr Weiniger's request for leave to appeal to the Court of Appeal.'

[7] This was said to be a 'novel' point. Having decided ground (viii) in favour of Mr Omilaju, the EAT did not need to (and did not) reach a conclusion on ground (ix). The council appeals against the EAT's decision on ground (viii). Mr Omilaju contends that this decision was correct, but in the alternative seeks to uphold the decision that he was constructively dismissed on the basis of ground (ix). I shall refer to grounds (viii) and (ix) respectively as the first and second issues.

#### THE DECISION OF THE ET

[8] It is necessary to examine the decision of the ET in a little detail. The issue of the reference to Kush in the context of alleged indirect discrimination is dealt with at paras 34–39 of the ET's extended reasons. Mr Omilaju applied for the post of housing services manager with Kush. On 14 October 1998 Kush requested a reference from Mr Driscoll at the council. The letter of reference, which was not sent out until 6 November, contained a paragraph about a disciplinary investigation of the conduct of Mr Omilaju. The earlier ET had concluded that this paragraph was 'a piece of unexplained negative or adverse treatment by Mr Driscoll', and that the reference contained an 'assertion for which there seems to be little foundation, namely that the disciplinary matter was live in November 1998'. The second ET came to the same conclusion and adopted the findings of their predecessor. They returned to the issue of the reference in the context of alleged race discrimination by way of victimisation at paras 81–87, and concluded that Mr Omilaju's complaint was made out.

[9] The ET (at para 40) dealt with Mr Omilaju's complaints about bullying and shouting by Ms Chown, who had been his line manager until mid-1998. This too had been considered by the earlier tribunal, who had found that the allegations that Ms Chown had treated Mr Omilaju less favourably than his fellow employees were not proved. The later tribunal noted that Mr Omilaju had not resigned in response to Ms Chown's treatment of him, but added:

a 'This tribunal considers that the finding that there was in use a managerial technique which involved shouting at employees and threatening them with disciplinary action supports a finding of an unacceptable management practice by this tribunal.'

b [10] The complaint of unfair dismissal was dealt with at paras 90–92. It is necessary to set out para 90 in full:

c 'The applicant has to show that he resigned in circumstances in which he was entitled to resign without notice by reason of his employer's contract [sic]. The applicant has to show that there was serious breach of contract, or a breach which was the last in a series of breaches; that he resigned in response to the breach, and that he resigned within a reasonable time without affirming the contract. The applicant in this case resigned because he was not paid wages for the days in July and August 2001 he was attending the employment tribunal. He was not paid because he was not available for work and his absence was not covered by the contract. There was no breach of contract at all never mind one which would entitle the applicant to resign without notice. The applicant did not resign because of the Kush reference or because of Mrs Chown's conduct towards him both of which may have been breaches of the implied term of trust and confidence. He resigned because he was not paid. The applicant also says it was the last in a series of actions such as to amount to a breach of trust and confidence. To this end the applicant relies on the history including his treatment by Mrs Chown and the reference from Mr Driscoll. He may not have resigned in response to these but taken together with non-payment of wages in the employment tribunal he was entitled to resign and claim he was dismissed. The difficulty for the applicant is that looked at objectively the straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract and the terms incorporated in it. The applicant was not dismissed. There was no dismissal and his complaint of unfair dismissal fails and is dismissed.'

g The reference to 'contract' in the first line must be in error for 'conduct'.

#### THE DECISION OF THE EAT

[11] Unsurprisingly, the EAT concentrated on para 90 of the ET's reasons. They said ([2004] 3 All ER 129 at 132 (para 7)) that there may have been some ambiguity in the sentence:

h 'He may not have resigned in response to these but taken together with non-payment of wages in the employment tribunal he was entitled to resign and claim he was dismissed.'

j They referred (at 132–133 (para 10)) to the important decision of this court in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 at 469, [1986] ICR 157 at 169, where Glidewell LJ said that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. The EAT made the point that the ET had not been referred to this decision, adding: 'If they had been, it would have been difficult for them to have said what they did at the beginning of para 90.'



[12] They continued:

'11. In its comprehensive judgment in the instant case, the employment tribunal, at para 90, indicate that because the final act, which caused Mr Omilaju to resign, was not a breach of contract, but, indeed, fully in accordance with the terms of his contract there could be no constructive dismissal. They also added that the action of the employers was a reasonable one. In general terms, Mr Weiniger submits that the tribunal approached the matters correctly, and reached conclusions which it was entitled to reach on the evidence it received. That, in general terms, is a powerful argument and this tribunal does not seek normally to disturb an employment tribunal decision approached in that way. The difficulty arises, however, in the terms of para 90, which we have set out above, and which does indicate some degree of ambiguity and possible confusion on the part of the employment tribunal.

12. However we have also had an interesting argument from Mr Weiniger, in respect of what can or cannot constitute a "last straw" situation. Mr Weiniger says that in order to constitute a "last straw" the conduct of the employer has to be unreasonable in some way, and, indeed, this tribunal expressly found that the employer's actions in respect of the non-payment of wages was reasonable.

13. The difficulty about that argument, it seems to us, is that in all "last straw" situations, matters turn to some extent on the perception of the employee at the time when he feels that he has been treated unreasonably or unfairly by his employer. It is that which causes him to decide to resign, bringing into the picture, as is usually the case and, indeed, is the case here, previous actions by the employer about which he had complained. It seems to us that it would be wrong to say that any possibility of a finding of constructive dismissal in such a situation is negatived if the final action of the employer is subsequently found by the employment tribunal to have been reasonable.

14. The case law indicates that the function of the employment tribunal when faced with a series of actions by the employer is to look at *all* the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer. We are unable to find in the judgment of this employment tribunal the answer to that question.'

[13] The EAT, therefore, found for Mr Omilaju on the first issue and allowed the appeal. They explained (para 16) that—

'[i]t would not be appropriate for us to substitute a decision on the matter of whether he was or was not constructively dismissed, as Mr Edward suggests, nor, indeed, do we think it would be proportionate for this matter to have to be remitted to a different employment tribunal.'

As I have said, they did not determine the second issue.

#### THE FIRST ISSUE

##### *The law*

[14] The following basic propositions of law can be derived from the authorities. (1) The test for constructive dismissal is whether the employer's

- a actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, [1978] QB 761. (2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example,
- b *Malik v Bank of Credit and Commerce International SA (in liq)*, *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 5, 14–16, [1998] AC 20 at 34–35, 45–46 per Lord Nicholls of Birkenhead and Lord Steyn respectively. I shall refer to this as ‘the implied term of trust and confidence’.
- c (3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347 at 351, [1981] ICR 666 at 672 per Browne-Wilkinson J. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship. (4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik’s* case [1997] 3 All ER 1
- d at 5, [1998] AC 20 at 35, the conduct relied on as constituting the breach must—

‘impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.’ (My emphasis.)

- e (5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in *Harvey on Industrial Relations and Employment Law* vol 1, para 480:

f ‘Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may

g be the “last straw” which causes the employee to terminate a deteriorating relationship.’

[15] The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, [1986] ICR 157. Neill LJ ([1985] IRLR 465 at 468, [1986] ICR 157 at 167) said that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said ([1985] IRLR 465 at 469, [1986] ICR 157 at 169):

j ‘(c) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken

together amount to a breach of the implied term? see *Woods v W M Car Services Ltd*. This is the "last straw" situation.' a

[16] Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application. b

[17] It is the alleged failure by the ET in the present case to apply the judgment of Glidewell LJ which led the EAT to allow the appeal. It is submitted by Mr Weiniger on behalf of the council that although, as Glidewell LJ makes clear, the final straw does not need to be a breach of contract, it must at least be conduct which is 'blameworthy or unreasonable'. Anything less than a breach of contract or conduct which is blameworthy or unreasonable is not capable of being a final straw in the sense discussed by Glidewell LJ. c

[18] On behalf of Mr Omilaju, Mr Edward Jnr submits that: (i) the final straw does not need to be a breach of contract (see *Lewis*' case), (ii) blameworthy or unreasonable conduct in a final straw case must by definition be, or at least contribute to, a breach of the implied term of trust and confidence, but (iii) since the breach of this implied term is, by definition, also a breach of contract, it cannot be a requirement that a final straw should amount to blameworthy or unreasonable conduct, since *Lewis*' case says that it does not need to be a breach of contract. d

[19] The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in *Woods*' case [1981] IRLR 347 at 351, [1981] ICR 666 at 671 where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, 'squeezes out' an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. e

[20] I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to f  
g  
h  
j

a the obligation of trust and confidence that it lacks the essential quality to which I have referred.

[21] If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

[22] Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in [14], above).

#### *This case*

[23] Paragraph 90 of the decision of the ET lies at the heart of this appeal. The EAT say ([2004] 3 All ER 129 at 132 (para 7)) that there is some ambiguity in the sentence in para 90 of the ET's decision:

'He may not have resigned in response to these but taken together with non-payment of wages in the employment tribunal he was entitled to resign and claim he was dismissed.'

The EAT consider that it is not clear whether this sentence records part of Mr Omilaju's submissions, or whether it forms part of the ET's conclusions. In my view, the sentence plainly is recording part of Mr Omilaju's submissions. The ET's conclusions start with the sentence which begins: 'The difficulty for the applicant ...' In any event, it would seem that the perceived ambiguity was not the reason why the EAT allowed the appeal. They said:

'It seems to us that there is some ambiguity there, but because of the action we have decided to take in this case, which we will come to in a moment, it will be helpful if the employment tribunal, in due course, can clarify the position on that matter.'

[24] I move, therefore, from the issue of ambiguity. The EAT rightly observed that the first part of para 90 is inconsistent with the principle that a final straw does not need of itself to be a breach of contract. The ET is saying that: (i) Mr Omilaju had to show that there was a serious breach of contract, or a breach which was the last in a series of breaches, and (ii) the council's refusal to pay was not a 'breach of contract at all never mind one which would entitle the applicant to resign without notice'. If para 90 had stopped there, the EAT would have been right to conclude that the ET had misdirected itself and to allow the appeal for that reason.



[25] But the second part of para 90 starts with the words: 'The applicant also says it was the last in a series of actions such as to amount to a breach of trust and confidence.' This submission is rejected by the ET because—

'looked at objectively the straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract ...'

The question is whether this application of the final straw principle was in accordance with the law as I have explained it earlier in this judgment.

[26] If the ET had rejected the submission by merely repeating that the refusal to pay Mr Omilaju's salary was not in breach of contract, that would clearly have been a misdirection for the reasons that I have given. But the ET also said that the refusal to pay, looked at objectively, was perfectly reasonable and justifiable conduct. It is true that I have rejected Mr Weiniger's submission that it is a prerequisite of a final straw that the act should be unreasonable, if not of itself a breach of contract: the essential requirement is that it should contribute to a breach of the implied term of trust and confidence. But it will be an unusual case where conduct which is 'perfectly reasonable and justifiable' satisfies the final straw test.

[27] In the passage under scrutiny, the ET is addressing the submission that the failure to pay was the last in a series of actions amounting to a breach of the implied term of trust and confidence. In that context, it seems to me that the ET is saying that the failure to pay was not the last in such a series. Viewed objectively, it did not have the quality of contributing to the undermining of Mr Omilaju's trust and confidence in his employer. The reason why it did not have that quality was that, in all the circumstances, the failure to pay was perfectly reasonable and justifiable conduct.

[28] I have not found it altogether easy to ascertain the basis on which the EAT did allow the appeal in this case. They make the fair point that the first part of para 90 falls into the error of saying that the final straw must be a breach of contract ([2004] 3 All ER 129 at 132–133 (para 10)). They say (para 11) that Mr Weiniger's submission that the ET approached the matters correctly, and reached conclusions which they were entitled to reach is in general terms 'a powerful argument'. But, they say, the difficulty is that para 90 indicates 'some degree of ambiguity and possible confusion'. I have already dealt with the ambiguity point. Nor is it clear what confusion is being referred to: it may be the breach of contract point. It is not clear whether this ambiguity/confusion is the basis on which the appeal was allowed. The EAT (para 12) deal with Mr Weiniger's submission that the final straw must have the quality of unreasonableness. They identify (para 13) the difficulty with that submission as being that in all last straw situations, matters turn to some extent on the 'perception of the employee at the time when he feels that he has been treated ... unfairly'. If this means that the test of whether there has been a breach of the implied term of trust and confidence is subjective, then it is not correct. The final sentence of para 13 rejects Mr Weiniger's submission for reasons with which I would agree. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw. The correct test is the one I have sought to explain earlier in this judgment. But, as I have said, it will be an unusual case where the final straw test is



a satisfied and the conduct relied on as the final straw has been judged objectively to be reasonable and justifiable conduct.

[29] Having rejected Mr Weiniger's submission at para 13, the EAT conclude (para 14) that the ET failed to 'look at *all* the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer'.

b [30] In the present case, the ET were fully aware of the circumstances in which Mr Omilaju had not been paid. They must have decided that, taking an objective view of all the circumstances, the failure to pay was not a final straw, and that they could reach this decision without considering in detail the nature and effect of the earlier acts. In my judgment, they were entitled to do so. I would find for the council on the first issue.

c THE SECOND ISSUE

[31] Mr Edward submits that the ET finding that Mr Omilaju resigned in response to the failure to pay his salary is perverse. He submits that the ET should have found that Mr Omilaju resigned in part for this reason, but also in part by reason of the council's earlier conduct, including its behaviour in relation to the Kush reference. In support of his argument, Mr Edward relies, in particular, on the terms of the letter of resignation of 7 September 2001.

d [32] The opening paragraph of the letter is in the clearest terms: the failure to pay is said to be 'an act that has destroyed my trust and confidence in my employer and its senior management'. The first sentence of the immediately following paragraph states: 'I see this also [sc the failure to pay] as the last straw in a series of less favourable treatments.' In other words, Mr Omilaju is making it clear that this is a last straw case, and that the failure to pay is the last straw. It is true that the letter goes on to set out some of his complaints of the council's earlier conduct. In my judgment, however, on a fair reading of the letter, the reason given for the resignation is the failure to pay. At the very least, the ET were entitled so to hold.

f [33] This interpretation is entirely consistent with the evidence adduced by Mr Omilaju and the way the case was presented on his behalf. Thus, at para 34 of his witness statement, Mr Omilaju said that the council's conduct in deducting his salary in respect of the period when he was attending the ET hearing was the 'last straw': 'It destroyed my trust and confidence in the respondent.' He made the same point at para 47 of the statement. The ET set out (para 2 of its extended reasons) the issues which had been identified at a directions hearing on 16 May 2002, and had been subsequently further clarified. These included at (viii) under the heading 'Unfair Dismissal' the following issue:

j 'Whether the breach of contract referred to in (vii), above [viz the deduction of salary] was a fundamental breach of the applicant's contract of employment and if not the last in a series of breaches by the respondent such as to entitle the applicant to resign without notice by reason of the respondent's conduct ...'

[34] In these circumstances, the ET were fully entitled to view this as a final straw case. I do not consider that it would have been open to the EAT to take a different view. It is certainly not open to this court to do so.

[35] For these reasons, I would not interfere with the ET's decision on the reason for Mr Omilaju's resignation. a

CONCLUSION

[36] For the reasons that I have sought to give, I would allow this appeal.

**WALL LJ.**

[37] I agree. b

**MAY LJ.**

[38] I agree that this appeal should be allowed for the reasons given by Dyson LJ. c

*Appeal allowed.*

Celia Fox Barrister.

# Johnson v Medical Defence Union Ltd

[2004] EWHC 2509 (Ch)

CHANCERY DIVISION

LADDIE J

1, 9 NOVEMBER 2004

*Data protection – Processing of information – Personal data – Individual making access request to data controller – Individual subsequently commencing action against data controller – Individual applying unsuccessfully for order requiring compliance with access request – Whether individual able apply for specific disclosure under CPR of substantially identical information – Data Protection Act 1998, ss 7(9), 15(2).*

The defendant was a body which provided medico-legal advice and support to its members, who were all members of the medical profession. The claimant, a consultant surgeon, was a member. One of the services provided by the defendant was access to professional indemnity insurance. The defendant decided not to renew the claimant's membership. He was forced to find alternative insurance cover and considered that his exclusion from membership of the defendant had blemished his professional reputation. The defendant's decision not to renew the claimant's membership was based upon its assessment of certain information concerning him. He believed that that amounted to improper processing of data relating to him which was actionable under the provisions of the Data Protection Act 1998 and made an access request under s 7<sup>a</sup> of the 1998 Act. That section allowed an individual (the data subject) to find out whether personal data about him were being processed (by a data controller), and if so, how they were being processed. The claimant considered that the defendant failed to respond properly to his access request and commenced proceedings claiming relief under s 7(9) of the 1998 Act, which provided that if the court were satisfied that a data controller had failed to comply with a s 7 request it could order compliance, and applying for an order to prevent the defendant from improperly processing data about him and for compensation. As a preliminary issue, the court determined that the defendant had complied with its obligations as a data controller under s 7. Subsequently, the claimant applied under the CPR for specific disclosure of documents which encompassed all the material he had applied for, unsuccessfully, by his s 7 access request. The defendant contended that such disclosure was precluded by s 15(2)<sup>b</sup> of the 1998 Act, which provided that for the purpose of determining whether an applicant under s 7(9) was entitled to the information he sought, the court could require the information to be made available for its own inspection, 'but shall not, pending the determination of that question in the applicant's favour, require the information sought by the applicant to be disclosed to him ... whether by discovery ... or otherwise'.

**Held** – Section 15(2) of the 1998 Act did not contain a general prohibition on a data subject obtaining disclosure in an action where he claimed relief for

<sup>a</sup> Section 7, so far as material, is set out at [19], [21], [22], below

<sup>b</sup> Section 15, so far as material, is set out at [24], below

breaches of data protection principles, and it had no direct bearing on whether there should be disclosure, or on its extent, in proceedings where the data subject had made out an arguable case that there had been a breach of the data protection principles by the data controller. Section 15(2) was concerned solely with whether requests for information, pursuant to an access request under s 7 of the 1998 Act, had been complied with properly. It was for the purposes of determining whether the data controller had been entitled to refuse to disclose any information to the data subject that the court might look at the information itself, while the data subject could not see that material, and for that reason s 15(2) provided that the information held by the data controller was not to be disclosed to an applicant under s 7, whether by discovery or otherwise, until after the court had determined the application in his favour. Moreover, the difference in purpose of an order for disclosure under s 7(9) and an order for disclosure under the CPR was reflected in the difference in the materials to which they might relate. It followed that the claimant's application for disclosure in relation to his claims for breaches by the defendant of the data protection principles was not, in principle, disposed of by the fact that he had failed on his claim under s 7(9). Accordingly, the application would be allowed (see [26]–[29], below).

### Notes

For the right of access to personal data, see 41 *Halsbury's Laws* (4th edn reissue) para 792.

For the Data Protection Act 1998, ss 7, 15, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 551, 565.

### Cases referred to in judgment

*Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2004] IP & T 814.

*Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, [1843–60] All ER Rep 378, VC Ct.

*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1975] 2 WLR 690, PC.

### Interim application

In the course of proceedings brought by David Paul Johnson claiming relief under the Data Protection Act 1998 and compensation against the Medical Defence Union Ltd (MDU), Mr Johnson applied for specific disclosure of documents including those which had been the subject of an application made by him under s 7 of the 1998 Act. In relation to that application Laddie J had determined on 20 February 2004, on a preliminary issue, that the MDU had complied with its obligations under s 7 of the 1998 Act. The facts are set out in the judgment.

*Ashley Roughton* (instructed by *Charles Russell*) for Mr Johnson.

*Jacqueline Reid* (instructed by *Fladgate Fielder*) for the MDU.

a 9 November 2004. The following judgment was delivered.

**LADDIE J.**

[1] This is the judgment on a further interim application in an action brought by David Paul Johnson, a consultant orthopaedic surgeon, against the Medical Defence Union (the MDU). I set out the background to this action in a judgment dated 20 February of this year on an earlier interim application ([2004] EWHC 347 (Ch)). In so far as necessary, I repeat the relevant facts below.

b [2] The MDU is a body which provides medico-legal advice and support to its members, who are all members of the medical profession. There are at least two similar organisations offering similar services to medical practitioners in this country. One of the services provided by the MDU is access to professional indemnity insurance, written by a major insurance company. MDU members obtain a discount on their premiums. This policy is, so I understand, only available to MDU members. Insurance is also available through other insurance companies outside this discounted scheme.

d [3] The articles of the MDU contain a number of provisions in accordance with which it can refuse to continue the membership of any member. In particular, art 11(a) purports to bestow on the MDU's board of management an absolute discretion to refuse to renew the membership of any member subject to a requirement to give 42 days' prior notice.

e [4] In January 2002, the MDU decided not to renew Mr Johnson's membership, in accordance with the provisions of art 11(a). This had obvious repercussions for Mr Johnson. He was forced to find alternative insurance cover because he was no longer eligible for the special insurance available through the MDU. Furthermore, Mr Johnson was extremely concerned that what he regarded as his expulsion from the MDU would be likely to convey to others, including medical colleagues, the impression that he was either incompetent or had done something wrong which was sufficiently grave to justify exclusion from the MDU.

g [5] Mr Johnson has been in practice for over 20 years and in all that time he has never been sued for negligence. Furthermore, in that period there have been only two occasions on which he has been reported to the General Medical Council. On both, the complaint was dismissed at a preliminary stage. He says that he is a highly competent surgeon and that, until January 2002, he had an unblemished reputation. That was changed, in his view, when he was excluded from the MDU.

h [6] The MDU denies that it has ever impugned Mr Johnson's competence as a surgeon. Nevertheless, it says that it was entitled to refuse to renew his membership.

j [7] The MDU's decision was based upon its assessment of certain information concerning Mr Johnson. He believes that that amounted to the improper processing of data relating to him which was not only damaging but also actionable under the provisions of the Data Protection Act 1998 (DPA). In order to better enable him to launch his claim, in January 2002 Mr Johnson made what is known as an 'access request' of the MDU under s 7 of the DPA. This action was commenced a year later. Mr Johnson said that the MDU failed to comply properly with his access request. That was added as one of the claims in the action. It was that assertion which lay behind the application which I heard, and in respect of which I gave judgment, earlier this year. In the terminology of the



DPA, Mr Johnson is the 'data subject' and the MDU is the 'data controller'. Some of the information held by the MDU is 'personal data' relating to Mr Johnson. a

[8] In my earlier judgment I explained the relationship between the substantive claims made by Mr Johnson against the MDU and his claim relating to the access request as follows:

'10. Mr Johnson seeks three major forms of relief. First, because he considers the MDU to have failed to respond properly to his access request of 22 January 2002, he claims relief pursuant to s 7(9) of the DPA. That is to say, he asks for an order requiring the MDU to comply properly. Second, he applies under the provisions of s 10(4) of the DPA for an order, in effect, to prevent the MDU from improperly processing personal data about him and an order under s 14(4) of the DPA for the rectification, blocking or destruction of certain data. Third, he seeks financial compensation under the provisions of s 13(1) and (2) of the DPA for damage suffered by him and distress caused to him by the allegedly improper processing by the MDU of his personal data. b

11. Logically, the second and third heads of relief are dependent upon an identification of all personal data concerning Mr Johnson processed by the MDU and a knowledge of how those data were used by the MDU. For that reason, at a case management conference before Master Moncaster on 12 August 2003, the parties agreed that the question of compliance with the access request should be dealt with as a preliminary issue. Accordingly, the master made an order that the following preliminary issue be determined: "Whether and to what extent the defendant has complied with its obligations under s 7 of the DPA, pursuant to the request made by the claimant of the defendant and dated 22 January 2002." c

[9] In the application leading to my judgment, Mr Johnson said that the MDU had a number of documents which contained references to him. Some had been disclosed to him by the MDU, sometimes with redactions. Others had not been disclosed at all. He argued that all the non-disclosed documents were his personal data and that, pursuant to his access request, he was entitled to see them and to have the redactions removed. The MDU argued that it had fully and properly complied with the access request. The purpose of the preliminary issue ordered by the master was to determine whether the MDU was correct or whether further material should be disclosed. d

[10] In my judgment of earlier this year, I held that the above question should be answered in the affirmative. The MDU had complied with its obligations under s 7 and no further documents need be supplied to Mr Johnson pursuant to his access request. The major ground for that decision was that the documents in issue were not and did not contain 'personal data' of Mr Johnson. This was for two reasons. First the documents were held by the MDU in manual form and without sophisticated indexing. This meant that they were not recorded as part of a 'relevant filing system' as required by s 1(1)(c) of the DPA. For that reason they were not 'data' within the meaning of the DPA and therefore not personal data. Second, many of the documents did not focus on Mr Johnson or were not about him. They were therefore not 'personal' in the sense necessary to constitute personal data. On both of these points I placed particular reliance on the judgment of the Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2004] IP & T 814. e

a [11] In the result, Mr Johnson was refused sight of the additional documents. I refused permission to appeal. So did the Court of Appeal.

b [12] The action has proceeded and a trial is now scheduled for January of next year. At a recent hearing before Master Moncaster, directions were given which required Mr Johnson to put in an amended particulars of claim within the next two weeks. The result is that the final definitive claim made by Mr Johnson has not been pleaded and the MDU has not had an opportunity to respond to it. Notwithstanding that, Mr Johnson has launched the current application, the major part of which consists of an application for specific disclosure. The disclosure sought is very wide. I do not understand Mr Roughton, who appears for Mr Johnson, to dispute that, in substance, it covers all the documents which were the subject of his client's earlier unsuccessful application following from the access request.

c [13] This has given rise to a point which may be of some general importance in DPA cases. Mr Roughton argues that his client is seeking relief from wrongful processing of his personal data. His right to bring proceedings is created by the DPA but the conduct of such proceedings has to be in accordance with the provisions of the CPR including, in particular, the obligation on the parties to give disclosure of documents. That is what his client seeks here. The fact that Mr Johnson had unsuccessfully sought access to the very same documents through the regime created by s 7 of the DPA is more or less irrelevant.

d [14] Miss Reid, who appears for the MDU, does not suggest that the earlier application for disclosure makes this application an abuse of process (see *Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378 and *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1975] 2 WLR 690). She argues that the statutory provisions which Mr Johnson used in his first application for sight of these documents is designed to balance the interests of the data subject (Mr Johnson) against those of the data controller (the MDU) and third parties. This includes express limitations on disclosure which the current application, if successful, would undermine. The legislature has indicated that disclosure should not be ordered in a case like this. Even if the court retains jurisdiction to order disclosure, the discretion should always be exercised in accordance with this legislative intent. Such orders against the data controller should not be made so as to circumvent the statutory restriction.

e [15] To determine this issue it is necessary to understand the structure and scope of this legislation. The DPA is concerned to control the way in which personal data about a data subject are gathered, processed and used. To this end, s 4(4) imposes a general duty on the data controller to comply with the 'data protection principles' in relation to all personal data in relation to which he is the data controller. The data protection principles are set out in Pt I of Sch I to the DPA. They cover a wide field. For example the first four such principles are as follows:

f (1) Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

g (2) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

(3) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed. a

(4) Personal data shall be accurate and, where necessary, kept up to date.'

[16] In addition to requiring the data controller to comply with the data protection principles, the DPA creates ways in which the data subject can interfere with the way in which the data controller handles or uses his personal data. For example ss 10(1) and 11(1) of the DPA provide: b

'10.—(1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons—(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and (b) that damage or distress is or would be unwarranted ... c

11.—(1) An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject.' d

[17] The data subject can also serve a notice requiring a data controller not to make certain decisions in certain circumstances (s 12). In the cases to which these sections apply it is not inevitable or a pre-requisite that the data controller has breached any of the data protection principles. e

[18] Furthermore, the DPA also contains provisions which create remedies for the data subject if the data controller has breached his duty under s 4(4) to comply with the data protection principles. If he is damaged or distressed by the breach, the data subject is entitled to financial compensation under s 13. If it is shown that personal data are inaccurate, under s 14 the court can order the data controller to rectify, block, erase or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on the inaccurate data. It will be appreciated from what is set out above, that Mr Johnson seeks relief under both of these provisions in this action. f

[19] The data subject's ability to make use of the safeguards given to him by ss 10–14 are dependent upon him knowing what personal data relating to him is controlled, and how it has been and will be processed or used, by the data controller. However, in the majority of cases the data subject will have little or no knowledge of these matters. He may not even know whether any personal data are held by the data controller. To overcome this, the DPA provides individuals with a mechanism by which they can find out what data, if any, are held by data controllers and, where such data are held, to what use they have been or will be put. To this end, s 7(1) provides: g

'Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller, (b) if that is the case, to be given by the data controller a description of—(i) the personal data of which that h

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a individual is the data subject, (ii) the purposes for which they are being or are to be processed, and (iii) the recipients or classes of recipients to whom they are or may be disclosed, (c) to have communicated to him in an intelligible form—(i) the information constituting any personal data of which that individual is the data subject, and (ii) any information available to the data controller as to the source of those data, and (d) where the processing by  
b automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.’

c [20] It will be noticed that s 7(1)(a) allows the individual to find out whether personal data about him are being processed and s 7(1)(b) allows him to find out how they are being processed if s 7(1)(a) is answered in the affirmative. There is no pre-condition that the individual believes or can demonstrate a prima facie  
d case that the data controller has any of his personal data nor is there a pre-condition that, if any such personal data are held, the individual believes or can demonstrate a prima facie case that they are being processed improperly. Section 7 is not concerned with whether the data controller is acting improperly.

e [21] Therefore the purpose of these provisions is to make the processing of personal data transparent. Because there is nothing in this to limit applications to cases where the data controller has acted in some way improperly, he may charge a fee for complying with a data request under this section (s 7(2)(b)). The section also contains provisions which allow the data controller to refuse requests for information, at least in part, where compliance might disclose the identity of third parties:

f ‘(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—(a) the other individual has consented to the disclosure of the  
g information to the person making the request, or (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

h (5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

i (6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—(a) any duty of confidentiality owed to the other individual, (b) any steps taken by the data controller with a view to seeking the consent of the other individual, (c) whether the other individual is capable of giving consent, and (d) any express refusal of consent by the other individual.’



[22] The right to seek information under s 7(1) is backed up by a power given to the court by s 7(9) to order the data controller to comply:

'If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.'

[23] In his particulars of claim, Mr Johnson has sought relief under s 10 (prevention of processing), s 13 (damages) and s 14 (rectification or erasure of data). He has also sought relief under s 7(9) (provision of information). It was the latter which was the subject of the preliminary issue hearing in relation to which I gave my earlier judgment in these proceedings.

[24] The manner in which a court exercises its powers under s 7(9) is governed by s 15(2) which provides:

'For the purpose of determining any question whether an applicant under subsection (9) of section 7 is entitled to the information which he seeks (including any question whether any relevant data are exempt from that section by virtue of Part IV) a court may require the information constituting any data processed by or on behalf of the data controller and any information as to the logic involved in any decision-taking as mentioned in section 7(1)(d) to be made available for its own inspection but shall not, pending the determination of that question in the applicant's favour, require the information sought by the applicant to be disclosed to him or his representatives whether by discovery (or, in Scotland, recovery) or otherwise.'

[25] Miss Reid puts this at the heart of her objection on principle to Mr Johnson's application for disclosure. She argues that the legislative intent, confirmed by the words of this subsection, is to prevent data subjects obtaining disclosure. Were Mr Johnson to succeed on this application, it would drive a coach and horse through s 15(2) and, in particular, the second half of it. The point is particularly clear here because it is not in dispute that the material which Mr Johnson wishes to have sight of pursuant to his application for disclosure encompasses all the material which he applied unsuccessfully to obtain under s 7 by his access request. It includes all those documents which, in applying s 15(2), I had to look at during the course of the last hearing and which Mr Johnson and his legal team were not allowed to see.

[26] As attractive as this argument may appear, I do not think it is right. Section 15(2) does not contain a general prohibition on a data subject obtaining disclosure in an action where he claims relief for breaches of the data protection principles. It is concerned solely with whether requests for information pursuant to an access request under s 7 have been complied with properly. That is a quite separate matter. As noted above s 7(4)–(6) entitle the data controller to refuse to respond, at least in part, to a data subject's request where confidential information relating to third parties is at stake. Section 15(2) dovetails into this. It allows the court to see for itself whether such confidential information does exist and to consider for itself whether or not relevant personal data are held by the data controller. Section 15(2) makes it clear that, for the purposes of determining whether the data controller was entitled to refuse to disclose any information to the data subject, the court can look at the information itself. However the data subject may not see this material. The purpose of this is



a obvious. A data controller's entitlement under the DPA to hold back information from the data subject so as to protect the interests of third parties would be destroyed if all the data subject had to do was make an application for disclosure under s 7 and then ask to see the withheld material in order to verify for himself whether it has been withheld on proper grounds. It is for this reason that s 15(2) provides that the information sought by the applicant and held by the data controller shall not be disclosed to him or his representatives whether by discovery or otherwise, until after the court has determined the application in his favour.

c [27] As its introductory words make clear, s 15(2) is only concerned with applications under s 7(9). The latter is concerned only with finding out whether the data controller has, is using or intends to use personal data. It is not concerned with whether there has been a breach of the data protection principles by the data controller. As a consequence it has no *direct* bearing on whether there should be disclosure, or its extent, in proceedings where the data subject has made out an arguable case that there has been such a breach.

d [28] The difference in purpose of an order under s 7(9) and an order for disclosure under the CPR is also reflected in the difference in the materials to which they relate. As the Court of Appeal pointed out in *Durant v Financial Services Authority* [2004] IP & T 814, whether information relating to an individual is personal data within the meaning of the DPA involves, *inter alia*, a consideration of whether it is 'data' as defined in s 1 of the DPA. That, amongst other things, requires that the information be 'recorded as part of a relevant filing system'. As the Court of Appeal explained, where information is retained in manual filing systems, it is only in a 'relevant filing system' when the manual system is broadly equivalent to computerised systems in ready accessibility to relevant information. As noted above, these principles were applied by me in the earlier judgment in this case. The upshot of this is that documents which might be highly material to an allegation of breach of the data protection principles and would fall within the ambit of disclosure might well not be personal data within the meaning of the DPA and, for that reason, not within the scope of ss 7 and 15. For example, a data subject may complain that his personal data are inaccurate. The personal data held by the data controller may be based on earlier documents which are held manually. The latter documents may be of primary significance to the data subject's assertion of inaccuracy but, because they are held in a manual system with insufficient organisation, do not qualify as personal data for the purpose of the DPA. They would fall within the class of documents which are likely to be discloseable for the purpose of the data subject's claim for damages and rectification but outwith the scope of ss 7 and 15. I can see no reason why the determination that the data subject cannot have access to such documents pursuant to an access request under s 7 should prevent such documents, if material to the data subject's claim under ss 13 or 14, being disclosed in the course, and for the purpose, of proceedings under the latter two sections.

j [29] It follows that Mr Johnson's application for disclosure in relation to his claims for breaches by the MDU of the data protection principles is not disposed of by the fact that he failed on his claim under s 7(9). The fact that, in determining the latter application, I looked at documents which, because of s 15(2), Mr Johnson and his lawyers were not allowed to see, does not mean that if some of those documents are relevant to his claims under ss 10, 13 and 14, Mr Johnson cannot seek disclosure of them.

[30] However, I should make two points clear. First, I have said that s 15(2) has no direct bearing on whether there should be disclosure. In my view it does have some indirect impact. Section 15(2), like s 7(4)–(6), emphasises the concern of the legislature that confidential information relating to third parties should not be disclosed to a data subject. When a court exercises its discretion to order specific disclosure, this concern must be borne in mind. It may, depending on all the circumstances of the case, reinforce the court in a decision either to refuse disclosure in whole or in part or to allow redaction of documents ordered to be disclosed. Second, as agreed with counsel, I have only considered the broad question of principle, namely whether it is open to Mr Johnson to seek disclosure under the CPR notwithstanding the failure of his s 7(9) application and the terms of s 15(2). I have not considered what, if any, disclosure would be appropriate if, as I have found, there is no fetter on Mr Johnson making his application. A decision on what order to make is dependent upon a determination of what are the arguable claims Mr Johnson has made and what are the issues between the parties. Those matters will only be possible to evaluate in this case once the pleadings have been amended.

[31] There is one other minor point which arises for determination at this stage. In June of this year, Mr Johnson served a lengthy request for further information and clarification of the defence pursuant to CPR Pt 18. The MDU has declined to answer some of the questions asked. In some cases it said that the requests were too vague and in others they said that the request is for evidence. That may not be, of itself, a proper objection. The purpose of a request for information is to narrow the areas of dispute between the parties and to avoid surprise at the trial. The court is likely to be unwilling to order responses if they will not make a significant contribution to achieving these objectives and if they will do little but add to the costs of the litigation. When a party refuses to respond to such a request, the court must consider whether, in all the circumstances, a significant benefit will be secured by ordering some or all of them to be answered.

[32] I was taken through the outstanding requests by Mr Roughton and Miss Reid. In most cases it appeared to me that little benefit would be secured by requiring the MDU to answer them. However that was not the case in respect of requests no 23, 40 and 43. I will direct that they be responded to.

*Application allowed.*

Victoria Ellis Barrister.

a **Barclays Mercantile Business Finance Ltd  
v Mawson (Inspector of Taxes)**  
[2004] UKHL 51

b **HOUSE OF LORDS**

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD AND LORD WALKER OF GESTINGTHORPE

12, 13 OCTOBER, 25 NOVEMBER 2004

- c *Capital allowances – Machinery or plant – Expenditure on provision of machinery or plant – Company carrying on trade of finance leasing – Company purchasing plant and machinery and leasing it back to vendor – Vendor subleasing plant and machinery to subsidiary – Subsidiary entering into arrangements for guarantee of rental payments such that purchase moneys unavailable for use other than in discharging rent liabilities – Subsidiary benefiting only by amounts equal to capital allowances claimed by company – Whether company entitled to capital allowances in respect of expenditure on machinery or plant – Whether purpose of expenditure obtaining of capital allowances – Capital Allowances Act 1990, s 24(1).*
- d

e The company (the lessor company) was a member of the B group of companies which included a bank, B bank, and a company carrying on the business of investment banking. The lessor company carried on the trade of finance leasing. It borrowed £91m from B bank, purchased a gas pipeline from an Irish statutory corporation (the corporation) for that sum of £91m, and granted the corporation a lease back (the head lease). The corporation granted its wholly owned United Kingdom subsidiary (the subsidiary) a sub-lease. The three

f companies entered into an assumption agreement, by which the subsidiary assumed direct liability to the lessor company to pay the rent due under the head lease, and the corporation and the subsidiary entered into a transportation agreement. The head lease provided for the rent due to be adjusted if rates of corporation tax and the availability of writing down allowances changed.

g Those allowances were provided for by s 24(1)<sup>a</sup> of the Capital Allowances Act 1990, under which allowances were available, where a person carrying on a trade had incurred capital expenditure on the provision of machinery or plant wholly and exclusively for the purposes of the trade, and in consequence of his incurring that expenditure, the machinery or plant belonged or had belonged to him. The lessor company required a guarantee of the subsidiary's liability to

h pay the rent. That guarantee was provided by B bank under a guarantee facility agreement made with the subsidiary company. As counter security for its potential liability under the guarantee, B bank required the subsidiary to provide a charge over the £91m. For that purpose the subsidiary deposited the money with a Jersey company which was managed by a company in the

j B group. The security agreements included a deposit agreement between the Jersey company and a B group company registered in the Isle of Man under which the Jersey company placed with the Isle of Man company an amount equal to that deposited with the Jersey company by the subsidiary. The Isle of

a Section 24, so far as material, is set out at [4], below

Man company kept its funds on deposit with B bank. The Jersey company executed a deed of indemnity in favour of B bank in respect of the bank's obligations under its guarantee of the subsidiary's obligations to the lessor company. As security for the indemnity the Jersey company assigned to B bank its interest in the deposit with the Isle of Man company and granted B bank charges over all its assets. The effect of the arrangements was that the purchase price for the pipeline remained on deposit with the Jersey company and was to be paid out over a period of years, partly to discharge the liability for rent under the headlease and partly for the benefit of the subsidiary. The benefit obtained by the subsidiary was entirely attributable to the lessor company being able to pass on the benefit of its capital allowances. The Revenue formed the view that these transactions, having been devised by the B group company which carried on the business of investment banking, had been set in motion as a co-ordinated scheme which neutralised the effect of the transaction in providing finance to the subsidiary so that the lessor company was not entitled to claim writing-down allowances of £91m under s 24(1) of the 1990 Act. It refused the claim on the ground that, having regard to the principle in *W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, the scheme as a whole took the expenditure out of the scope of s 24(1). Applying that principle, the Special Commissioners dismissed the lessor company's appeal, holding that the purpose of the expenditure of £91m by the lessor company had not been the acquisition of the plant and machinery but the obtaining of capital allowances. On appeal to the High Court the judge upheld the Special Commissioners' decision. The Court of Appeal allowed the lessor company's appeal, holding that the expenditure had been incurred by it wholly and exclusively for the purposes of its trade of providing asset-based finance. The Revenue appealed.

**Held** – The essence of the approach to construction first applied in the *Ramsay* case had been, first, to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and secondly, to decide whether an actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. The question was always whether the relevant provision of the statute, upon its true construction, applied to the facts as found, and the simplicity of that question showed that the *Ramsay* case had not introduced a new doctrine operating within the special field of revenue statutes. The view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded went too far. It elided the two steps. While it was not an unreasonable generalisation to say that if a statute laid down requirements by reference to some commercial concept, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature, then an act having that legal effect would suffice, whatever its commercial purpose, that proposition had not been intended to provide a substitute for a close analysis of what a statute meant. It certainly did not justify the assumption that an answer could be obtained by classifying all concepts a priori as either 'commercial' or 'legal'. The instant case illustrated the need for a close analysis of what, on a purposive construction, the statute actually required. The object of granting the



a allowance was to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery and plant used for the purposes of a trade. Consistently with that purpose, s 24(1) of the 1990 Act required that a trader should have incurred capital expenditure on the provision of machinery or plant for the purposes of his trade. When the trade was finance leasing, that meant that the capital expenditure should have been incurred to  
 b acquire the machinery or plant for the purpose of leasing it in the course of the trade. In that circumstance, it was the lessor as owner who suffered the depreciation in the value of the plant and was therefore entitled to an allowance against the profits of his trade. Those statutory requirements were in the case of a finance lease concerned entirely with the acts and purposes of the lessor, and, in the instant case, so far as the lessor was concerned, all the requirements  
 c of s 24(1) had been satisfied. If the lessee chose to make arrangements, even as a preordained part of the transaction for the sale and lease back, which resulted in the bulk of the purchase price being irrevocably committed to paying the rent, that was no concern of the lessor. The 1990 Act said nothing about what the lessee should do with the purchase price, how he should find the money to  
 d pay the rent or how he should use the plant. Accordingly, the appeal would be dismissed (see [32]–[43], below).

*W T Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865 explained.

*MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] 1 All ER 865 considered.

## e Notes

For general rules for the interpretation of taxing acts, and for qualifying expenditure on plant and machinery, see 23(1) *Halsbury's Laws* (4th edn reissue) paras 22, 296–298.

f The Capital Allowances Act 1990 was repealed by the Capital Allowances Act 2001, s 580, Sch 4. The repeal has effect, in relation to corporation tax, as respects allowances and charges falling to be made for chargeable periods ending on or after 1 April 2001, and in relation to income tax, as respects allowances and charges falling to be made for chargeable periods ending on or after 6 April 2001. The rewritten provisions replacing s 24(1) of the 1990 Act are  
 g contained in ss 11(4), 15(1)(a), 59(3) of the 2001 Act.

For the Capital Allowances Act 2001, see 43 *Halsbury's Laws* (4th edn) (2002 reissue), 900.

## Cases referred to in the report

- h *Campbell v IRC* [2004] STC (SCD) 396.  
*Carreras Group Ltd v Stamp Comr* [2004] UKPC 16, [2004] STC 1377.  
*Collector of Stamp Revenue v Arrowtown Assets Ltd* (2004) 6 ITLR 454, HK CFA.  
*Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL.  
 j *IRC v Burmah Oil Co Ltd* [1982] STC 30, HL.  
*IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991, HL.  
*MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] 1 All ER 865, [2003] 1 AC 311, [2001] 2 WLR 377.  
*Ramsay (W T) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.

**Cases referred to in list of authorities**

- Alpine Investments BV v Minister van Financiën* Case C-384/93 [1995] All ER (EC) 543, [1995] ECR I-1141, ECJ. a
- Bank of Credit and Commerce International SA (No 8), Re* [1997] 4 All ER 568, [1998] AC 214, [1997] 3 WLR 909, HL.
- Barclays Mercantile Industrial Finance Ltd v Melluish (Inspector of Taxes)* [1990] STC 314. b
- Charge Card Services Ltd, Re* [1986] 3 All ER 289, [1987] Ch 150, [1986] 3 WLR 697; *affd* [1988] 3 All ER 702, [1989] Ch 497, [1988] 3 WLR 764, CA.
- Coates (Inspector of Taxes) v Arndale Properties Ltd* [1985] 1 All ER 15, [1984] 1 WLR 1328, HL.
- Craven (Inspector of Taxes) v White* [1988] 3 All ER 495, [1989] AC 398, [1988] 3 WLR 423, HL. c
- Danner (Proceedings brought by)* Case C-136/00 [2002] STC 1283, [2002] ECR I-8147, ECJ.
- DTE Financial Services Ltd v Wilson (Inspector of Taxes)* [2001] EWCA Civ 455, [2001] STC 777.
- Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, HL. d
- Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275, [1992] 1 AC 655, [1992] 2 WLR 469, HL.
- Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* Case C-294/97 [1999] ECR I-7447, ECJ.
- FA and AB Ltd v Lupton (Inspector of Taxes)* [1971] 3 All ER 948, [1972] AC 634, [1971] 3 WLR 670, HL. e
- Fitzwilliam v IRC* [1993] 3 All ER 184, [1993] 1 WLR 1189, HL.
- Gregory v Helvering* (1935) 293 US 465, US SC.
- IRC v Scottish Provident Institution* [2003] STC 1035, Ct of Sess (IH); *rvsd* [2004] UKHL 52, [2005] STC 15. f
- IRC v Willoughby* [1997] 4 All ER 65, [1997] 1 WLR 1071, HL.
- Lankhorst-Hohorst GmbH v Finanzamt Steinfurt* Case C-324/00 [2003] STC 607, [2002] ECR I-11779, ECJ.
- Moodie v IRC* [1993] 2 All ER 49, [1993] 1 WLR 266, HL.
- New Angel Court Ltd v Adam (Inspector of Taxes)* [2004] EWCA Civ 242, [2004] STC 779, [2004] 1 WLR 1988. g
- Norman v Golder (Inspector of Taxes)* [1945] 1 All ER 352, CA.
- Overseas Containers (Finance) Ltd v Stoker (Inspector of Taxes)* [1989] STC 364, [1989] 1 WLR 606, CA.

**Appeal** h

John Mawson, HM Inspector of Taxes, appealed, with permission of the Appeal Committee of the House of Lords given on 7 April 2003, from the decision of the Court of Appeal (Peter Gibson, Rix and Carnwath LJ) on 13 December 2002 ([2002] EWCA Civ 1853, [2003] STC 66) allowing the appeal of Barclays Mercantile Business Finance Ltd (BMBF) against the order of Park J dated 22 July 2002 ([2002] EWHC 1527 (Ch), [2002] STC 1068) dismissing its appeal from the decision of the Special Commissioners (T H K Everett and M P Cornwell-Kelly) released on 18 October 2001 (sub nom *ABC Ltd v M (Inspector of Taxes)* [2002] STC (SCD) 78) dismissing BMBF's appeal from the Revenue's refusal of its claim that it was entitled to capital allowances under j

a s 24(1) of the Capital Allowances Act 1990 in respect of expenditure of £91m. The facts are set out in the report of the Appellate Committee.

David Goy QC and David Ewart (instructed by the *Solicitor of Inland Revenue*) for the Inland Revenue.

b Graham Aaronson QC, Iain Milligan QC, Camilla Bingham and Paul Farmer (instructed by *Denton Wilde Sapte*) for BMBF.

Their Lordships took time for consideration.

c 25 November 2004. The APPELLATE COMMITTEE delivered the following report.

[1] The following is the opinion of the Committee to which all its members have contributed.

d CAPITAL ALLOWANCES

[2] The issue in this appeal is whether Barclays Mercantile Business Finance Ltd (BMBF) is entitled to capital allowances in consequence of having paid about £91m for a gas pipeline under the Irish Sea.

e [3] A trader computing his profits or losses will ordinarily make some deduction for depreciation in the value of the machinery or plant which he uses. Otherwise the computation will take no account of the need for the eventual replacement of wasting assets and the true profits will be overstated. But the computation required by Sch D (whether for the purpose of income or corporation tax) has always excluded such a deduction. Parliament therefore makes separate provision for depreciation by means of capital allowances f against what would otherwise be taxable income. In addition, generous initial or first-year allowances, exceeding actual depreciation, are sometimes provided as a positive incentive to investment in new plant.

g [4] This appeal is concerned with the form of capital allowance called a 'writing-down allowance', which, as its name suggests, is intended to be a substitute for deducting depreciation in the computation of profits. The conditions upon which it is allowed are contained in s 24(1) of the Capital Allowances Act 1990:

h 'Subject to the provisions of this Part, where—(a) a person carrying on a trade has incurred capital expenditure on the provision of machinery or plant wholly and exclusively for the purposes of the trade, and (b) in consequence of his incurring that expenditure, the machinery or plant belongs or has belonged to him, allowances and charges shall be made to and on him in accordance with the following provisions of this section.'

j BMBF

[5] BMBF is a member of the Barclays group which carries on the trade of finance leasing or providing 'asset based finance'. It is the United Kingdom market leader in this field. The essence of its business is to provide capital for the purchase of an asset for use by its customer in return for a series of periodic payments secured upon the asset itself. The transaction normally takes the

form of a purchase of the asset by BMBF, either from a third party or (by way of 'sale and lease back') from the customer himself, followed by the grant to the customer of a lease at a rent calculated to secure BMBF an appropriate return. BMBF has the security of being owner of the asset and entitled in the event of default to sell it and recover the sums outstanding.

[6] There is no dispute that BMBF, as purchaser of an asset, is ordinarily entitled to a capital allowance under s 24(1). It carries on the trade of leasing and has acquired the asset wholly and exclusively by way of provision for the purposes of that trade. In consequence of its purchase from the third party or the customer, BMBF becomes owner of the asset and remains owner during the subsistence of the lease. Depreciation of the asset is a depreciation in the value of BMBF's capital assets.

#### THE PIPELINE

[7] Bord Gáis Éireann (BGE) is an Irish statutory corporation responsible for the supply, transmission and distribution of natural gas in the Republic of Ireland. Between 1991 and 1993 BGE employed contractors to build a high-pressure pipeline for the transport of natural gas from Moffat in Scotland to Ballough in the Republic. The pipeline consisted of three parts: a 30-inch onshore pipeline 80 km long from a compressor station at Moffat to another compressor station at Brighthouse Bay on the Scottish coast; a 24-inch undersea pipeline 208 km long from Brighthouse Bay to Loughshinny on the Irish coast, not far north of Dublin; and a 30-inch onshore pipeline, 8 km in length, from Loughshinny to Ballough. This was an infrastructure project of national importance, intended to meet the need for natural gas in the Republic as its own natural gas fields (off the south coast of Ireland) came to be exhausted. The pipeline was completed by the end of 1993, although there was a lengthy period of commissioning before it was fully in service. The cost was met, as to part, by a 35% EEC grant. The rest appears to have been provided by a consortium of banks.

#### THE SALE AND LEASE BACK

[8] On 31 December 1993 BGE sold the pipeline to BMBF for £91.292m and was granted a lease back. The judge rounded the purchase price down to £91m and we shall do the same. The sale was given effect by two acquisition agreements executed between BGE and BMBF providing for the sale of part of the pipeline in two sections: (i) the section on Irish soil or in Irish territorial waters (the price being £25.018m plus VAT) and (ii) the section running in international waters (or in Manx territorial waters) and three turbine compressor units at the compressor station at Brighthouse Bay on the Scottish coast (the purchase price being £38.363m plus VAT for the pipeline in Manx waters and the compressors and £27.911m with no VAT for the pipeline in international waters between the Isle of Man and Ireland). These prices were based on an apportionment of the actual cost of the pipeline and compressors, with various adjustments, the most important being the deduction of apportioned amounts of the EEC grant. The aggregate assets acquired by BMBF under the acquisition agreements are referred to below as 'the plant'.

[9] The lease to BGE was for (i) a pre-primary period (covering the initial commissioning of the plant) from 31 December 1993 to 30 September 1995 and (ii) a primary period of 31 years from 1 October 1995. Thereafter the lease



a could be renewed for a succession of one-year periods. The basic rent was specified in an 'initial cash flow', a computer printout annexed to a lengthy financial schedule forming part of the lease. The rent (which was chargeable to corporation tax in the hands of BMBF) was to be about £2.86m in 1995 and about £6.01m in 1996, escalating by 5% annually in each later year. But Pt 3 of the financial schedule provided for the rents to be adjusted (by the mechanism of one or more revised cash flows) if any of the assumptions in Pt 2 of the schedule (which centred on corporation tax matters, and in particular rates of corporation tax and the availability of writing-down allowances) proved incorrect, either initially or as a result of changes during the course of the lease. In the event of default, BMBF became entitled to termination payments intended to put it in the same financial position as if the lease had continued and there were quite elaborate provisions for re-delivery of the plant to BMBF and its sale to enable the termination payments to be recovered.

[10] BGE did not intend to operate the pipeline itself. It incorporated a wholly-owned United Kingdom subsidiary called BGE(UK) Ltd (BGE(UK)) on 17 June 1993. It is resident and carries on a substantial business in the United Kingdom. On the same day as the lease to BGE was executed, it granted a sub-lease to BGE(UK) for the 'Sub Lease Period', an expression which appears (after a lengthy paper chase through a thicket of definitions) to correspond exactly to the period of the lease. (No one has ever taken the point that the sub-lease might have taken effect as an assignment.) In general the terms of the sub-lease followed those of the lease, but there was an important difference as regards rent. The sub-lease provided for the same escalating rental payments as in the initial cash flow, but without any provision for adjustments.

[11] At the same time BMBF, BGE and BGE(UK) entered into an assumption agreement by which BGE(UK) assumed direct liability to BMBF to pay the rent due under the head lease. BMBF agreed to accept these payments in discharge of BGE's liability and BGE agreed to treat them as discharging BGE(UK)'s liability under the sublease. The only complication arose from the absence of any provision for adjustment of the rent under the sublease. Park J described what he understood would be the position if the rent under the headlease was adjusted ([2002] EWHC 1527 (Ch) at [18], [2002] STC 1068 at [18]):

'If corporation tax rates changed, the headlease rent payable to BMBF would change but the sublease rent payable by BGE(UK) would remain the same. If I have understood correctly how it would work, if the headlease rent went up BGE(UK) would still pay the full amount of the sublease rent to BMBF, and the balance of the (now) increased headlease rent would be paid by BGE to BMBF; if the headlease rent went down BGE(UK) would pay part of the sublease rent to BMBF (that part being equal to the (now) reduced headlease rent) and would pay the balance of the sublease rent to BGE.'

j It has not been suggested that the judge's understanding was incorrect.

[12] As the most important part of BGE(UK)'s business was to be to transport BGE's gas through the pipeline to Ireland, BGE(UK) and BGE entered into a transportation agreement and an ancillary licence agreement. BGE(UK) undertook the obligation to transport natural gas through the pipeline in consideration of annual payments calculated by various formulae. The details

are very complicated and are not relevant, except that it is common ground that (as provisions for 5% annual escalations suggest) the payments were intended to ensure that BGE(UK) had sufficient funds to meet the rent payable to BGE under the sublease. BGE's payments to BGE(UK) were to be paid into a designated transportation account.

#### THE SCHEME

[13] If the transactions so far described—the sale to BMBF, the lease back, the sublease to BGE(UK) and the assumption and transportation agreements—were all that there was to be said about the transaction, the Inland Revenue would accept that BMBF is entitled to capital allowances. It has acquired the pipeline in the course of its trade and leased it back to BGE at a rent which reflects its entitlement to capital allowances (and provides for an increase if those allowances are not obtainable). The sublease, assumption agreement and transportation agreement were essentially Irish matters with which BMBF was not particularly concerned.

[14] The challenge by the Inland Revenue arises from the fact that all these transactions formed part of a larger scheme devised by Barclays de Zoete Wedd Ltd (BZW), another company in the Barclays group. It carried on the business of investment banking and acted as adviser to BGE. As the Special Commissioners found, it was plain on the documents that all the arrangements were organised and set in motion by BZW as part of a co-ordinated scheme. The relevant parts of the scheme which have not so far been described concerned the disposal of the £91m which BMBF paid for the pipeline. From the point of view of BMBF, these were described as the 'security arrangements', since they supported a guarantee of the rent payable under the lease and assumption agreement. The Inland Revenue, on the other hand, say that if one looks at the scheme as a whole, they were not security arrangements. They neutralised the effect of the transaction in providing finance to BGE and took it outside the scope of s 24(1).

[15] BMBF required a guarantee of BGE(UK)'s liability to pay the rent. This guarantee was provided by Barclays Bank itself pursuant to a guarantee facility agreement made with BGE(UK). As counter-security for its potential liability under the guarantee, Barclays Bank required BGE(UK) to provide a charge over the £91m. For this purpose, BGE deposited the money with a Jersey company called Deepstream Investments Ltd (Deepstream) which was managed by a company in the Barclays group. The deposit agreement, approved by Barclays, provided for Deepstream 'to repay the Deposit' by a series of payments, described as 'A', 'B' or 'C' amounts, over a period ending in 2025 (except that the B payments ended in 2001). The amounts totalled—indeed the A amounts by themselves totalled—much more than £91m. It was expressly provided that Deepstream was not required to make any other payment of any nature to BGE.

[16] The security in favour of Barclays Bank was then created by the following transactions. (a) As security for its obligations to BGE(UK) under the transportation agreement, BGE assigned its interest in the Deepstream deposit to BGE(UK). It also charged a current account held in the name of BGE. (b) As security for its obligations to Barclays under the guarantee facility agreement BGE(UK) assigned to Barclays its interest in the Deepstream deposit, its interest in the charged BGE account, and its rights under the

a transportation agreement, and it also charged its interest in the transportation account provided for by the transportation agreement. (c) There was a deposit agreement between Deepstream and Barclays Finance Co (Isle of Man) Ltd (BloM), a Barclays company registered in the Isle of Man, under which Deepstream placed with BloM an amount equal to the sum deposited with Deepstream by BGE. (d) Deepstream executed a deed of indemnity in favour of Barclays in respect of Barclays' obligations under its guarantee of BGE(UK)'s obligations to BMBF. As security for the indemnity Deepstream assigned to Barclays its interest in the deposit with BloM and granted Barclays fixed and floating charges over all its assets.

[17] BMBF had, unsurprisingly, borrowed the £91m which it paid for the pipeline from Barclays Bank. And BloM kept its funds on deposit with Barclays Bank. So, as the Special Commissioners and Park J pointed out, the £91m passed from Barclays Bank to BMBF, from BMBF to BGE, from BGE to Deepstream, from Deepstream to BloM and from BloM back to Barclays Bank again. The effect, as Park J said, was that BGE, having sold the pipeline, was unable to get its hands on the purchase price. It had to remain on deposit with Deepstream and be paid out, year by year, partly (in the form of A payments) to discharge the liability for rent under the lease and partly (in the form of B and C payments) for the benefit of BGE. And the benefit obtained by BGE was entirely attributable to BMBF being able to pass on the benefit of its capital allowances.

e THE DECISIONS OF THE SPECIAL COMMISSIONERS AND THE JUDGE

[18] The Special Commissioners (whose decision is reported in an anonymised form in [2002] STC (SCD) 78 and [2002] STC 1068 at 1070–1084) found as a fact that the events of 31 December 1993 were pre-ordained and designed by BZW to be a composite whole. That finding has not been f challenged. The circularity of the payments of the £91m was not an essential part of the scheme. The terms upon which BMBF bought and leased back the pipeline were commercial terms negotiated at arm's length and, as a matter of history, the scheme originally contemplated that a company outside the Barclays group would be the purchaser and lessor. Likewise, the terms upon which Barclays Bank provided the guarantee were ordinary commercial terms. g It could have been provided by a different bank without affecting the way in which the scheme worked. In fact, however, the payments did circulate within the Barclays group.

[19] Park J, who has great experience in these matters, described the term of the Deepstream deposit agreement between BGE and Deepstream as most h unusual. He acknowledged (at [29]) that the circularity was not a necessary part of the scheme and also that the circulation of the £91m had created a trail of obligations to make periodic payments which would not be entirely circular:

j 'Although the A payments from Deepstream to BGE would be within the circle (moving on to BGE(UK), thence to BMBF, and thence to [Barclays'] group treasury), the B and C payments would not be: BGE would keep them. Further, the transportation agreement would be likely to mean that the payments from BGE to BGE(UK) were greater than the amounts which went round the circle (to say nothing of the prospect of BGE(UK) making substantial profits by exploiting the capacity of the pipeline in so far as it

was not fully used by BGE). And ... BMBF would need more than the receipts which it would get from BGE(UK) under the assumption agreement in order fully to service and repay its borrowing of £91m from [Barclays].'

[20] Nevertheless, the judge concluded, in agreement with the Special Commissioners, that the difference between what BMBF was receiving from BGE(UK) and what it had to pay Barclays to service its borrowing was represented by the benefit of the capital allowances. It was these allowances which provided the only new money introduced into the circular system and which enabled BGE to receive the only money to leave the system, namely the B and C payments from Deepstream. All the rest was passed round between Barclays companies.

[21] The Special Commissioners summed up their views on the effect of the transactions ([2002] STC (SCD) 78 at 93, [2002] STC 1068 at 1083–1084):

'The only benefit which [BGE] obtained from the very complicated arrangements choreographed by [BZW] were amounts B and C paid to it under the terms of the deposit agreement. Payments of amount A returned eventually to [BMBF] and from [BMBF] to the Bank. [BGE] was to benefit to an extent of £8.1m net and the [Irish] government was to receive £1.8m in stamp duty. Those payments would be financed entirely by United Kingdom taxpayers by means of the hoped for capital allowances. Without the capital allowances [BGE] would receive nothing, for the amounts of the rents would increase to take account of the non-availability of capital allowances. Looking at the matter in the round we accept Mr Goy's primary submission that the payment of money by [BMBF], even if it is said to have involved [BMBF] incurring expenditure, cannot be said to have been expenditure on the pipeline. The payment by [BMBF] to [BGE] achieved no commercial purpose. Commercially driven finance leasing is designed to provide working capital to the lessee. But [BGE] could not get its hands on the money. It parted with a valuable asset allegedly for £91,292,000 but received no immediate benefit from the transaction. [BMBF] provided no finance to [BGE] simply because the amounts had to be deposited as part of the arrangements with [Deepstream] to be repaid only in accordance with the deposit agreement with [Deepstream] ... In our judgment the purpose of the expenditure by [BMBF] on 31 December 1993 was not the acquisition of the plant and machinery but the obtaining of capital allowances which would result in ultimately a profit to [BGE] and fees payable to [BMBF] and [BZW]. The transaction had no commercial reality.'

[22] Park J agreed. He said (at [49]) that finance leasing ordinarily involved the provision of 'up-front finance' to the lessee: a capital sum used to buy the plant or refinance its previous acquisition:

'But in the transaction involved in the present case no up-front finance was provided. BGE already owned the pipeline and had paid for it with a loan from a syndicate of banks. After the transaction BGE was still able to use the pipeline as before, though by then it did so by virtue of the lease,



sublease and transportation agreement, and it still owed to the banks the money which it had borrowed. Nor was the £91m available to BGE for it to use in any other way to finance transactions or activities of its business.'

[23] In answer to the submission that BMBF had paid the £91m in consideration of the acquisition of the pipeline and had become its owner under the acquisition agreements, Park J said:

'[57] ... It is true that in a strictly legal sense one can say that BMBF incurred expenditure on the provision of the pipeline. That is what the two acquisition agreements said ... However, in the light of the *Ramsay* authorities I consider that I have to interpret and apply the statute in a wider way ... I have to ask: on what did BMBF *really* incur its expenditure of £91m? Was it really incurred on the provision of the pipeline, or was it really incurred on something else?

[58] ... My answer is that the expenditure was really incurred on the creation or provision of a complex network of agreements under which, in an almost entirely secured way, money flows would take place annually over the next 32 or so years so as to recoup to BMBF its outlay of £91m plus a profit.'

[24] The Special Commissioners and the judge therefore considered that BMBF did not incur expenditure of £91m in the provision of a pipeline for the purposes of its finance leasing trade because the transaction lacked commercial reality. The judge went so far as to say that the existence of the pipeline and the amount of the consideration were irrelevant. Because of the circularity of the payments, the scheme would have worked just as well whatever price had been named in the documents and whether there had actually been a pipeline or not.

#### THE COURT OF APPEAL

[25] The Court of Appeal (Peter Gibson, Rix and Carnwath LJ) ([2002] EWCA Civ 1853) unanimously allowed the appeal and set aside the order of the judge and the decision of the Special Commissioners. The judgments in the Court of Appeal are reported at [2003] STC 66. We shall return to them in the course of our discussion. The Inland Revenue appeal to this House and ask that the decision of Park J should be restored.

#### THE RAMSAY PRINCIPLE

[26] In treating the legal effect of the acquisition agreements as irrelevant for the purposes of s 24(1), the Special Commissioners and Park J said that they were applying the principles of construction first applied by this House in *W T Ramsay Ltd v IRC*, *Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300. These principles have since been discussed and explained in numerous cases both in lower courts and in your Lordships' House. But these attempts at clarification appear only to have raised fresh doubts and further appeals. Mr Aaronson QC, who appeared for BMBF, said that he spoke on behalf of the profession when he hoped that the House would take this opportunity to give definitive guidance.

[27] It is no doubt too much to expect that any exposition will remove all difficulties in the application of the principles because it is in the nature of questions of construction that there will be borderline cases about which people will have different views. It should however be possible to achieve some clarity about basic principles.

[28] As Lord Steyn explained in *IRC v McGuckian* [1997] 3 All ER 817 at 824, [1997] 1 WLR 991 at 999, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* case, however, revenue statutes were 'remarkably resistant to the new non-formalist methods of interpretation'. The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said, it was—

'those two features—literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately—[which] allowed tax avoidance schemes to flourish ...'

[29] The *Ramsay* case [1981] 1 All ER 865, [1982] AC 300 liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the influential speech of Lord Wilberforce. First ([1981] 1 All ER 865 at 871, [1982] AC 300 at 323), on the general approach to construction:

'What are "clear words" is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...'

[30] Secondly ([1981] 1 All ER 865 at 871, [1982] AC 300 at 323–324), on the application of a statutory provision so construed to a composite transaction:

'It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.'

[31] The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-believe') and that therefore ([1981] 1 All ER 865 at 873, [1982] AC 300 at 326):

'To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a

a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, is not such a loss (or gain) as the legislation is dealing with is in my opinion well, and indeed essentially, within the judicial function.'

b [32] The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6 at [8], [2001] 1 All ER 865 at [8], [2003] 1 AC 311: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'

e [33] The simplicity of this question, however difficult it might be to answer on the facts of a particular case, shows that the *Ramsay* case did not introduce a new doctrine operating within the special field of revenue statutes. On the contrary, as Lord Steyn observed in *McGuckian's* case [1997] 3 All ER 817 at 824, [1997] 1 WLR 991 at 999 it rescued tax law from being 'some island of literal interpretation' and brought it within generally applicable principles.

f [34] Unfortunately, the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard *Ramsay* as establishing a new jurisprudence governed by special rules of its own. This tendency has been encouraged by two features characteristic of tax law, although by no means exclusively so. The first is that tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, 'in the real world'. The second is that a good deal of intellectual effort is devoted to structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge.

j [35] There have been a number of cases, such as *IRC v Burmah Oil Co Ltd* [1982] STC 30, *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474 and *Carreras Group Ltd v Stamp Comr* [2004] UKPC 16, [2004] STC 1377 in which it has been decided that elements which have been inserted into a transaction without any business or commercial purpose did not, as the case might be, prevent the composite transaction from falling within a charge to tax or bring it within an exemption from tax. Thus in the *Burmah* case, a series of circular payments which left the taxpayer company in exactly the same financial position as before was not regarded as giving rise to a 'loss' within the meaning of the legislation. In *Furniss*, the transfer of shares to a subsidiary as

part of a planned scheme immediately to transfer them to an outside purchaser was regarded as a taxable disposition to the outside purchaser rather than an exempt transfer to a group company. In the *Carreras* case the transfer of shares in exchange for a debenture with a view to its redemption a fortnight later was not regarded as an exempt transfer in exchange for the debenture but rather as an exchange for money. In each case the court looked at the overall effect of the composite transactions by which the taxpayer company in *Burmah* suffered no loss, the shares in *Furniss* passed into the hands of the outside purchaser and the vendors in *Carreras* received cash. On the true construction of the relevant provisions of the statute, the elements inserted into the transactions without any commercial purpose were treated as having no significance. a b

[36] Cases such as these gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowsmith Assets Ltd* (2004) 6 ITLR 454 at 468: c d

‘[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.’ e

[37] The need to avoid sweeping generalisations about disregarding transactions undertaken for the purpose of tax avoidance was shown by *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] 1 All ER 865, [2003] 1 AC 311 in which the question was whether a payment of interest by a debtor who had borrowed the money for that purpose from the creditor himself and which had been made solely to reduce liability to tax, was a ‘payment’ of interest within the meaning of the statute which entitled him to a deduction or repayment of tax. The House decided that the purpose of requiring the interest to have been ‘paid’ was to produce symmetry by giving a right of deduction in respect of any payment which gave rise to a liability to tax in the hands of the recipient (or would have given rise to such a liability if the recipient had been a taxable entity). As the payment was accepted to have had this effect, it answered the statutory description notwithstanding the circular nature of the payment and its tax avoidance purpose. f g

[38] *MacNiven* shows the need to focus carefully upon the particular statutory provision and to identify its requirements before one can decide whether circular payments or elements inserted for the purpose of tax avoidance should be disregarded or treated as irrelevant for the purposes of the statute. In the speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been. This is not an h j



a unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts a priori as either 'commercial' or 'legal'. That would be the very negation of purposive construction: see the *Arrowtown* case (2004) 6 ITLR 454 at 468–469, 470 (paras 37 and 39) per  
b Ribeiro PJ and the perceptive judgment of the Special Commissioners (Theodore Wallace and Julian Ghosh) in *Campbell v IRC* [2004] STC (SCD) 396.

[39] The present case, like *MacNiven*, illustrates the need for a close analysis of what, on a purposive construction, the statute actually requires. The object of granting the allowance is, as we have said, to provide a tax equivalent to the normal accounting deduction from profits for the depreciation of machinery  
c and plant used for the purposes of a trade. Consistently with this purpose, s 24(1) requires that a trader should have incurred capital expenditure on the provision of machinery or plant for the purposes of his trade. When the trade is finance leasing, this means that the capital expenditure should have been incurred to acquire the machinery or plant for the purpose of leasing it in the  
d course of the trade. In such a case, it is the lessor as owner who suffers the depreciation in the value of the plant and is therefore entitled to an allowance against the profits of his trade.

[40] These statutory requirements, as it seems to us, are in the case of a finance lease concerned entirely with the acts and purposes of the lessor. The Act says nothing about what the lessee should do with the purchase price, how  
e he should find the money to pay the rent or how he should use the plant. As Carnwath LJ said in the Court of Appeal ([2003] STC 66 at [54]):

[‘T]here is nothing in the statute to suggest that “up-front finance” for the lessee is an essential feature of the right to allowances. The test is based on  
f the purpose of the lessor’s expenditure, not the benefit of the finance to the lessee.’

[41] So far as the lessor is concerned, all the requirements of s 24(1) were satisfied. Mr Boobyer, a director of BMBF, gave unchallenged evidence that from its point of view the purchase and lease back was part of its ordinary trade  
g of finance leasing. Indeed, if one examines the acts and purposes of BMBF, it would be very difficult to come to any other conclusion. The finding of the Special Commissioners that the transaction ‘had no commercial reality’ depends entirely upon an examination of what happened to the purchase price after BMBF paid it to BGE. But these matters do not affect the reality of the expenditure by BMBF and its acquisition of the pipeline for the purposes of its  
h finance leasing trade.

[42] If the lessee chooses to make arrangements, even as a preordained part of the transaction for the sale and lease back, which result in the bulk of the purchase price being irrevocably committed to paying the rent, that is no concern of the lessor. From his point of view, the transaction is exactly the  
j same. No one disputes that BMBF had acquired ownership of the pipeline or that it generated income for BMBF in the course of its trade in the form of rent chargeable to corporation tax. In return it paid £91m. The circularity of payments which so impressed Park J and the Special Commissioners arose because BMBF, in the ordinary course of its business, borrowed the money to buy the pipeline from Barclays Bank and Barclays happened to be the bank

which provided the cash collateralised guarantee to BMBF for the payment of the rent. But these were happenstances. None of these transactions, whether circular or not, were necessary elements in creating the entitlement to the capital allowances.

[43] For these reasons, which are substantially the same as those of the Court of Appeal, we would dismiss this appeal.

*Appeal dismissed.*

Celia Fox Barrister.

## R v Montila

[2004] UKHL 50

## HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, BARONESS  
HALE OF RICHMOND AND LORD CARSWELL

2, 25 NOVEMBER 2004

*Criminal law – Proceeds of crime – Concealing or converting property known to be proceeds of criminal conduct or having reasonable grounds for suspecting property to be proceeds of criminal conduct – Whether necessary for prosecution to prove property actually proceeds of criminal conduct – Criminal Justice Act 1988, s 93C(2).*

*Criminal law – Drugs – Drug trafficking – Concealing or converting property known to be proceeds of drug trafficking or having reasonable grounds for suspecting property to be proceeds of drug trafficking – Whether necessary for prosecution to prove property actually proceeds of drug trafficking – Drug Trafficking Act 1994, s 49(2).*

The defendants were awaiting trial for money laundering offences under s 49(2)<sup>a</sup> of the Drug Trafficking Act 1994 and s 93C(2)<sup>b</sup> of the Criminal Justice Act 1988. Those two subsections related to the proceeds of drug trafficking, and the proceeds of crime. Each subsection provided that a person was guilty of an offence if, 'knowing or having reasonable grounds to suspect' that any property was, or in whole or in part directly or indirectly represented, 'another person's proceeds' of drug trafficking or of crime (respectively), he concealed or disguised that property, or converted or transferred it or removed it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for a drug trafficking offence, or an offence under the relevant part of the 1988 Act (respectively) or the making or enforcement of a confiscation order. Section 49(1) of the 1994 Act and s 93C(1) of the 1988 Act created offences where the person's conduct related to his own proceeds of drug trafficking or crime. A preparatory hearing took place to resolve the question whether it was necessary for the Crown to prove that the property being converted was in fact the proceeds of drug trafficking or of crime. The Crown contended that whilst it had to prove that the defendants knew or had reasonable grounds to suspect that the property in question was the proceeds of drug trafficking or of crime, it did not have to prove that the property was in fact such proceeds. The judge rejected that argument, and the Crown appealed. The Court of Appeal allowed the appeal, and the defendants appealed against that decision.

**Held** – In a prosecution under s 93C(2) of the 1988 Act or under s 49(2) of the 1994 Act, it was necessary for the Crown to prove that the property being converted was, in the case of the 1988 Act, the proceeds of crime and, in the case of the 1994 Act, the proceeds of drug trafficking. The opening words of the subsections, 'knowing or having reasonable grounds to suspect', provided a strong indication that they were directed to activities in relation to property

a Section 49, so far as material, is set out at [12], below

b Section 93C, so far as material, is set out at [19], below

which was in fact 'another person's proceeds of drug trafficking' or 'another person's proceeds of criminal conduct'. A person could have reasonable grounds to suspect that property was one thing (A), when in fact it was something different (B). But that was not so when the question was what a person knew. A person could not know that something was A when in fact it was B. A further indication was found in the absence of any defence if the property which a defendant was alleged to have known or had reasonable grounds to suspect to be 'another person's proceeds' turned out to be something different. Furthermore, in the context of ss 49(1) of the 1994 Act and 93C of the 1988 Act there was no doubt that the Crown had to prove that the property in question was the proceeds of drug trafficking or of criminal conduct. Moreover, such indications as could be gathered from the headings and sidenotes to the 1994 and 1988 Acts were that the mischief that Parliament had been seeking to address was the concealment, conversion or transfer of actual proceeds for the purpose of avoiding prosecution for the conduct that gave rise to them or the making or enforcement of a confiscation order calculated with reference to the value of those proceeds, or, in other words, that the fact that the property in question had its origin in drug trafficking or criminal conduct was an essential part of the actus reus of the offence (see [27]–[29], [37], [45], below).

Decision of the Court of Appeal [2004] 1 All ER 877 reversed.

Per curiam. Headings and sidenotes, subject to the fact that they are unamendable and that therefore less weight can be attached to them than to parts of an Act that are open to parliamentary debate, are open to consideration as part of an enactment when it reaches the statute book (see [33], [34], below).

Dicta of Phillimore LJ in *Re Woking UDC (Basingstoke Canal) Act 1911* [1914] 1 Ch 300 at 322 and of Avory J in *R v Hare* [1934] 1 KB 354 at 355–356 disapproved.

## Notes

For concealing or transferring proceeds of drug trafficking and for offences in connection with money laundering, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) paras 408A, 408C respectively.

Section 93C of the Criminal Justice Act 1988 and s 49 of the Drug Trafficking Act 1994 were repealed by ss 456, 457 of, paras 1, 17(1), (2)(a), 25(1), (2)(a) of Sch 11 to, and Sch 12 to the Proceeds of Crime Act 2002 with effect from 24 February 2003.

For s 93C of the Criminal Justice Act 1988, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 989.

For s 49 of the Drug Trafficking Act 1994, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1287.

## Cases cited in the report

*Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763, [1962] 3 WLR 694, HL.

*Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97, [1999] 1 WLR 2093, HL.

*Pickstone v Freemans plc* [1988] 2 All ER 803, [1989] AC 66, [1988] 3 WLR 265, HL.

*R v El-Kurd* [2000] All ER (D) 1446, CA.

*R v Hare* [1934] 1 KB 354, [1933] All ER Rep 550, CA.



- a *R v Shivpuri* [1986] 2 All ER 334, [1987] AC 1, [1986] 3 WLR 988, HL.  
*R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.  
*Westminster City Council v Haywood (No 2)* [2000] 2 All ER 634, [2000] ICR 827.  
*Woking UDC (Basingstoke Canal) Act 1911, Re* [1914] 1 Ch 300, CA.

b **Cases referred to in list of authorities**

- A-G's Ref (No 4 of 2003)* [2004] EWCA Crim 1994, [2004] All ER (D) 379 (Jul).  
*Anderton v Ryan* [1985] 2 All ER 355, [1985] AC 560, [1985] 2 WLR 968, HL.  
*Bird v Adams* [1972] Crim LR 174, DC.  
*R v Causey* [1999] CA Transcript 7879.  
c *R v Hulbert* (1979) 69 Cr App R 243, CA.  
*R v Hussain (Akhtar)* [2002] EWCA Crim 6, [2002] 2 Cr App R 363.  
*R v Korniak* (1982) 76 Cr App R 145, CA.  
*R v Singh* [2003] EWCA Crim 3712, [2003] All ER (D) 358 (Dec).  
*R v Taaffe* [1984] 1 All ER 747, [1984] AC 539, [1984] 2 WLR 326, HL.

d **Appeal**

- The defendants, Stephen William Montila, Kim Newbury (also known as Kim Milton), Amanda Joan Turrell, Ian Simpson, Robert Daniel McArthur Rankin, Darren Robert Rankin, William Leonard Chidley, Warren Gervaise Baseley, and Anthony Leslie Newell, appealed with leave of the Appeal Committee of the House of Lords given on 5 May 2004, from the decision of the Court of Appeal (Scott Baker LJ, Jackson and Hunt JJ) on 3 November 2003 ([2003] EWCA Crim 3082, [2004] 1 All ER 877) allowing the appeal of the Crown under s 35(1) of the Criminal Procedure and Investigations Act 1996 from the decision of Judge van der Bijl in the Crown Court at Canterbury on 19 December 2002 at a preparatory hearing under s 29 of the 1996 Act to resolve the point of law set out at [5], below arising in criminal proceedings against the defendants brought under s 49(2) of the Drug Trafficking Act 1994 and s 93C(2) of the Criminal Justice Act 1988. The facts are set out in the report of the Appellate Committee.

- g *Gibson Grenfell QC* and *David Whittaker* (instructed by *Hughmans*) for the appellants.

*David Perry* and *Andrew Bird* (instructed by the *Solicitor for Customs and Excise*) for the Crown.

- h Their Lordships took time for consideration.

25 November 2004. The APPELLATE COMMITTEE delivered the following report.

- j [1] This is the considered opinion of the Committee.

[2] This appeal concerns the meaning of words in legislation which was introduced to combat that aspect of criminal conduct which is popularly known as money laundering.

[3] In its typical form money laundering occurs when criminals who profit from their criminal enterprises seek to bring their profits within the

legitimate financial sector with a view to disguising their true origin. Their aim is to avoid prosecution for the offences that they committed and confiscation of the proceeds of their offences. Various measures have been taken both internationally and in domestic law aimed at detecting and deterring this activity. They include much closer regulation of the financial sector and the introduction of measures requiring known or suspected money laundering to be reported to the authorities. They also include the enactment of a series of offences to bring the activities of third parties within the reach of the criminal law.

#### THE ISSUE

[4] The appellants, who are nine in number, are awaiting trial in the Crown Court at Canterbury. They were arraigned on 18 December 2002 on three indictments. Each of the three indictments has been laid against three of the appellants. Each of them contains counts laid in pairs against those named in the indictment. Each pair comprises one count of converting the proceeds of drug trafficking, contrary to s 49(2)(b) of the Drug Trafficking Act 1994, and one count of converting the proceeds of criminal conduct, contrary to s 93C(2) of the Criminal Justice Act 1988. The particulars of dates, places and sums of money are identical within each pair of counts. It is alleged that between 17 March 2000 and 20 September 2001 in 34 separate transactions the appellants used the services of one or another of two bureaux de change in London to convert a total of over £3m in sterling banknotes into Dutch guilders.

[5] A preparatory hearing took place before Judge van der Bijl at Canterbury under s 29 of the Criminal Procedure and Investigations Act 1996. It was held to resolve a point of law which had been raised about the elements within each of the twin offences that the prosecution must prove to establish guilt. The question is whether it is necessary for the Crown to prove that the property being converted was in fact the proceeds, in the case of the 1994 Act, of drug trafficking and, in the case of the 1988 Act, of crime. The argument for the Crown was that, while it had to prove that the defendants knew or had reasonable grounds to suspect that the property being converted was the proceeds of drug trafficking or of criminal conduct, it did not have to prove that the property was in fact those proceeds.

[6] On 19 December 2002 Judge van der Bijl held that the clear and unambiguous implication of the words used by the relevant subsections was that the foundation stone of the offences which they created was that the alleged offenders were dealing with the proceeds of drug trafficking or of criminal conduct. So it was for the Crown to prove that the property being converted was in fact the proceeds of that activity. The prosecutor appealed to the Court of Appeal by way of an interlocutory appeal under s 35(1) of the 1996 Act. On 3 November 2003 the Court of Appeal (Scott Baker LJ, Jackson and Hunt JJ) ([2003] EWCA Crim 3082, [2004] 1 All ER 877, [2004] 1 WLR 624), allowed the appeal by the Crown. It held that it was not necessary, to prove an offence under sub-s (2) of either s 49 of the 1994 Act or s 93C of the 1988 Act, that the property was in the case of the former the proceeds of drug trafficking or in the case of the latter the proceeds of crime: [2004] 1 All ER 877 at [35].

a [7] The Court of Appeal certified under s 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in its decision, namely:

b 'In a prosecution under s 93C(2) of the Criminal Justice Act 1988 or under s 49(2) of the Drug Trafficking Act 1994 is it necessary for the Crown to prove that the property was, in the case of the 1988 Act, the proceeds of crime and, in the case of the 1994 Act, the proceeds of drug trafficking?'

#### THE STATUTORY BACKGROUND

c [8] The offences with which the appellants have been charged found their way into domestic law in response to international initiatives. This forms an important part of the background. A brief review of the history will help to put the offences into their context. An understanding of the context in which the draftsman was working when describing the offences sets the scene for the words that were used to describe them.

d [9] On 19 December 1988 the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988; TS 26 (1992); Cm 1927) (the Vienna Convention) was adopted in Vienna. It was noted in the preamble that the parties to the convention were deeply concerned by the magnitude of a rising trend in the illicit production of and demand for and traffic in narcotic drugs and psychotropic substances, e and that they were aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organisations to penetrate, contaminate and corrupt the structure of government, legitimate commercial and financial business and society at all its levels. The purpose of the convention was to promote co-operation among the parties so that they f might address more effectively the various aspects of illicit traffic having an international dimension.

[10] Article 3 of the Vienna Convention provided that each party was to adopt such measures as might be necessary to establish as criminal offences under its domestic law, when committed intentionally, a variety of activities g in connection with narcotic drugs and psychotropic substances. The activities listed in para (a) include their production, offering for sale, transportation and importation. The following activities were listed in para (b):

h 'i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences ...'

j

Paragraph (c) contains a further list of activities, subject to each party's constitutional principles and the basic concepts of its legal system, among which are the following: a

'i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences ...' b

[11] The Criminal Justice (International Co-operation) Act 1990 was enacted to enable the United Kingdom to join with other countries in implementing the convention. Part II of the Act was headed 'The Vienna Convention'. The first group of sections in this part, comprising ss 12 and 13, was headed 'Substances useful for manufacture of controlled drugs'. The second group, comprising ss 14 to 17, was headed 'Proceeds of drug trafficking'. Section 14 was accompanied by the sidenote 'Concealing or transferring proceeds of drug trafficking'. c

[12] The first three subsections of s 14 of the 1990 Act were in these terms: d

'(1) A person is guilty of an offence if he—(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for a drug trafficking offence or the making or enforcement in his case of a confiscation order. e

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for a drug trafficking offence or the making or enforcement of a confiscation order. f

(3) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires that property for no, or for inadequate, consideration.' g

[13] Section 14 of the 1990 Act was repealed in its application to England and Wales, but not to Scotland, by s 67(1) of and Sch 3 to the 1994 Act. The offences which had been created by s 14(1) and (2) of the 1990 were re-enacted in identical terms as ss 49(1) and (2) of the 1994 Act. h

[14] Section 14(3) of the 1990 Act was replaced for England and Wales by s 23A of the Drug Trafficking Act 1986, inserted by s 16(1) of the Criminal Justice Act 1993. That section was in its turn replaced by s 51(1) of the 1994 Act. It provides: j

'(1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking, he acquires or uses that property or has possession of it.'



a An equivalent provision was inserted into the Criminal Justice (Scotland) Act 1987 by s 17(1) of the 1993 Act.

b [15] It is to be noted that the offence under s 51(1) of the 1994 Act is narrower than that under s 14(3) of the 1990 Act. It requires actual knowledge, as does the offence under what was s 14(1) of the 1990 Act and is now s 49(1) of the 1994 Act. Proof of reasonable grounds for suspicion is not enough. It is also to be noted that ss 49 and 51 of the 1994 Act appear together in Pt III of the Act which is headed 'Offences in connection with proceeds of drug trafficking'. The sidenote to s 49 is 'Concealing or transferring proceeds of drug trafficking'. The sidenote to s 51 is 'Acquisition, possession or use of proceeds of drug trafficking'.

c [16] The example of the Vienna Convention in the field of illicit traffic in narcotic drugs and psychotropic substances was soon followed by European measures designed to combat the laundering of the proceeds of crime generally. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990; TS (Misc) 10 (1991); Cm 1561) (the Strasbourg Convention) was signed by the United Kingdom on 8 November 1990. It was noted in the preamble to this convention that the member states of the Council of Europe considered that the fight against serious crime called for the use of modern and effective methods on an international scale, and that they believed that one of those methods consisted of depriving criminals of the proceeds from crime. Chapter II set out a series of measures to be taken at national level to establish a system of international co-operation for the attainment of this aim. The term 'proceeds' was defined in art 1 as meaning any economic advantage from criminal offences.

e [17] Article 6, headed 'Laundering Offences', includes the following:

f '1. Each party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally; (a) the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions; (b) the concealment or disguise of the true nature, source, location, disposition, movement, right with respect to, or ownership of, property, knowing that such property is proceeds; and, subject to its constitutional principles and the basic concepts of its legal system; (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds ...'

j [18] The Strasbourg Convention was followed by Council Directive (EEC) 91/308 (on prevention of the use of the financial system for the purpose of money laundering) (OJ 1991 L166 p 77). The expression 'money laundering' was defined for the purpose of the directive as meaning the following conduct when committed intentionally:

—the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the

property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action,

—the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity,

—the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity,

—participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing paragraphs.' (See art 1.)

[19] The opportunity was taken in the Criminal Justice Act 1993 to implement provisions of Directive 91/308. Among the provisions in Pt III of that Act, under the heading 'Proceeds of Criminal Conduct', is s 31. The sidenote to this section is 'Concealing or transferring proceeds of criminal conduct'. It inserted the following section in the 1988 Act:

'93C.—(1) A person is guilty of an offence if he—(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conducts; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of the Act applies or the making or enforcement in his case of a confiscation order.'

[20] These two subsections, which extend to Scotland subject to the modifications set out in s 93E of the 1988 Act as inserted by s 33 of the 1993 Act, appear to have been modelled on s 14(1) and (2) of the 1990 Act. There is no equivalent in this legislation of the offence which was created by s 14(3) of the 1990 Act, which was repealed by s 79(14) of and Sch 6 to the 1993 Act.

[21] The offences which are currently to be found in the 1988 and 1994 Acts in relation to money laundering are now to be replaced by a new set of money laundering offences set out in Pt 7 of the Proceeds of Crime Act 2002. The relevant sections of that Act are not yet in force, but the approach which has been taken to the *actus reus* of these offences is instructive. Section 327(1) of the 2002 Act provides that a person commits an offence if he conceals, disguises, converts or transfers criminal property or removes criminal property from England and Wales or from Scotland or from Northern Ireland.

a [22] The meaning of the expression 'criminal property' in s 327(1) of the 2002 Act is to be found in s 340 of that Act, which provides:

(2) Criminal conduct is conduct which—(a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there.

b (3) Property is criminal property if—(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.'

c The description of the offences created by s 327(1) requires the prosecutor to prove that the property is criminal property within the meaning of s 340(3).

#### THE DECISION OF THE COURT OF APPEAL

d [23] The Court of Appeal noted that the judge had given six reasons for saying that he was fortified in the conclusion that he had reached as to what was implied by the words used in the subsection, namely that it was necessary for the Crown to prove that the property was the proceeds of drug trafficking or of criminal activity: [2004] 1 All ER 877 at [18]. These were (i) the decision in *R v El-Kurd* [2000] All ER (D) 1446, in which the Crown accepted that it had to establish that the money had come from drug trafficking or other criminal conduct, (ii) the terms of the 2002 Act, (iii) the fact that almost invariably third party money laundering cases include directly or indirectly evidence as to the provenance of the money, (iv) the reference in the subsection to assisting a person to avoid a prosecution, (v) relative unfairness between a principal subject to sub-s (1) and a third party subject to sub-s (2), and (vi) analysis of international treaties and conventions leading to the passing of the two Acts.

f [24] Having examined each of these points, the court said that it was not persuaded that any of them required the implication into sub-s (2) of words which would have the effect of extending the actus reus of the offence. Turning to the question of construction, the contrast between sub-ss (1) and (2) was noted. It was beyond argument that the Crown had to prove the source of the laundered money in sub-s (1), as the property had to be the proceeds of the defendant's own drug trafficking or criminal activity. But sub-s (2) was phrased in an entirely different way. There was no such requirement, and compelling reasons would be required to imply an additional element into the offence.

g [25] The court said that the Crown's construction was supported by fact that sub-s (2) envisaged commission of the offence where the defendant's state of mind fell short of actual knowledge, as reasonable suspicion was enough. The Crown's construction also made practical sense, in view of the difficulty of proving the source of cash where a person was discovered dealing with it. And, on the judge's construction, the Crown would have to prove in every case a coincidence between the defendant's view of the origin and the origin itself.

j On this view, if the Crown had to prove the origin of the cash, counts under the 1994 Act and the 1988 Act would be mutually destructive in relation to the same cash.

[26] Their Lordships prefer to start by examining the words of the subsection, and they propose to do so in the context of the legislation as a whole. There are then a number of other factors which the appellants say can

properly be taken into account in reaching a conclusion about the meaning of those words. a

#### THE MEANING OF THE WORDS USED

[27] Subsection (2) states that a person is guilty of an offence 'if knowing or having reasonable grounds to suspect that any property is ... another person's proceeds of drug trafficking' (see s 49(2) of the 1994 Act)/'of criminal conduct' (see s 93C(2) of the 1988 Act) he does one or other of the things described to 'that property' for the purpose which the subsection identifies. A person may have reasonable grounds to suspect that property is one thing (A) when in fact it is something different (B). But that is not so when the question is what a person knows. A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is the question whether the person knows that the property is A. b c

[28] The opening words of the subsection thus provide a strong indication that it is directed to activities in relation to property which is in fact 'another person's proceeds of drug trafficking' or 'another person's proceeds of criminal conduct', as the case may be. A further indication is to be found in the absence of any defence if the property which the defendant is alleged to have known or had reasonable grounds to suspect was another person's proceeds turns out to be something different. Subsequent events may show that the property that he was dealing with had nothing whatever to do with any criminal activity at all, but was the product of a windfall such as a win on the National Lottery. On the Crown's argument it is enough for it to be proved that he had the mens rea at the time when he was dealing with the property and that he was doing what he did for the purpose that the subsection identifies. d e

[29] Further indications that when the subsection refers to 'another person's proceeds' it proceeds on the basis that the property in question is in fact proceeds of the kind described are to be found in the surrounding context. Subsection (1), in the case of both s 49 of the 1994 Act and s 93C of the 1988 Act, states that a person is guilty if he does the things described in relation to 'his proceeds' of drug trafficking or of criminal conduct. The reader is left in no doubt that the Crown must prove that the property in question was of the kind the subsection describes, as the Crown for its part accepts without qualification. Then there is the offence created by s 14(3) of the 1990 Act. It was moved to another section in the 1994 Act, and it was not included in what became s 93C of the 1988 Act. But there is no reason to think that the words used in s 14(2) of the 1990 Act changed their meaning when they appeared in the same form in subsequent statutes. f g h

[30] It is in regard to s 14(3) that the weakness in the Crown's argument is revealed. There is no defence if the property turns out to not to have been another person's proceeds of drug trafficking or his criminal conduct. What this subsection says is that an offence is committed by a person who, having the state of mind that it describes, acquires the property for no, or for inadequate, consideration. This makes sense if the Crown has to prove that the origin of the property was of the kind described. But it makes no sense to say that the defendant was guilty of an offence of money laundering simply because he acquired the property for no or inadequate consideration, having reasonable j



- a grounds to suspect that this was its origin (his purpose being irrelevant in this case), if he is in a position to prove that it was not property of that kind at all.

#### HEADINGS AND SIDENOTES

- b [31] Then there are the headings to each group of sections and the sidenotes, or marginal notes, to each section. The legislation which is in issue in this case was considered and published with sidenotes in the old form. In fact the sidenotes are sidenotes no longer. In 2001, due to a change in practice brought about by the Parliamentary Counsel Office, they were moved so that they now appear in bold type as headings to each section in the version of the statute which is published by The Stationery Office: see *Bennion on Statutory Interpretation* (4th edn, 2002) p 636. They appear in that form in the Bills that are presented to Parliament, and they also appear in that form in amendments which propose the insertion of new clauses into the Bill. But it remains true that, as Lord Reid said in *Chandler v DPP* [1962] 3 All ER 142 at 145, [1964] AC 763 at 789, these components of a Bill, even in their current form, are not debated during the progress of a Bill through Parliament. They are part of the Act when it has been enacted and they are descriptive of its contents. But they are unamendable: *Bennion*, pp 608, 635–636.

- e [32] Mr Perry for the Crown submitted that it was well settled that a sidenote in an Act of Parliament does not constitute a legitimate aid to the construction of the section to which it relates. Mr Grenfell QC for the appellants said that he was willing to concede the point. But this is not a concession that can be accepted. It was based on a dictum of Phillimore LJ in *Re Woking UDC (Basingstoke Canal) Act 1911* [1914] 1 Ch 300 at 322, where he said:

- f ‘I am aware of the general rule of law as to marginal notes, at any rate in public general Acts of Parliament; but that rule is founded, as will be seen on reference to the cases, upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons.’

- g In *R v Hare* [1934] 1 KB 354 at 355–356 Avory J said:

- h ‘Headings of sections and marginal notes form no part of a statute. They are not voted on or passed by Parliament, but are inserted after the Bill has become law. Headnotes cannot control the plain meaning of the words of the enactment, though they may, in some case, be looked at in the light of preambles if there is any ambiguity in the meaning of the sections on which they can throw light.’

- j [33] These observations were not wholly accurate at the time they were made, and they are out of keeping with the modern approach to the interpretation of statutes and statutory instruments. It is not true that headings and sidenotes are inserted by ‘irresponsible persons’, in the sense indicated by Phillimore LJ. They are drafted by Parliamentary Counsel, who are answerable through the Cabinet Office to the Prime Minister. The clerks, who are subject to the authority of Parliament, are empowered to make what are known as printing corrections. These are corrections of a minor nature which do not alter the general meaning of the Bill. But they may very occasionally, on the

advice of the Bill's drafter, alter headings which because of amendments or for some other reason have become inaccurate: *Bennion*, p 609. Nor is it true that headings are inserted only after the Bill has become law. As has already been said, they are contained in the Bill when it is presented to Parliament. Each clause has a heading (previously a sidenote) which is there throughout the passage of the Bill through both Houses. When the Bill is passed, the entire Act is entered in the Parliamentary Roll with all its components, including those that are unamendable. As *Bennion* states at p 638, the format or layout is part of an Act.

[34] The question then is whether headings and sidenotes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes are included on the face of the Bill throughout its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.

[35] There is a further point that can be made. In *Pickstone v Freemans plc* [1988] 2 All ER 803 at 818, [1989] AC 66 at 127 Lord Oliver of Aylmerton said that the explanatory note attached to a statutory instrument, although it was not of course part of the instrument, could be used to identify the mischief which it was attempting to remedy: see also *Westminster City Council v Haywood* (No 2) [2000] 2 All ER 634 at 645, [2000] ICR 827 at 839 (para 19) per Lightman J. In *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [2000] 1 All ER 97 at 107–108, [1999] 1 WLR 2093 at 2103, it was said that an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous. In *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [5], [2002] 4 All ER 654 at [5], [2002] 1 WLR 2956 Lord Steyn said that, in so far as the explanatory notes that since 1999 have accompanied a Bill on its introduction and are updated during the parliamentary process cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed, such materials are always admissible aids to construction. It has become common practice for their Lordships to ask to be shown the explanatory notes when issues are raised about the meaning of words used in an enactment.

[36] The headings and sidenotes are as much part of the contextual scene as these materials, and there is no logical reason why they should be treated differently. That the law has moved in this direction should occasion no surprise. As Lord Steyn (at [5]) said in that case the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used.

[37] In the present case there are two features about the headings and the sidenotes that provide guidance. The first is that the subject matter of these sections is 'proceeds'—in the one case of drug trafficking, in the other of

a criminal conduct. The second is that no distinction is made as to subject matter between the various offence-creating subsections within each section. All three, in the case of the 1990 Act, and both, in the case of the 1994 and 1988 Acts, are grouped under the same heading and have the same sidenote. There is no indication here that the subject matter of the activities that are being criminalised need not, in the case of sub-s (2), actually be proceeds of drug trafficking or of criminal conduct. Such indications as can be gathered from the headings and sidenotes are to the contrary. They indicate that the mischief that Parliament was seeking to address was the concealment, conversion or transfer of actual proceeds for the purpose of avoiding prosecution for the conduct that gave rise to them or the making or enforcement of a confiscation order calculated with reference to the value of those proceeds. In other words, that the fact that the property in question had its origin in drug trafficking or criminal conduct is an essential part of the *actus reus* of the offence.

#### OTHER INDICATIONS

d [38] There are a number of other indications. Common to all three international instruments was the proposal that those third parties whose actions were to be criminalised were people who knew that the property which they were dealing with was the proceeds of drug trafficking or criminal conduct. Reasonable suspicion is not mentioned in any of them. It was of course open to the legislature to find its own solutions to the problem in the domestic system. There is no doubt that the effectiveness of the measures that were being introduced was assisted by enabling prosecutions to be brought where there was no evidence of actual knowledge but reasonable grounds to suspect could be established. But to broaden the scope of the third party offences still further so as to bring cases within their reach where the Crown could not prove that the property that was being dealt with was the proceeds of drug trafficking or criminal conduct would have been a significant departure from what had been asked for by the international instruments. One would have expected some indication of this to be given to Parliament, and there was none.

g [39] Two other points were mentioned in argument, but they carry little weight. First, there is the concession in *R v El-Kurd* [2000] All ER (D) 1446, in which the Crown accepted that it had to establish that the money had come from drug trafficking or other criminal conduct. That was a case where the defendants had been charged with four conspiracies, each of which was indicted as a conspiracy to commit offences under the 1994 Act on the one hand and under the 1988 Act on the other. As Latham LJ pointed out in para 26, the wording of each alternative depended upon whether the property was the proceeds of drug trafficking or criminal conduct. Secondly, there is the way the 2002 Act has dealt with the problem of money laundering.

j [40] All that need be said on the first point is that the concession, if that was what it was, could not have been held against the Crown if the interpretation for which it is now contending was the right one. There is some authority for the view that official statements by a government department which is responsible for administering an Act may be taken into account as persuasive authority as to what the Act means: *Bennion*, p 597. But the concession that was made in that case fell well short of being an official statement of that kind.

[41] As for the second, Parliament is of course free to restructure the offences that it creates in any way it likes. The language that it has chosen to use in the 2002 Act is different from that in the enactments which are in issue in this case. There is no room for any ambiguity. The property that is being dealt with in each case must be shown to have been criminal property. But it would be surprising if the intention was to reduce the scope of these offences. The problem of money laundering has not gone away. The fact that these offences have been designed on the assumption that proof that the property being dealt with was in fact criminal property fits into the pattern which was set by the international instruments and which the wording of the subsections themselves, when properly construed in their context, indicates.

#### THE EFFECT IN PRACTICE

[42] Mr Perry submitted that, if the Crown has to prove the origin of the property, counts alleging that the money was the proceeds of drug trafficking on the one hand and that it was the proceeds of criminal conduct on the other would be mutually destructive if applied to the same property. As Scott Baker LJ put in the Court of Appeal, the Crown would have to prove in every case a coincidence between the defendant's view of origin and the origin itself [2004] 1 All ER 877 at [34]. So the jury would have to be told that they could not convict under s 49(2) of the 1994 Act if the defendant thought that the money which was said to be the proceeds of drug trafficking might be the proceeds of criminal conduct, and that they could not convict under s 93C(2) of the 1988 Act if he thought that the money which was said to be the proceeds of criminal conduct might be the proceeds of drug trafficking.

[43] The problem which Mr Perry has identified is plain enough in theory. But it is not a sufficient reason for thinking, despite all the indications to the contrary, that Parliament intended that it should be solved by relieving the Crown of the burden of proving the coincidence. Proof that the origin of the property was of the kind which the subsection describes is, after all, a necessary element of the offence in sub-s (1). The coincidence does not need to be proved, because the allegation in a count under sub-s (1) is that the defendant is dealing with his own property. But the origin must be proved, and the evidence which goes to prove knowledge or reasonable grounds to suspect for the purposes of sub-s (2) will often be sufficient to justify the inference that the origin of the property was coincident with that state of mind.

[44] There are other answers to the problem, as Mr Grenfell pointed out. Where (as in this case) the counts are in pairs, the facts proved may be sufficient for a conviction pursuant to sub-ss (3) and (4) of s 6 of the Criminal Law Act 1967 of attempting to commit whichever of the two offences coincided with what the defendant suspected the origin of the property to be; for Scotland, see s 294 and para 10(1) of Sch 3 of the Criminal Procedure (Scotland) Act 1995. Mr Grenfell conceded that the effect of s 1(2) of the Criminal Attempts Act 1981 was that an accused who dealt with such property in these circumstances would be guilty of an attempt: *R v Shivpuri* [1986] 2 All ER 334, [1987] AC 1. Or it might have been open to the Crown, if there was a problem about proving origin, to charge the defendants with a conspiracy to launder money which had been obtained illicitly whether by way of drug trafficking or other criminal activity, as Latham LJ said in *R v El-Kurd* [2000] All ER (D) 1446 at para 47. The suggestion that the appellants' construction will put the Crown in an



a impossible position is not convincing. The problem appears to have been solved for the future by the approach which is taken in the 2002 Act to the definition of criminal property.

CONCLUSION

b [45] For these reasons their Lordships are satisfied that the judge's decision was right and ought not to have been reversed by the Court of Appeal. The appeal will be allowed and the certified question will be answered in the affirmative.

*Appeal allowed.*

Kate O'Hanlon Barrister.

**R v Ahmed and another**

[2004] EWCA Crim 2599

COURT OF APPEAL, CRIMINAL DIVISION

LATHAM LJ, PITCHER AND ROYCE JJ

15, 28 OCTOBER 2004

*Sentence – Confiscation order – Realisable property – Right to respect for private and family life – Value of offender's beneficial share in matrimonial home – Whether judge making confiscation order having discretion to exclude value of offender's beneficial share in computing realisable property – Whether breach of right to respect for private and family life – Criminal Justice Act 1988, ss 71(6)(b), 74 – Human Rights Act 1998, Sch 1, Pt I, art 8.*

The defendants stood convicted of certain money laundering offences. The judge found that they had each benefited from their criminal activities in substantial amounts. He made confiscation orders against each of them under s 71<sup>a</sup> of the Criminal Justice Act 1988. Under s 71(6) the sum which an order made by a court required an offender to pay was to be equal to the benefit in respect of which it was made, or 'the amount appearing to the court' to be 'the amount that might be realised', whichever was the less. Section 74 of the 1988 Act identified how the court was to identify 'the amount that might be realised' and provided, inter alia, that the value of property was the market value of a person's beneficial interest in the property. In assessing the defendants' realisable assets the judge took into account the value of their half shares in their respective matrimonial homes. The judge had accepted evidence that the probability was that the homes would have to be sold to meet the confiscation order, but he concluded that although he had a discretion as to whether or not to include the value of those assets, there were no exceptional circumstances justifying their exclusion. The defendants appealed. They contended that the judge had been correct to conclude that he had a discretion, but wrong in his exercise of it. They argued that a confiscation order based on the inclusion of an offender's share in the matrimonial home, which could only be met if the home were sold, engaged the rights of the innocent members of the family for respect to private and family life under art 8<sup>b</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and that as the interference with the rights of those family members might not be proportionate the phrase 'the amount appearing to the court' in s 71(6) should be construed in such a way as to grant a discretion to the court.

**Held** – After a court had concluded under s 71 of the 1988 Act that offenders had benefited from criminal activity, and had made findings as to the extent of that benefit, it had no discretion in relation to the assessment of the value of realisable property. That exercise required a simple application of the provisions of s 74 of the 1988 Act in computing what was, in effect, a statutory debt. The process did

<sup>a</sup> Section 71, so far as material, is set out at [4], below

<sup>b</sup> Article 8 is set out at [7], below

- a not involve any assessment of the way in which that debt might ultimately be paid, and therefore no questions arose at that stage under art 8 of the convention. Different considerations might arise if the debt were not met and the prosecution took enforcement action. If the court were asked to make an order for the sale of the matrimonial homes, rights under art 8 would be engaged, and it was at that stage that the court would have to consider whether an order for sale would be proportionate. Accordingly, the judge's decision had been right, albeit that he had wrongly concluded that he had a discretion (see [6], [11]–[13], below).

*R v Benjafield* [2002] 1 All ER 815 distinguished.

*Re Norris* [2001] 3 All ER 961 followed.

### c Notes

For confiscation orders, and for the right to respect for private and family life, see, respectively, 8(2) *Halsbury's Laws* (4th edn reissue) paras 150, 151 and 11(2) *Halsbury's Laws* (4th edn reissue) para 1285.

- d Sections 71 and 74 of the Criminal Justice Act 1988 were repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, para 17(1), (2)(a), Sch 12 with effect from 24 March 2003. Sections 71 and 74 of the 1988 Act continue to have effect where the offence was committed before 24 March 2003.

For the Criminal Justice Act 1988, ss 71, 74, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 950, 958.

- e For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

### Cases referred to in judgment

*De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, [1998] 3 WLR 675, PC.

- f *Norris, Re* [2001] UKHL 34, [2001] 3 All ER 961, [2001] 1 WLR 1389.

*R v Benjafield* [2002] UKHL 2, [2002] 1 All ER 815, [2003] 1 AC 1099, [2002] 2 WLR 235; *affg on other grounds* [2001] 2 All ER 609, [2003] 1 AC 1099, [2001] 3 WLR 75, CA.

- g *R v DPP, ex p Kebeline, R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

*R v Lee* [1996] 1 Cr App R (S) 135, CA.

*R v Rezvi* [2002] UKHL 1, [2002] 1 All ER 801, [2003] 1 AC 1099, [2002] 2 WLR 235; *affg on other grounds sub nom R v Benjafield, R v Leal, R v Rezvi, R v Milford* [2001] 2 All ER 609, [2003] 1 AC 1099, [2001] 3 WLR 75.

- h *R v Taigel* [1988] 1 Cr App R (S) 328, CA.

### Appeal

Muntaz Ahmed and Ghuluam Qureshi appealed against confiscation orders in the sums of £27,424.52 and £226,152.90 respectively made under s 71 of the Criminal Justice Act 1988 by Judge Winstanley in the Wood Green Crown Court on 8 July 2003 following the conviction of Ahmed of a conspiracy to contravene s 49(2) of the Drug Trafficking Act 1994 and/or s 93C(2) of the 1988 Act, contrary to s 1(1) of the Criminal Law Act 1977 and the guilty plea of Qureshi to two counts of conspiracy to contravene s 93C(2) of the 1988 Act, contrary to s 1(1) of the 1977 Act. The facts are set out in the judgment of the court.

j

*Michael House* (instructed by *Birds Solicitors*) for Ahmed.

*Simon Farrell QC* (instructed by the *Registrar of Criminal Appeals*) for Qureshi.

*Michael Brompton QC* and *Janet Weeks* (instructed by *HM Customs & Excise*) for the Crown.

*Cur adv vult*

15 October 2004. The court dismissed the appeal for reasons to be given later.

28 October 2004. The following judgment of the court was delivered.

**LATHAM LJ.**

[1] The appellant Qureshi pleaded guilty to two counts of conspiracy to contravene s 93C(2) of the Criminal Justice Act 1988, contrary to s 1(1) of the Criminal Law Act 1977. The particulars were that he, together with others, conspired to convert cash which he knew or had reasonable grounds to suspect was, in whole or in part directly or indirectly represented, another person's proceeds from criminal conduct for the purpose of assisting another person to avoid prosecution. The appellant Ahmed was convicted of a conspiracy to contravene s 49(2) of the Drug Trafficking Act 1994 and/or s 93C(2) of the 1988 Act, contrary to s 1(1) of the 1977 Act. The particulars were that he together with others conspired to convert cash which he knew or had reasonable grounds to suspect was, or in whole or in part directly represented, another person's proceeds of either drug-trafficking or other criminal conduct or both for the purpose of assisting another to avoid prosecution for either a drug-trafficking offence or an offence to which Pt VI of the 1988 Act applied. We have dismissed the appellant Ahmed's appeal against his conviction and allowed in part his appeal against sentence in so far as it related to the sentence of imprisonment which was imposed upon him. On 8 July 2003, the judge made confiscation orders against both appellants. In the case of the appellant Qureshi, he made a confiscation order in the sum of £226,152.90; and in the case of the appellant Ahmed he made a confiscation order in the sum of £27,424.52. In each case he imposed a sentence of imprisonment in default of payment. They both appeal against those orders. At the hearing, we dismissed those appeals and now give our reasons.

[2] Each appeal raises a similar question of some practical importance in relation to the application of the confiscation provisions of the 1988 Act, as amended. In the case of the appellant Qureshi, the judge assessed the benefit figure, that is the figure which, in accordance with the Act, was to be taken as the benefit that he had obtained from his criminal activity at £12,257,135.88; and in the case of the appellant Ahmed he assessed the benefit figure in the sum of £1,385,000. The confiscation orders that he made were based on his assessment of their respective realisable assets. In computing the latter, he took into account the value in each case of the appellants' half share in his matrimonial home. He accepted evidence from the families that in each case the probability was that the homes would have to be sold to meet the confiscation order. The appellants' submitted to the judge that he had a discretion as to whether or not to include the value of those shares. The judge accepted those submissions. He none the less concluded that there were no exceptional circumstances which justified his



a excluding them. The appellants submit to us that the judge was correct in  
b concluding that he had a discretion, but that he was wrong in exercising the  
discretion as he did. The prosecution submit, as they did to the judge, that he had  
no such discretion, but that if he had, he was entitled to come to the conclusion  
that he did.

[3] There is no doubt that prior to the amendment of the 1988 Act, the court  
b did have a general discretion in relation to the making of a confiscation order  
under s 71. If the prosecution applied for a confiscation order, s 71 gave to the  
court a power to make an order 'requiring him to pay such sum as the court  
thinks fit'. These words clearly gave the court a discretion not merely in relation  
c to the amount of an order but also as to whether to make any order at all. We  
have been referred to two cases decided by this court under the original  
provisions of the 1988 Act, *R v Lee* [1996] 1 Cr App R (S) 135 and *R v Taigel* [1988]  
1 Cr App R (S) 328. In both cases the courts were concerned with the same  
question as that which has been raised before us. In both the judge had included  
the value of the appellant's interest in the matrimonial home when determining  
the amount of the confiscation order. In each there was evidence that in order to  
d raise the sum required to be paid by the confiscation order so assessed, the  
matrimonial home would have to be sold as a result of which the family would  
be rendered homeless. In both cases, this court held that whilst there was no  
justification for a rule precluding the court from taking into account the value of  
the offender's interest in the matrimonial home, none the less on the facts of  
those cases, the court, in the exercise of its discretion, should not have done so.

e [4] The Proceeds of Crime Act 1995, however, made substantial changes to  
the confiscation provisions of the 1988 Act. Section 71, as amended provided:

f '(1) Where an offender is convicted, in any proceedings before the Crown  
Court, or a magistrates court, of an offence of a relevant description, it shall  
be the duty of the court—(a) if the prosecutor has given written notice to the  
court that he considers that it would be appropriate for the court to proceed  
under this section, or (b) if the court considers, even though if it has not been  
given such notice, that it would be appropriate for it so to proceed, to act as  
follows before sentencing or otherwise dealing with the offender in respect  
of that offence or any other relevant criminal conduct.

g (1A) The court shall first determine whether the offender has benefited  
from any relevant criminal conduct.

h (1B) ... if the court determines that the offender has benefited from any  
relevant criminal conduct, it shall then—(a) determine in accordance with  
subsection (6) below the amount to be recovered in his case by virtue of this  
section, and (b) make an order under this section ordering the offender to  
pay that amount ...

j (6) ... the sum which an order made by a court under this section requires  
an offender to pay shall be equal to—(a) the benefit in respect of which it is  
made; or (b) the amount appearing to the court to be the amount that might  
be realised at the time the order is made, whichever is the less.'

[5] Section 74 of the 1988 Act in its relevant form identifies how the court is to  
assess 'the amount that might be realised'. It provides:

'(1) In this Part of this Act, "realisable property" means, subject to  
subsection (2) below—(a) any property held by the defendant; and (b) any

property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act ...

(3) For the purposes of this Part of this Act the amount that might be realised at the time a confiscation order is made is—(a) the total of the values at that time of all the realisable property held by the defendant, less (b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations, together with the total of the values at that time of all gifts caught by this Part of this Act.

(4) Subject to the following provisions of this section, for the purposes of this Part of this Act the value of property (other than cash) in relation to any person holding the property—(a) where any other person holds an interest in the property, is—(i) the market value of the first-mentioned person's beneficial interest in the property, less (ii) the amount required to discharge any incumbrance (other than a charging order) on that interest; and (b) in any other case, is its market value.'

[6] Parliament's intention in amending the 1988 Act in those terms would appear to be clear. What was a power to make a confiscation order has been changed to a duty where the prosecution gives the appropriate notice. Subject to what was said in *R v Benjafield* [2002] UKHL 2, [2002] 1 All ER 815, [2003] 1 AC 1099 the court accordingly has no discretion in those circumstances as to whether or not to make an order. As to the amount of the order, the court is required to make an order calculated in accordance with s 71(6). On its face, this also appears to preclude the exercise of any judicial discretion, properly so-called. Leaving aside the assessment of benefit, with which we are not concerned in these appeals, the assessment of 'the amount that might be realised at the time the order is made' would appear to require a simple application of the provisions of s 74. On behalf of the appellant Ahmed, it was submitted that the court's discretion was retained by the use of the phrase 'the amount appearing to the court' in sub-s (6)(b). We have little hesitation in rejecting that argument. It seems to us that that phrase is not intended to import any discretion. It merely refers to the evaluation or valuation process which the court has to carry out under s 74.

[7] Both appellants submit, however, that the making of a confiscation order is capable of engaging art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). This provides:

'1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[8] They submit that where there is evidence, as there was in this case, that a confiscation order based upon the inclusion of the offenders' share in the matrimonial home could, on the balance of probabilities, only be met if the matrimonial home was sold, that would result in interference with not just

a the appellants' art 8 rights, but the art 8 rights of innocent members of the family, such as his wife and children. Accepting that the interference with the offenders' rights could be justified and proportionate under art 8(2), they submit that the interference may not be proportionate in so far as it may affect the other members of the family. Accordingly, they submit that the phrase 'the amount appearing to the court' should be construed in such a way as to grant to the court b a discretion, so as to ensure compliance with the convention.

[9] In support of their submissions, they referred us to *R v Benjafield* [2003] 1 AC 1099. This report deals with two conjoined appeals, by the appellant Benjafield, who was appealing against a confiscation order made pursuant to the Drug Trafficking Act 1994 and the appellant Rezvi, who appealed against a c confiscation order made under the provisions with which we are concerned in the 1988 Act as amended. Those appeals raised different issues from the present. None the less, it is submitted, there are statements of principle which support the argument that the court is concerned to ensure that no injustice arises as a result of the making of a confiscation order, and accordingly must retain a discretion in relation to its exercise. The passage to which we have been referred is contained d in para 15 of the speech of Lord Steyn who was dealing with the argument as to proportionality in the *R v Rezvi* appeal. He said ([2002] UKHL 2 at [15], [2002] 1 All ER 801 at [15], [2003] 1 AC 1099 at [15]):

'It is clear that the [1988 Act] was passed in the furtherance of a legitimate aim and that the measures are rationally connected with that aim (see *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, [1998] 3 WLR 675 at 684 for the three-stage e test). The only question is whether the statutory means adopted are wider than is necessary to accomplish the objective. Counsel for the appellant submitted that the means adopted are disproportionate to the objective in as much as a persuasive burden is placed on the defendant. The Court of Appeal ([2001] 2 All ER 609 at 634–635, [2001] 3 WLR 75 at 103) carefully f considered this argument and ruled:

"87. The onus which is placed upon the defendant is not an evidential one but a persuasive one, so that the defendant will be required to discharge the burden of proof (see Lord Hope's third category of provisions in [*R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801 at 843, [2000] 2 AC 326 at 379]). This is therefore a situation where g it is necessary to carefully consider whether the public interest in being able to confiscate the ill-gotten gains of criminals justifies the interference with the normal presumption of innocence. While the extent of the interference is substantial, Parliament has clearly made efforts to balance the interest of the defendant against that of the public in the following respects. (a) It is only after the necessary convictions that any question of confiscation arises. This is of significance, because h the trial which results in the conviction or convictions will be one where the usual burden and standard of proof rests upon the prosecution. In addition, a defendant who is convicted of the necessary offence or j offences can be taken to be aware that if he committed the offences of which he has been convicted, he would not only be liable to imprisonment or another sentence, but he would also be liable to confiscation proceedings. (b) The prosecution has the responsibility for

initiating the confiscation proceedings unless the court regards them as inappropriate ... (c) There is also the responsibility placed upon the court not to make a confiscation order when there is a serious risk of injustice. As already indicated, *this will involve the court, before it makes a confiscation order, standing back and deciding whether there is a risk of injustice*. If the court decides there is, then the confiscation order will not be made. (d) There is the role of this court on appeal to ensure there is no unfairness.

88. It is very much a matter of personal judgment as to whether a proper balance has been struck between the conflicting interests. Into the balance there must be placed the interests of the defendant as against the interests of the public, that those who have offended should not profit from their offending and should not use their criminal conduct to fund further offending. However, in our judgment, if the discretions which are given to the prosecution and the court are properly exercised, the solution which Parliament has adopted is a reasonable and proportionate response to a substantial public interest, and therefore justifiable." (My emphasis.)

For my part I think that this reasoning is correct, notably in explaining the role of the court in standing back and deciding whether there is or might be a risk of serious or real injustice and, if there is, or might be, in emphasising that a confiscation order ought not be made. The Crown accepted that this is how the court, seized with a question of confiscation, should approach its task. In my view this concession was rightly made.'

[10] The appellants submit that this makes it clear that the court should construe the Act so as to ensure that there should be no injustice, and that accordingly, this court should read the words of s 71(6) so as to import the discretion necessary to achieve this objective. But it seems to us that it is important to read the words of Lord Woolf CJ, as approved by Lord Steyn, in their context. The argument in *R v Rezvi* was concerned with the possible impact of art 6 on the provisions for determining whether the offender had benefited from the relevant criminal conduct and if he had of assessing the value of that benefit in accordance with s 72AA of the 1988 Act. That section requires the court to make certain assumptions in relation to an offender's property or expenditure unless it is shown that those assumptions would be incorrect in the particular case, or the court is satisfied that there would be a serious risk of injustice if the assumptions were made. The reference to the discretions given to the prosecution and the court in Lord Woolf's judgment seems to us to be clearly a reference to the decisions made on the one hand by the prosecution under s 71(1)(a), and on the other the court under s 71(1)(b). Whatever may be the mechanism for the control of the exercise of the prosecution's discretion, that is a discretion capable of review. Further the courts in *R v Rezvi* considered that where no true benefit could sensibly be said to have been obtained by the offender, it would be inappropriate to make an order. The provisions of 72AA which entitle the court to decline to make the assumptions where there would be a serious risk of injustice are clearly there for that purpose.

[11] But in the present appeals, we are not concerned with the question of whether or not there has been any benefit. The judge concluded that both appellants had benefited from criminal activity and made findings as to the extent



a of that benefit. There is no appeal against those findings. We are therefore  
concerned with the next stage of the process, which is the assessment of the value  
of realisable property. It seems to us that that exercise is prescribed by the  
provisions of the Act as we have already indicated. The court is merely concerned  
b with the arithmetic exercise of computing what is, in effect, a statutory debt.  
That process does not involve any assessment, in our judgment, of the way in  
which that debt may ultimately be paid, any more than the assessment of any  
other debt. No questions therefore arise under art 8 at this stage in the process.

[12] Different considerations, will, however arise if the debt is not met and the  
prosecution determine to take enforcement action, for example by obtaining an  
order for a receiver. As the House of Lords explained in *Re Norris* [2001] UKHL  
34, [2001] 3 All ER 961, [2001] 1 WLR 1389, this is the stage of the procedure in  
c which third party's rights can not only be taken into account but resolved. If the  
court is asked at that stage to make an order for the sale of the matrimonial  
homes, art 8 rights are clearly engaged. It would be at that stage that the court  
will have to consider whether or not it would be proportionate to make an order  
selling the home in the circumstances of the particular case. That is a decision  
d which can only be made on the facts at the time. The court would undoubtedly  
be concerned to ensure that proper weight is given to the public policy objective  
behind the making of confiscation orders, which is to ensure that criminals do not  
profit from their crime. And the court will have a range of enforcement options  
available with which to take account of the rights of third parties such as other  
members of the Ahmed family.

e [13] For these reasons, we consider that the judge's decision was right, albeit  
that he wrongly concluded that he had a discretion in this case.

*Appeals dismissed. The court refused leave to appeal to the House of Lords, but certified  
that a point of law of general public importance was involved in its decision, namely  
f whether ss 71(1), 71(6) and 74 of the Criminal Justice Act 1988 (as amended) should be  
construed in such a way as to grant the Crown Court a discretion at confiscation  
proceedings not to include the defendant's share in the matrimonial home as his realisable  
property under s 71(6) of the Criminal Justice Act 1988 by reference to the interest of third  
parties under art 8 of the European Convention for the Protection of Human Rights and  
Fundamental Freedoms 1950.*

g  
Stephen Leake Barrister.

# Eagle v Chambers

[2004] EWCA Civ 1033

COURT OF APPEAL, CIVIL DIVISION

WALLER, BUXTON AND SCOTT BAKER LJJ

6-9, 29 JULY 2004

*Damages – Personal injury – Benefits – Statutory provision requiring court to disregard listed benefits when assessing personal injury damages – Whether provision precluding court from ordering listed benefit to be used to mitigate future loss – Social Security (Recovery of Benefits) Act 1997, s 17, Sch 2.*

*Damages – Personal Injury – Amount of damages – Discount rate for future pecuniary loss – Patient – Whether patient entitled to recover as damages panel brokers' fees likely to be charged by Court of Protection in managing fund representing damages.*

The claimant was knocked down by a car driven by the defendant. She suffered severe brain damage, and became a patient subject to the Court of Protection. In subsequent personal injury proceedings, there was a separate trial of the issue of quantum. Since any damages that the claimant received would be held by the Court of Protection, those damages would be ring-fenced, and she would therefore continue to receive benefits. One of the benefits she received was mobility allowance. That allowance was included in the list of benefits set out in Sch 2<sup>a</sup> to the Social Security (Recovery of Benefits) Act 1997. Section 17<sup>b</sup> of the Act required the court to disregard the amount of any listed benefits likely to be paid when assessing damages in respect of any accident. At trial, the damages that the claimant sought to recover included compensation for future loss of mobility. The judge held that the claimant would be obliged to use her mobility allowance to invest in a scheme, available only to those in receipt of mobility allowance, which would provide her with less costly transport than the scheme that she had proposed. The claimant appealed that ruling on the ground that, while in accord with the ordinary rules of mitigation, it was precluded by s 17. In response, the defendant contended that s 17 merely forbade direct deduction of the mobility allowance in the assessment of damages, and did not prevent the court from requiring that allowance to be used to mitigate the claimant's loss. The claimant also appealed, inter alia, against a ruling by the judge that she could not recover as damages the panel brokers' fees which would probably be charged by the Court of Protection on advice and other aspects of dealing with the investment of the funds awarded by way of damages. Although there was authority that a non-patient was not entitled to claim the fees he would incur on investment advice on receipt of the damages, the claimant contended that the position of a patient was different from that of a non-patient because a patient under the protection of the court had no choice about how the funds would be invested and would thus be charged the panel brokers' fees in accordance with the prescribed rules whether he liked it or not.

a Schedule 2 is set out at [50], below

b Section 17 is set out at [51], below

**Held** – (1) Since *prima facie* a rule as to mitigation could be said to be a rule relating to the assessment of damages, s 17 of the 1997 Act, on its language, precluded any insistence that any of the relevant benefits should be used in any way to mitigate loss. Such a conclusion could only be avoided by placing a strained, narrow construction on the section. Authority did not support the adoption of such a construction. Accordingly, the appeal would be allowed in relation to that ground (see [58]–[60], [104], [113], below); *Wisely v John Fulton (Plumbers) Ltd*, *Wadey v Surrey CC* [2000] 2 All ER 545 applied.

(2) (Buxton LJ dissenting) A patient was not entitled to recover the panel brokers' fees which the Court of Protection was likely to charge while looking after the fund representing damages. A defendant had to pay by way of compensation damages assessed on the basis that the return on the money would be by way of investing in gilts, even though the practice was to gain a higher return by investing more broadly. A claimant was entitled to use his money as he liked, but if he wished to increase the sum awarded and awarded on the most advantageous basis to him, he had to set off the fees charged against the gains made and could not recover the fees from the defendant. That was as true of a claimant who was a patient as it was of a claimant who was not a patient, and as a matter of principle different answers should not be reached depending on whether or not a claimant was a patient. The distinction sought to be drawn between a patient and a non-patient was invalid. First, there was no compulsion on the Court of Protection to invest more widely. It was the present policy, but the policy was not set in stone. Secondly, it was wrong to equate the Court of Protection with some body independent of the patient. The decision as to whether to invest more widely should not be looked at as anything other than the decision of the patient if he were capable of making that decision. Thirdly, the rules which gave the court power to charge the panel brokers' fees were necessary, but they were actually no different from the fees that a non-patient would be charged if he decided to use brokers to make more of the funds that he had been awarded. Accordingly, that ground of appeal would be dismissed (see [95]–[98], [113], below); *Page v Plymouth Hospitals NHS Trust* [2004] 3 All ER 367 applied.

### Notes

For future pecuniary loss and for benefits to be disregarded in assessing damages for personal injury, see 12(1) *Halsbury's Laws* (4th edn reissue) paras 881, 903–904.

For the Social Security (Recovery of Benefits) Act 1997, s 17, Sch 2, see 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 961, 974.

### Cases referred to in judgments

*Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, [1968] 2 QB 229, [1968] 2 WLR 366, CA.

*Anderson v Davis* [1993] PIQR Q87.

*Barry v Ablerex Construction (Midlands) Ltd* [2000] PIQR Q263.

*Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA.

*Corbett v Barking Havering and Brentwood Health Authority* [1991] 1 All ER 498, [1991] 2 QB 408, [1990] 3 WLR 1037, CA.

*Cunningham v Harrison* [1973] 3 All ER 463, [1973] QB 942, [1973] 3 WLR 97, CA.

*Dews v National Coal Board* [1987] 2 All ER 545, [1988] AC 1, [1987] 3 WLR 38, HL.

*Francis v Bostock* (1985) *Times*, 9 November.

*Harris v Bright's Asphalt Contractors Ltd, Allard & Saunders Ltd (Third Parties)* [1953] 1 All ER 395, [1953] 1 QB 617, [1953] 1 WLR 341. a

*Jefford v Gee* [1970] 1 All ER 1202, [1970] 2 QB 130, [1970] 2 WLR 702, CA.

*Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174, [1979] 3 WLR 44, HL.

*Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB), [2004] 3 All ER 367. b

*Sowden v Lodge* [2003] EWHC 588 (QB), [2003] All ER (D) 364 (Mar).

*Spittle v Bunney* [1988] 3 All ER 1031, [1988] 1 WLR 847, CA.

*Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL.

*Wisely v John Fulton (Plumbers) Ltd, Wadey v Surrey CC* [2000] 2 All ER 545, [2000] 1 WLR 820, HL. c

### Appeal and cross-appeal

The claimant, Karen Janet Eagle (suing by her stepfather and litigation friend, Ernest Edward Giles), appealed with permission of Potter LJ (such permission having been extended by the Court of Appeal at the start of the hearing) from various parts of the decision of Cooke J on 19 December 2003 ([2003] EWHC 3135 (QB), [2003] All ER (D) 387 (Dec)) awarding her damages of £1,499,268.13 in her proceedings for personal injury against the defendant, Garth Maynard Chambers. The defendant cross-appealed with permission of Mance LJ against two aspects of the judge's decision. The facts are set out in the judgment of Waller LJ. d  
e

*Robin de Wilde QC and Nicholas Levisieur* (instructed by Chamberlins, Great Yarmouth) for the claimant.

*Edward Faulks QC and Angus Piper* (instructed by Davies Lavery, Chelmsford) for the defendant. f

*Cur adv vult*

29 July 2004. The following judgments were delivered.

### WALLER LJ.

[1] On 22 June 1989 the claimant/appellant (the claimant) was knocked down by a car driven by the defendant/respondent (the defendant) while walking down the middle of the road. At a trial which did not take place until November 2002 the defendant was held liable for the accident with the claimant being held responsible in contributory negligence as to 60%. That apportionment was varied by the Court of Appeal in July 2003 ([2003] EWCA Civ 1107, [2004] RTR 115) to 40%. As a result of the accident the claimant was very severely injured suffering serious brain damage. Following a trial in December 2003 and in accordance with a reserved judgment handed down on 19 December 2003 ([2003] EWHC 3135 (QB), [2003] All ER (D) 387 (Dec)) and a shorter extempore judgment of the same date Cooke J ordered the defendant to pay damages in the sum £1,499,268.13, and he refused permission to appeal. g  
h  
j

[2] The most significant aspect of the damages award was the judge's assessment that £66,000 was the appropriate sum for the annual cost of the future care regime needed by the claimant. To that figure he applied a multiplier of 18.5 representing his assessment of the claimant's life expectation taking into account also the period



a that the claimant would spend in a rehabilitation unit. This figure involved preferring the expert evidence of Tessa Gough RGN who gave evidence for the defendant to that of Maggie Sargent RGN. It was assessed on the basis that the claimant's needs were for a continuation with the carers provided as at the time of trial by social services through an agency, Care Watch, but importantly also on the basis that (1) the regime would be enhanced; (2) it should be funded privately; and b (3) a saving could be made because of some likely improvement in the claimant as a result of the rehabilitation course, resulting in her needs at night being met by the less expensive sleep-in carer rather than an awake carer.

c [3] He also found that with such a care regime, and in particular because there would be a need for a room for the sleep-in carer, the flat also supplied by social services would no longer be suitable, and that further accommodation would need to be purchased leading to an award of £215,265.

d [4] Those advising the claimant applied for permission to appeal to the Court of Appeal. No attempt at this stage was made to disturb the judge's assessment of the care regime needed for the claimant. One ground (ground 11) asserted that £2,000 should have been added to the £66,000 on the basis that a concession had been made by Tessa Gough that she should have included certain items in the appendix to her report (App D) which the judge had taken as the basis of his calculation. The other grounds sought to attack the judge's findings on 14 or possibly 15 discrete issues.

e [5] Potter LJ granted permission on 12 grounds including ground 11 on the basis that the grounds seemed to raise issues of principle.

f [6] Those advising the defendant sought to respond by raising three grounds on which the assessment made by the judge should be reduced. They involved making an attack on the key finding that the need was for a privately funded care regime. These grounds sought to uphold the judge's conclusion that the present regime of carers would continue, but attacked the finding that the claimant needed that regime privately funded, and attacked the judge's finding that there was any necessity to move accommodation. The argument which they wished to put was that there was simply no need to disturb the present regime other than by a limited enhancement for which the defendant should pay. They were thus seeking to adopt Tessa Gough's primary position as g costed in her App A, which if successful would dramatically reduce the damages as assessed by the judge on the key issue from £1,354,500, to about £420,000, and would further reduce the award by £215,265, the sum awarded for the change in accommodation. The defendant also attacked a finding by the judge that he should be responsible for the costs of a rehabilitation course at the h Kemsley Unit which, if successful, would have reduced the damages by a figure in the region of £150,000. Mance LJ granted the defendant permission to appeal on those grounds.

j [7] This led those advising the claimant to look again at the judge's approach to his assessment of the amount to be awarded for care, and his assessment of damages generally. Following this review a skeleton argument was served in which notice was given of an intention to attempt to amend the notice of appeal to assert that the figure of £2,000 in the original ground 11 to be added to the £66,000 should be increased to something in excess of £22,873. This would have increased the judge's award by some £400,000. From the skeleton it was clear that in part (as with the figure of £2,000) this aspect, covered by a proposed ground 11A to the notice of appeal, was to be argued by reference to points which

could be made on the evidence, but which it was said the judge had failed to take into account, but in large measure by reference to points on App D to Tessa Gough's report which had not been explored at the trial in any way at all. The skeleton also indicated that an application would be made to amend to challenge the award of general damages assessed by the judge at £165,000.

[8] At the commencement of the hearing of the appeal we had to deal with applications to amend the notice of appeal by the claimant as well as applications to renew grounds on which permission had been refused by Potter LJ. During this exercise it became apparent that those advising the defendant now appreciated that they had to concede ground 1 of the appeal which related to the fact that the judge had deducted from past earnings a sum received in respect of income support, but Mr Faulks QC indicated that his client might wish to allege that there had been a failure to take into account receipt of other benefits in the calculation of future losses for which they would need leave to amend their respondent's notice. He also indicated that he resisted ground 11A, but the interchange with the court indicated that his own attitude to arguing the major ground in his respondent's notice, ie that the App A calculation should be adopted, could be affected by the court's approach to ground 11A.

[9] In any event we granted permission to the claimant to amend and raise ground 11A and we granted permission to raise certain grounds for which permission had been refused, grounds 8 and 10, on the basis that they raised the same point of principle as ground 9. We refused the application to renew ground 7 on the basis that there was no evidence on which costs of speech therapy could be assessed, and no issue of principle was raised; and we refused permission in relation to ground 16, relating to additional telephone calls to be made by the care team, on the basis that it was impossible to demonstrate any loss having regard to the lesser use of telephone which the claimant was likely to make and because no issue of principle was raised. We refused permission to amend to challenge the award of general damages because the figure was within the range which a judge could award and no issue of principle was raised.

[10] It is not necessary to go further into the details of the arguments which took place at this stage, but it is important to identify the issues which ultimately had to be considered on the appeal. It will I hope assist in that exercise if I do that by categories.

#### THE ISSUES IDENTIFIED

*The costs of 12 weeks' assessment at the Kemsley Unit for rehabilitation, and nine months thereafter at the unit which the judge assessed as likely to occur*

[11] This issue raised by the defendant in the respondent's notice was whether having been faced with a *fait accompli* at the beginning of the trial, of the claimant having been sent to Kemsley to be assessed, it was right for them to have to pay by way of damages for that assessment and for the projected nine months of rehabilitation.

*The cost of a care regime and accommodation*

[12] This issue (as will by now be apparent) was of most significance in monetary terms. The first sub-issue (raised by the defendant in the respondent's

- a notice) was whether the judge was right in finding that the claimant needed a privately funded regime as opposed to a top-up to the regime being provided by social services, the latter being costed in App A of Tessa Gough's report. This sub-issue involved two aspects, first whether the only requirement in addition to that which social services was already providing was a manager together with care for a four-hour gap and second, whether, if this regime continued, that
- b would make it unnecessary to consider whether the claimant would only need a sleep-in carer at night, the factor that influenced the judge in holding that there was a need for different accommodation. The second sub-issue was whether, if the judge was right that a privately funded care regime was necessary, he was right to take Miss Gough's App D as he did with adjustments indicated at
- c para [55] of his judgment, or whether significantly greater adjustments were necessary. This is the issue raised by grounds 11 and 11A of the claimant's notice of appeal as amended.

*Benefits referred to in Sch 2 to the Social Security (Recovery of Benefits) Act 1997*

- d [13] Two benefits identified in Sch 2 to the Social Security (Recovery of Benefits) Act 1997 are income support and mobility allowance. As regards income support, Mr Faulks made the concession that the judge should not have deducted £30,237.80 from the claimant's past earnings. (He did not press any request to amend to assert that allowances should have been made in
- e calculation of future losses.) That disposed of ground 1. We were concerned as to whether the judge may have been misled by an apparent agreement on this aspect in the court below. Mr Levisur stoutly refuted that suggestion, and we did not think it right to take up time exploring the position.

- f [14] As regards mobility allowance (ground 5), the issue was whether the judge's finding that the claimant would be obliged to use that allowance to partake in the Motability Scheme in order to provide herself with transport, which would provide her with a less costly transport than the scheme proposed by the claimant, infringed s 17 of the 1997 Act.

- g [15] The determination of that issue is linked with a further issue (ground 6) as to whether the judge was right to award the cost of insurance by reference to a driver over 25 rather than a driver from the age of 17.

*Travelling expenses*

- h [16] The judge deducted 15% from the claimant's past earnings as travelling expenses. He made no such deduction in respect of future earnings. The claimant argues that the deduction should not have been made relying on a passage in the speech of Lord Griffiths in *Dews v National Coal Board* [1987] 2 All ER 545 at 548, [1988] AC 1 at 13 (ground 2).

j *Individual items available on the NHS or from social services*

- [17] The judge found that certain items would be available from the NHS or social services, and that the claimant could not claim the cost of the same from the defendant. Potter LJ had granted permission for ground 9, laundry; we granted permission in relation to ground 8, chiropody and ground 10, Tena pads, which raised the same issue.

*Cigarettes*

[18] The claimant had been a smoker before she was injured. In her injured state she began to smoke excessively, and to waste some of the cigarettes that she was contemplating smoking. The judge awarded a sum for cigarettes wasted in the past, but not for the cost of any increased number of cigarettes smoked, drawing the distinction it would seem between those from which she obtained a benefit and those she did not. He made no award for the future, relying again, possibly, on the benefit obtained if she did smoke more than prior to the accident, but also on the fact that it was in this area that rehabilitation at Kemsley was likely to assist. a

*Receiver*

[19] The claimant is a patient subject to the Court of Protection. Mr Duffield, the solicitor who has acted for her throughout the proceedings, has been appointed by that court as her receiver. Mr Duffield's evidence was that he would continue as a receiver and that his charge would be £200 per hour and the claim on that basis was for £280,710. The judge took an adverse view of Mr Duffield because of, among other matters, the delays in the conduct of this litigation, and took the view that the claimant's mother could perfectly well act as the receiver with such professional help as she needed. He awarded a sum of £30,000 to enable the mother to take professional advice. The issues are (1) whether the judge was right to contemplate that the mother or anyone other than a professional receiver would be appointed by the Court of Protection as receiver; (2) if a professional receiver was necessary whether the costs of such a receiver would be the £280,710 claimed or some lower figure. b

*Panel brokers*

[20] Quite separate from the issue relating to receivers was the issue as to whether the judge was right in his conclusion that panel brokers' fees which will be charged by the Court of Protection on advice and other aspects of dealing with the investment of funds should not be awarded by way of damages. c

*Interest*

[21] The judge took the view that there was seven years of delay, which was the fault of those acting for the claimant, and refused to award interest for those seven years. The claimant's advisers seek to reduce that period from seven to two years. d

*GEWA central control unit*

[22] A central control unit enables a disabled person to operate housing functions such as opening windows and opening doors remotely. The judge refused to award any sum for such a unit on the basis it was 'unnecessary'. The issue is whether that finding should be disturbed (ground 3). e

*Cleaning*

[23] Both experts were of the view that a sum should be allowed for extra cleaning. The judge took the view there was no need for separate cleaners since in the past the carers had done all that was necessary. The issue was whether the judge should have rejected the evidence of both experts (ground 4). f



*The Kemsley Unit issue*

- a [24] The claimant was injured in an accident on 22 June 1989. She received various forms of therapy in the years following her accident, including intensive rehabilitation in Addenbrooke's Hospital, between 19 November 1990 and 8 February 1991. Without any recommendation from any of her treating doctors and without any consultation with those representing the defendant, the
- b claimant was admitted to the Kemsley Unit, a specialist unit for brain-damaged patients, so that she could be assessed as to her suitability for a rehabilitation course. This admission seems to have been under the auspices of the occupational therapist and her solicitor.
- c [25] On a pre-trial review of the case on 24 November 2003 Collins J was informed that the claimant had been admitted to the Kemsley Unit four days earlier. The defendant before Collins J expressed concern as to whether the trial judge was going to be in a position to decide the case, having regard to the recent admission to the Kemsley Unit and the uncertain benefit of therapy there. Collins J expressed anxiety about this himself.
- d [26] The trial duly commenced before Cooke J on 8 December 2003. There was an application before the trial judge that the judge should visit the Kemsley Unit and that provoked argument as to whether the claimant should be entitled to advance the claim for the costs of therapy at the Kemsley Unit, notwithstanding the fact that the 12-week assessment period had not been
- e completed. Ultimately the judge ruled against the visit but allowed the claim to be advanced as requested on behalf of the claimant. That provoked an application for an adjournment on behalf of the defendant. The judge ruled against that application and made clear that he would simply have to do his best in assessing damages, notwithstanding the uncertainty of any benefit that might accrue for the claimant as a result of her time at Kemsley.
- f [27] The refusal of the judge to adjourn the trial was not appealed. As Mr Faulks explained to us it would have been an uphill task for him to persuade a Court of Appeal that the refusal to adjourn was a wrongful exercise of discretion by the judge.
- g [28] In the result the trial continued. The claimant invited the judge to award damages on the basis that there was likely to be an 18-month in-patient stay at Kemsley following the assessment. On that basis the award sought by the claimant was in the sum on £221,738.
- h [29] By the end of the trial the position was as follows. First, Professor Wood had given evidence and clearly had approved of the move to admit the claimant to the Kemsley Unit for assessment. The judge recorded indeed that both he and Mr Paul Jamie, who was consulted by the defendant, had respectively agreed that there were no substantive differences in their observations or opinions with the regard to the claimant and that—
- j [26] ... They both believed that a period of behavioural rehabilitation was still worthwhile because some of the claimant's current behaviour placed her at risk and appeared to have a manipulative element. In this respect they particularly had in mind the claimant's habit of dropping lighted cigarettes on the floor. Likewise, they were in agreement that, following such rehabilitation the claimant would require supervision and a care manager to co-ordinate her care ... [but] rehabilitation would make

her easier to manage on a day-to-day basis and might slightly reduce her daytime care needs ...'

[30] Professor Wood considered that the claimant would be likely to spend a period of less than a year in the Kemsley Unit following the period of assessment. So far as benefit from that period of rehabilitation was concerned he accepted that there was no question of any significant improvement of the claimant's physical condition. As the judge recorded:

'[27] ... The most that could be hoped for was improvement in her standing balance which would enable her, during a day, to occasionally stand on one leg with the help of a frame. This would be morale-boosting and of some benefit because of the unhealthy repercussions of remaining chair-bound or bed-bound. The brain damage suffered was irreversible. All that could now be hoped for in this respect was an improvement in behavioural conduct ...'

This led the judge to conclude:

'[30] ... Whilst there would be no dramatic improvements as a result of rehabilitation, there could be modest but significant improvement which would affect her daily life and the care afforded to her.'

[31] In the light of the above findings the judge concluded as follows:

'[35] In the light of the clear evidence of Professor Wood, Mr Jamie, Dr Dick and Dr Sawle, I am in no doubt that it is appropriate for an assessment to be made of the claimant for her suitability for a behavioural rehabilitation course at the Kemsley Unit. The cost of that period of assessment is therefore recoverable. Equally, if the assessment concludes that she is suitable for the rehabilitation course it would be proper mitigation of damage for the claimant to undergo that course. Whilst it is unclear what the length of such a rehabilitation period would be, exactly what benefits will result if it is followed and there is no certainty as to the assessments to be made, I conclude that, on the balance of probabilities, she will prove suitable for such a course and that, following the initial 12-week assessment, she will undergo a course lasting a further nine months.'

[32] On the above basis he awarded the cost of the period of assessment and the cost of a period of nine months on a rehabilitation course. This attendance on the course he further reflected in his assessment of the number of years of care, which the claimant would need once she returned from that rehabilitation.

[33] I have some sympathy with the defendant's position, when asserting that the Kemsley Unit was forced on his advisers at a time when they had no opportunity to say one way or another whether it was the right thing to do and when, because of the lateness of the referral, they would not have an opportunity to assess the benefit and any possible impact on the damages that the court might otherwise award. They say that the award of the cost of assessment and a period of rehabilitation against them is unfair if they cannot properly take into account the benefit to be attained therefrom. Sympathetic as I may be, it seems to me that the judge's approach cannot be criticised. He too was faced with the last-minute referral and he was of the view that it was

a important in the context of the history of the case that the trial should not be  
adjourned. He cannot be criticised for taking that decision. As the evidence  
developed it became clear that some period of assessment would always have  
been appropriate, and some period of rehabilitation would have been likely to  
take place as a result of that assessment. Furthermore he had clear evidence  
b that there was likely to be a benefit at least in relation to the quality of life of  
the claimant by virtue of a period of rehabilitation. The evidence was indeed  
all one way, that there was likely to be that benefit, but it was equally likely that  
the claimant would still need a full-time care regime and it was only the quality  
of her life which would be improved.

[34] Indeed it is right to say by the end of the trial Mr Faulks, on behalf of the  
defendant, felt constrained to accept that the defendant should pay the cost of  
c assessment. As it seems to me, that was a concession rightly made. The finding  
by the judge that the defendant should also pay for the period of nine months'  
rehabilitation, which conformed with the evidence of Professor Wood that that  
would be the likely period also seems to me to be unassailable. Thus I would  
dismiss this aspect of the appeal by the defendant.

d *Care regime*

[35] This as indicated is the most significant aspect of the claim but having  
regard to the conclusion I have formed, it is possible to take the matter reasonably  
shortly. Before the judge the parties were at either end of the spectrum and  
therefore concentrated very little on any intermediate position. By the time of  
e the trial the claimant was living in a flat which was accommodation supplied by  
social services. She was being cared for by carers organised by Norwich Social  
Services through Care Watch, those carers providing care in turns from 11 am to  
2 pm; 2 pm to 7 pm; 7 pm to 11 pm; and 11 pm to 7 am (this night carer being  
f an awake carer and not a sleep-in carer, and thus much more expensive than a  
sleep-in carer). On behalf of the claimant evidence was given by Maggie Sargent  
and for the defendant Tessa Gough. Following their joint meeting it was  
recorded as follows:

'The two experts both agree that a case manager and carers will be  
necessary if she is to live in her own accommodation. The two experts do  
g not agree rates of pay and Maggie Sargent has costed for a high rate of pay to  
attract experienced carers who are capable of managing her behaviour.  
Tessa Gough has costed on the rates paid to the carers presently caring for  
[t]he claimant together with alternative cost to identify the local commercial  
rates of pay for the area.'

h [36] Two calculations were placed before the court by Maggie Sargent, one of  
which assessed the cost of her higher paid carers with an awake night carer, and  
one of which provided for a sleep-in carer at night, on the basis that Kemsley  
would produce some improvement. She gave evidence to support her view and  
her costings.

j [37] Tessa Gough gave evidence that in her view the present Care Watch  
regime would meet the claimant's needs, but as the joint statement indicated  
she accepted that a manager would be needed and that the four-hour gap  
should be filled. The present scheme was supplied by social services and that  
led to the defendant's primary case being at all times that that scheme was what  
the claimant needed and all that should be funded privately was the cost of a

manager and the 'four-hour gap'. This was costed by Tessa Gough in her App A. a

[38] The alternative case was that if social services were not to provide the care, then the equivalent should be provided privately with a manager and the four-hour gap filled. Her report stated that the present carers were paid £6.50:

'This is prior to any increase they may receive in April 2003 ... I include the carers' rate of pay at £6.50 per hour; there is no reason to pay any more than this rate which is above the local rate and the rate paid to carers who have been very committed to the claimant over the past 5 years.'

b

The cost on this basis was set out in her App B. Her comment as to some possible increase in April 2003 was a little strange since although her original report was dated 29 April 2003, at which time she might not know of any suggested increase, the report before the judge was the updated version dated 10 October 2003, and one would have thought the question of increase or not would have been resolved. c

[39] She too produced an alternative to App B with a sleep-in carer as opposed to an awake carer, and that was set out in App D. No advocate at the trial noted that two elements 'training' and 'entertainment', which were in App B and which clearly should also have been in App D, had been omitted from App D. It is this figure which was the subject of the original ground 11 and the figure of £2,000. d

[40] Miss Gough also produced examples of costings of private carers through various local private agencies in App C. e

[41] The judge made the following findings:

[49] I conclude on the evidence before me that there is great benefit in consistency of care support and the continuation of established good relationships between the claimant and her carers. I conclude also that, although social services have made provision thus far, a more appropriate regime would be one established on more directive and structured lines, for all the reasons set out earlier in relation to the rehabilitation of the claimant and the need to perpetuate the disciplines and routines put into place. Thus, notwithstanding such authorities as *Sowden v Lodge* [2003] EWHC 588 (QB), [2003] All ER (D) 364 (Mar), I take the view that a different structure of care is required and that this falls to be funded by the defendant, not by social services ... f

[52] The claimant's nursing expert costed two contrasting care regimes based on "unsuccessful rehabilitation" and "successful rehabilitation". The former included a second carer for six hours a day in addition to 24-hour care by one carer, with sleep-in care for ten hours. The evidence of Professor Wood and others satisfied me that there was no need for the extra carer. The carer's rates charged were to be £8 per hour and £10 at weekends now, going up to £9 and £11 respectively in 2005. A sleep-in carer would be paid for six hours when present for ten hours overnight. g

[53] The defendant's nursing expert costed care on the basis of the rates paid to the Care Watch Agency carers of £6.50 per hour with the team leader at £7 per hour. A night-awake carer would be paid for the full ten hours overnight care whereas a sleep-in carer would be paid for six of those hours. Those rates were, on Ms Gough's evidence, above the local rates and above h



a BNA Norwich rates for weekdays, but cheaper at weekends and public holidays.

b [54] It is generally accepted that a sleep-in carer is likely to be sufficient for the claimant. Although she sometimes awakes screaming in the night, because of pain and may need changing or assistance in turning over to be more comfortable, there is no suggestion that there is any risk which requires an awake carer throughout the night. She shows no inclination to smoke at night so there is no enhanced fire risk. On Ms Gough's costings, the annual difference between the use of an awake carer and a sleep-in carer is of the order of £23,000. With a life expectancy of a further 26 years after rehabilitation, this differential amounts to almost £600,000.

c [55] Having examined the evidence of rates for appropriate care, I am satisfied that Ms Gough's figures are in essence to be accepted, with some small adjustments in respect of weekend and bank holiday care. I assess the appropriate cost for the employment of carers, including the team leader, ENIC, liability insurance, recruitment advertising, expenses, payroll and training at the annual sum of £66,000. I see no need for any separate cleaning as the carers have in the past done all that is necessary. Equally I could see no justification for the higher figures put forward by the claimant's experts for case management. £65 per hour is the figure to be used for this purpose. In the first year as the rehabilitation course draws towards its close and after it has finished (in about December 2004), to [sic] there will be additional costs involved in setting up the regime, which I assess at £4,000, over and above the usual annual cost which I assess at £7,000 pa with a greater requirement for hours spent than Ms Gough allows on a monthly basis.'

f [42] Those findings are only consistent with him using Miss Gough's figures in App D with some modification for weekends and bank holidays and with some allowance for other items such as training and expenses.

g [43] Mr Faulks's attack on the judge's rejection of App A and a regime that was basically state-funded was not pressed hard by him, and in my view rightly. That the claimant needed a regime on more 'directive and structured lines' was a finding clearly open to the judge, and not a finding that it would be right to reconsider in the Court of Appeal.

h [44] That leaves grounds 11 and 11A. Mr de Wilde QC together with Mr Levisieur who followed on this aspect sought to persuade us first that the judge if he was finding that there should be a private regime should have found in favour of the regime costed by Tessa Gough in App C. Indeed Mr de Wilde submitted that counsel, when they received the judge's judgment, thought that the judge was working off Tessa Gough's App C. Apart from finding that difficult to understand in the light of the paragraphs above quoted, so far as the appeal is concerned it is accepted that after judgment the judge made clear he was working off App D, and yet there was no suggestion in the original notice of appeal that he had in some way made the errors it is now suggested were made.

j [45] In any event the submission to us included the following points. That the judge had made an error in failing to appreciate that the care would have to be carried out post-rehabilitation by trained carers whose rates would be higher than the Care Watch rates; that Tessa Gough's rates were drafted as at April 2003 and did not allow for the increase in the uplift that social services

would have to pay to Care Watch as at April 2003 as allowed for in their contract of 5.3%; that entertainment had not been allowed for; that the weekend and bank holiday adjustments were too low; that no allowance had been made for consequential ENIC increases. Mr Levisieur, when he followed, concentrated on the entertainment and training expenses, the subject of the original ground 11, and the increase which he submitted would have taken place in April 2003 and a further increase which he submitted would have been likely in April 2004, plus the consequential ENIC increases making, as he submitted, at least a 10% uplift in the figure of £66,000 chosen by the judge.

[46] The difficulty is that none of the points sought, now to be taken up, were taken up with Tessa Gough or made the subject of submissions to the judge. The question for example of whether the carers received any increase in April 2003 (as opposed to Care Watch itself) was not explored in evidence, and Mr Levisieur's suggestion that another rise would have occurred in 2004 is simply a submission without a scintilla of evidence to back it up. Two of the carers came and gave evidence and were available to be examined on the question, but they were not asked questions relevant to these points.

[47] The reality is that at the trial those advising the claimant concentrated their arguments on seeking to persuade the judge that he should adopt the private care regime of Maggie Sargent with the higher rates she recommended. They did not challenge Tessa Gough's figures if that case failed. That being so it is in my view too late to do so now particularly as Tessa Gough has had no opportunity, and the judge no opportunity, to consider the points. The only question which I have been a little concerned about is whether the mistake in Tessa Gough's App D, where entertainment and training do seem to have been missed out, was noticed and whether the judge did intend to cover those items in his uplifted figure of £66,000. But I have concluded that the judge, having expressly mentioned items that he was including in the enhanced figure, and the matter again not having been taken up at the trial, it is now too late.

[48] I would therefore dismiss grounds 11 and 11A.

*Benefits referred to in Sch 2 to the 1997 Act*

[49] The statutory scheme provides for a tortfeasor to be able to obtain a certificate (a CRU certificate) in relation to certain defined benefits received or to be received over a period of five years from the accident. The tortfeasor has then a liability to the Secretary of State for the amount of those benefits, and is entitled to deduct from any damages payable to the claimant the amount shown on the CRU certificate. The scheme contemplates benefits during the relevant period being claimed and a certificate applying to those benefits during the same period. It does not contemplate there being a reduction against claims for future loss of mobility or future loss of earnings (see the general note under Sch 2 in 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 975).

[50] Sch 2 is in the following form:

## 'SCHEDULE 2

## CALCULATION OF COMPENSATION PAYMENT

a

b

c

d

e

f

g

h

j

(1)  
Head of compensation(2)  
Benefit1. Compensation for earnings lost  
during the relevant period...  
Disablement pension payable  
under section 103 of the 1992 Act  
Incapacity benefit  
Income support  
Invalidity pension and allowance  
Jobseeker's allowance  
Reduced earnings allowance  
Severe disablement allowance  
Sickness benefit  
Statutory sick pay  
Unemployability supplement  
Unemployment benefit2. Compensation for cost of care  
incurred during the relevant periodAttendance allowance  
Care component of disability  
living allowance  
Disablement pension increase  
payable under section 104 or 105  
of the 1992 Act3. Compensation for loss of mobility  
during the relevant periodMobility allowance  
Mobility component of disability  
living allowance'

[51] There is a general provision, s 17, which provides as follows:

*'Benefits irrelevant to assessment of damages.* In assessing damages in respect  
of any accident, injury or disease, the amount of any listed benefits paid or  
likely to be paid is to be disregarded.'This provision clearly applies both to the calculation of losses during the relevant  
period (subject of course to the certification process), and to future losses.[52] In this case for reasons which are unclear the defendant obtained from the  
Secretary of State a CRU certificate which stated that during the relevant period  
the benefits received by the claimant were 'nil'. It followed that the defendant  
was unable to deduct any sums pursuant to that certificate from the damages to  
be awarded to the claimant.[53] It became common ground at the trial however that the claimant had  
received benefits identified in Sch 2 and had also received benefits not identified

in Sch 2. At the trial the assessment of the quantum of those benefits took time and the figures were only received from those acting for the claimant very late, indeed at the moment final speeches were beginning. All the benefits that she had received were deducted from her past losses including £30,237.80 being the income benefit that she had received. It is now accepted that s 17 provides for such benefits not being taken into account in the assessment of damages and it is for that reason Mr Faulks has conceded ground 1 of the claimant's appeal.

[54] It was also common ground that because any damages that the claimant received would be held by the Court of Protection, that her damages would be ring-fenced, and the result would be that the claimant would continue to receive benefits. One of the benefits she would continue to receive would be the mobility allowance, a benefit identified in Sch 2. It is the receipt of this allowance in the future which gives rise to a difficult point of construction on s 17 (although it is fair to say I am not sure that the judge had his attention fully directed to it).

[55] The claimant's claim for damages included a claim for compensation for loss of mobility in the future, ie outside the five-year period. This was not a claim, accordingly, to which the provisions, which might have allowed for the obtaining of a CRU certificate, and a reduction of the damages by reference to that certificate, applied. As regards future loss of mobility both experts were of the view that the claimant should have a car adapted to deal with her disability. The choice was between the scheme preferred by Mrs Clarke-Wilson, and that preferred by Tessa Gough. Tessa Gough's involved taking advantage of the Motability Scheme. Such a scheme was only available to a person who was in receipt of a mobility allowance and who invested that mobility allowance in the scheme. If the claimant was obliged to invest her mobility allowance in the Motability Scheme that scheme was certainly cheaper than the scheme suggested by Mrs Clarke-Wilson. If she was not obliged to do so, then Mr Faulks has a second string to his bow, arguing that a 'brand new' people-carrier as recommended by Mrs Clarke-Wilson was unnecessary, a second-hand vehicle would be sufficient. He submitted that the cost of a second-hand vehicle was in fact below the sums awarded by the judge, but accepted that the judge's award should not be disturbed.

[56] The first argument accordingly is about a duty to mitigate, and the question is whether a ruling that the claimant is obliged to use her mobility allowance and invest it in the Motability Scheme which, under the ordinary rules relating to mitigation, she would be obliged to do, is the correct approach, or whether s 17 forbids the court so ruling.

[57] I have not found the answer to this question easy. At one stage I was attracted by a narrow construction of s 17 suggested by Mr Faulks. His submission was that since the effect of not insisting that the claimant should use the mobility allowance to invest in the Motability Scheme would be that she was overcompensated, that supported a construction of s 17 that simply forbade direct deduction of the mobility allowance in any assessment of damages, but did not preclude insisting that the use of that allowance should be made in order to mitigate her loss. Indeed if one tested the matter by reference to the situation in which a claimant was claiming for loss of mobility during the five-year period in that situation a defendant could obtain a CRU certificate which would have enabled a deduction of the amount of the mobility allowance from the damages. Is there any reason why in order to ensure that a claimant is not overcompensated a defendant should not also say that during the relevant period



a the claimant should use the mobility allowance the claimant will in fact receive from the state to mitigate their loss?

[58] I have ultimately concluded that a narrow construction would be inconsistent with the way the section has been construed by the House of Lords in *Wisely v John Fulton (Plumbers) Ltd*, *Wadey v Surrey CC* [2000] 2 All ER 545, [2000] 1 WLR 820. In that case the House of Lords ruled that so far as interest was  
b concerned, s 17 meant that it had to be calculated by reference to a figure which ignored the fact that benefits had been received and ignored the fact that the defendant was paying the benefits to the Secretary of State. That does not support a narrow construction of s 17.

[59] Prima facie it seems to me that a rule as to mitigation can be said to be a rule relating to the assessment of damages. If that is so, on its language the section precludes an insistence that any of the benefits set out in Sch 2 to the 1997 Act should be used in any way to mitigate loss. It would only be if a strained,  
c narrow construction was placed on the section that such a conclusion would be avoided, and authority does not support the adoption of such a strained construction.

[60] In relation to the second string to Mr Faulks's bow, no oral argument was addressed to us by either side. It would however appear from the schedule on which the judge's findings on transport are recorded that this submission of Mr Faulks was not considered by the judge as an option. Accordingly I would allow the appeal relating to this ground and substitute in relation to transport the  
e figure put forward on behalf of the claimant.

#### *Driver over 25 (ground 6)*

[61] This ground was connected to the previous ground by virtue of the fact that Tessa Gough gave oral evidence to the effect that the Motability Scheme included a named driver and one other and that she had costed the insurance as  
f part of the Motability package recommended by her. Having rejected the Motability Scheme as the appropriate scheme by reference to which damages should be assessed, this approach of Tessa Gough can no longer be supported.

[62] However, it is not clear that the judge was making his finding on this aspect by reference to Tessa Gough's evidence because he found 'that insurance  
g is sufficient for one named driver over 25'. This appears to be following a recommendation of Tessa Gough as to the allowance she was making as recorded in the joint statement in the following terms: 'One named driver plus any driver over 25, as the insurance costs are less.'

[63] Mrs Clarke-Wilson, who gave evidence on behalf of the claimant on this  
h aspect, was of the view that restricting insurance cover to over 25 restricted the recruitment of carers. She was of the view that it would be quite difficult to recruit carers and the pool needed to be as wide as possible.

[64] It seems likely that the judge took the view that it was unlikely that carers between the ages of 17 and 25 would be looking after the claimant at all. The  
j present members of the existing care team were over 25 and the serious condition of the claimant meant that she was likely to require experienced carers, ie carers who were not teenagers.

[65] In my view the judge's assessment on this aspect should not be disturbed. He was entitled to find that insurance for one named driver over 25 would supply the needs of the claimant. I would dismiss the appeal on this aspect.

*Travelling expenses*

[66] In assessing loss of past earnings the judge without any explanation simply deducted 15% for travelling expenses. Rather illogically, it could be said, he made no such deduction in relation to future earnings. It seems that one explanation for the difference is that in the defendant's submissions to him he suggested the deduction in relation to past earnings but did not suggest any deduction for the future. Little time unsurprisingly was spent on this item with other more significant issues taking up the parties' concentration. a  
b

[67] Mr de Wilde and Mr Levisur in their written submissions before us refer to the following passage in the speech of Lord Griffiths in the House of Lords in *Dews v National Coal Board* [1987] 2 All ER 545 at 548, [1988] AC 1 at 13:

'... wherever a man lives he is likely to incur *some* travelling expenses to work which will be saved during his period of incapacity, and they are strictly expenses necessarily incurred for the purpose of earning his living. It would, however, be intolerable in every personal injury action to have an inquiry into travelling expenses to determine that part necessarily attributable to earning the wage and that part attributable to a chosen life-style. I know of no case in which travelling expenses to work have been deducted from a weekly wage and, although the point does not fall for decision, I do not encourage any insurer or employer to seek to do so. I can, however, envisage a case where travelling expenses loom as so large an element in the damage that further consideration of the question would be justified, as, for example, in the case of a wealthy man who commuted daily by helicopter from the Channel Islands to London. I have only touched on the question of travelling expenses to show that in the field of damages for personal injury principles must sometimes yield to common sense ...' (Lord Griffiths' emphasis.) c  
d  
e

[68] The judge was not directed to this passage. However even if he had been the passage does not lay down any rule of law. If there were some rule of law that travelling expenses should not be deducted no doubt Mr de Wilde and his team would have protested more loudly at the suggestion in the defendant's submissions that there should be the deduction. What the passage seeks to prevent is inordinate time being spent on not very significant items in the context of an exercise which is attempting to assess damages in a broad way. I would not disturb the judge's finding. f  
g

*Individual items from NHS and social services*

[69] These are not significant items in themselves. This may again have led to the judge not receiving the help he needed as to the correct approach. So far as the NHS is concerned the correct approach flows from s 2(4) of the Law Reform (Personal Injuries) Act 1948 which provides: h

'In an action for damages for personal injuries ... there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977 ...' j

[70] The following submissions in the skeleton of Mr de Wilde and Mr Levisur are not I think in dispute:

a 'The effect of this provision has been considered judicially a number of  
times. The authorities establish that the Act is to be regarded as preventing  
a tortfeasor from raising an argument that because facilities are available on  
the NHS it is unreasonable to allow the, higher, costs of obtaining goods and  
services privately. (See *Harris v Bright's Asphalt Contractors Ltd, Allard &  
b Saunders Ltd (Third Parties)* [1953] 1 All ER 395, [1953] 1 QB 617, *Cunningham  
v Harrison* [1973] 3 All ER 463, [1973] QB 942 and *Lim Poh Choo v Camden and  
Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174.) The  
question thereafter becomes one of fact: who will provide the services. If the  
answer is that the claimant will purchase goods and services privately then it  
is no answer that the claimant could obtain them under the auspices of the  
NHS more cheaply. If the facts establish that the claimant will obtain goods  
c and services freely under the auspices of the NHS then the cost of obtaining  
them privately will not be allowed. The question is never: are these services  
available on the NHS? It can only be: are these services available on the NHS  
and am I satisfied that they will actually be provided to the claimant: thus  
d obviating the need to purchase them privately? These are not matters of  
theoretical concern to a judge: in each case he must be satisfied that the  
claimant will actually get the relevant service from the NHS.'

[71] So under the section the question is whether on balance of probabilities  
the claimant will obtain the services from the NHS. So far as social services are  
concerned again there is no reason why the test should not be the same—on the  
e balance of probabilities will the claimant obtain the services from social services?  
The judge held that the claimant is a person who would when uninjured  
normally have obtained state benefits so far as possible. But he held she needs a  
private care regime. Once the judge has so held it must be for the defendant to  
show that the services such as laundry, Tena pads, and chiropody will be obtained  
on the NHS or from social services. It cannot be enough for the defendant to say,  
f 'there is no evidence that the services will not be available from the NHS or social  
services' which was the submission of Mr Faulks on behalf of the defendant made  
in relation to each of these items. We have had a note of the evidence on these  
items as agreed between counsel and that was the only submission open to  
Mr Faulks, but in my view, on the basis that a private care regime was needed, it  
g was for the defendant, if the judge was to find that a private care regime was to  
be what the claimant needed, to show that these kinds of items would have been  
available and obtained either on the NHS or from social services.

[72] As it seems to me the defendant's evidence came nowhere near to  
establishing that the three items would be available to the claimant under the  
regime favoured by the judge, and accordingly since the findings of the judge (in  
h accordance with the submissions of the defendant) was simply that there was no  
evidence that the services would not be supplied by the NHS or social services,  
those findings in my view cannot stand. I would allow the appeal on these items.

### *Cigarettes*

j [73] As indicated in defining the issues the judge awarded a sum for past  
wastage. He did not award any sum for the increase in smoking in the past. He  
did not award any sum for increased future smoking or any sum for wastage in  
the future.

[74] There is something deeply unattractive about the notion that a claimant  
should recover damages to cover her increase in cigarette consumption either for

the past and a fortiori for the future. Only if the medical evidence were to convince the court that the accident had caused such injury to the brain that the victim had no real choice but to increase her consumption of cigarettes, could the extra consumption be a head of damage. In this case the judge has awarded a sum for those cigarettes destroyed rather than smoked in the past, and Mr Faulks for the defendant sensibly does not seek to disturb that finding. But he submits first that the medical evidence does not support the theory that it was the brain injury which caused the claimant to increase her smoking habit, and second that so far as the future is concerned additionally it is hoped that a benefit will come out of the Kemsley rehabilitation for which the defendant is entitled to credit.

[75] Mr Levisseur referred us to the evidence of Professor Wood as to the consequences of Miss Eagle's head injury. He spoke about her injury restricting her to procedural learning and memory and the consequences of repetitive practice. He then said: 'Her life revolves around ... repetitive smoking because that is the habit she has got into, pulling the cigarettes out of an available packet.' In my view that does not support the submission that it was the claimant's brain injury which left the claimant no choice but to increase her smoking habit. On this aspect I would not disturb the judge's award.

#### *Receiver*

[76] There is no issue that the defendant is liable to pay the costs of the receiver. The issue relates to whether a professional is needed as receiver and the costs. As in other areas the judge was faced with the parties arguing for the extremes of their positions without alternatives nearer the medium. For the claimant the evidence was provided by Mr Duffield who had represented her throughout the litigation and with conspicuous dilatoriness. He had in fact been appointed by the Court of Protection as her receiver in May 2003. He put in a statement which suggested what he contemplated he would be required to do as a receiver and the sort of fees he would charge.

[77] The defendant put in a statement from Mr Hyde, another litigation solicitor, who expressed the view that he could not see how Mr Duffield's assessment of what he would have to do or of the fees he would charge could be reasonable. He suggested that it should be possible for Mrs Giles, the claimant's mother, to carry out the task of receiver and for her son David to take over if it got too much for her. It seems that after David gave evidence it became clear that it would not be right to rely on him being able to take over from Mrs Giles. Mrs Giles, when she gave evidence, clearly showed herself to be competent with the way she had handled money on the claimant's behalf up until that time, but she was never actually asked whether she would be prepared to be the receiver. Mr Giles when he gave evidence stated that he would prefer it if Mrs Giles was not the receiver.

[78] Mr Duffield and Mr Hyde were called and cross-examined, and the judge held that Mr Duffield would not make an appropriate receiver and that his fees were excessive. He found that Mrs Giles would be able to do the job with professional help and he awarded what he thought was a generous sum of £30,000 to cover such professional help as she would need.

[79] When granting permission to appeal Potter LJ stated that notice should be given to the Court of Protection to enable submissions to be made on their behalf. Master Lush has responded to that invitation, and we have his submissions. He does not deal with panel brokers' fees (see below) and expresses



a views on the circumstances when a layman or a professional might be  
appointed a receiver and provides some form of general guidance on fees.  
Mr Faulks was concerned as to the procedure adopted on the basis that the  
parties, and in particular his client, had not been given any opportunity to make  
submissions as to the appropriateness of the Court of Protection making  
b clear that her advisers did not make submissions to the master and simply  
provided 'the file' to him so as to enable him to acquaint himself with the case.

[80] We were considerably helped by the submissions from Master Lush,  
but I do understand the anxiety of Mr Faulks. But it is right to point out that  
his instructing solicitors must have had notice of what was proposed long  
before any submissions were actually forthcoming from the master, and were  
c thus in a position to protest if they thought the direction inappropriate. It is I  
also think surprising that if the advisers for the claimant thought it right to  
supply a file to the Court of Protection, that they did not consult with the  
defendant's advisers as to precisely what should be supplied. We are however  
where we are.

d [81] I have great sympathy with the judge in relation to this aspect.  
Mr Duffield was a litigation solicitor acting for the claimant giving evidence  
which was intended to assist her in her damages claim. His charges if he were  
appointed a receiver would of course be the subject of taxation, but he was not  
disinterested in the fees that he hoped that he would be able to charge. He  
e could not conceivably be bringing any independent mind to bear on the right  
course or on the appropriate fees. He was not someone who acted in the  
normal run of things as a receiver, although apparently he had been appointed  
a receiver within the previous 12 months in another case in which he was the  
instructing solicitor. As an instructing solicitor he had not acquitted himself  
f with any glory, the case having taken some 14 years to come to trial on liability.  
The judge was clearly right in thinking that Mr Duffield was not the right  
person to be the receiver.

[82] On the other hand the defendant called Mr Hyde, another litigation  
solicitor, who expressed the view that Mr Duffield's charges were too high. He  
thought that Mrs Giles could cope, but was himself no expert in receiverships.

g [83] The judge on the evidence before him took a course which one can fully  
understand. He had seen Mrs Giles give evidence. He formed a good view of  
her competence. He was quite clear that Mr Duffield was inappropriate, and  
he therefore thought that Mrs Giles would as a member of the family be able  
to take on the task with the aid of professional advice, and he awarded a sum  
h that would enable her to do just that.

[84] We now have the submissions of Master Lush and detailed submissions  
as to the way in which the Court of Protection works. Mr de Wilde's primary  
submission was that Mr Duffield had been appointed the receiver and that thus  
the court should conclude that he will remain so and should adopt the  
j assessment of fees of Mr Duffield. He appreciated that that submission might  
not find favour, and his secondary submission was that even if not Mr Duffield,  
a professional receiver should be appointed. Mrs Giles was he submitted  
now 58 and would be unlikely to be able to cope in the short term but certainly  
not in the long term. He relied on Master Lush's submissions that a  
professional receiver was normally appointed at least for the first two years. As

to the fees he sought to take the indications from Master Lush's submissions which were 'in excess of £3,500 plus VAT'. a

[85] Master Lush's view as to professional receiver or not were ultimately summarised in two paragraphs as follows:

'In my view it is not appropriate to say that the court will only appoint professional receivers in damages cases, nor that, if a professional receiver has been initially appointed, a lay receiver should not subsequently be appointed. I consider that the proper approach in general is that a professional receiver is desirable in acquired brain injury cases at least until the first or second year after the award. Such cases are likely to be more complex in the early stages. After this initial period, much will depend on whether there is a family member (or friend) who is both willing and suitable to act. If there is such a person able and suitable to act, he or she may employ a solicitor or accountant to deal with matters reasonably requiring professional assistance. If there is no such person willing to act, then no doubt it will be necessary for a professional receiver to remain in post (in the present case, either the current receiver or a new receiver appointed from the panel). b  
c  
d

Should a panel receiver be appointed in the future, the ongoing costs would depend on the complexity of the case. A professional receiver's costs are subject to detailed assessment (if not agreed), and are likely to exceed £3,500 a year (plus VAT). The costs of a professional receiver vary widely from case to case, and it would be difficult to predict what they might be in the present case. An alternative to a receivership would be the creation of a trust. The Court of Protection usually insists on one of the trustees being a professional, whose costs for acting as trustee may not be significantly less than the costs of acting as receiver.' e  
f

[86] Mr Faulks's submission was that Master Lush's submissions did not undermine the judge's findings. In essence he submitted that the submissions supported the judge in his view that the fees that Mr Duffield said he would charge as a receiver were exorbitant. The judge had awarded a generous sum to enable Mrs Giles to obtain professional advice; the figure would in fact cover a period of a professional receiver if that were thought necessary at the sort of costs which on taxation a receiver would be likely to obtain. g

[87] I accept Mr Faulks's submission. What the court is trying to do is to assess the cost of a receivership when the question as to who should be the receiver and what charges they will make, is in the hand of the Court of Protection. The indications in Master Lush's submissions are that the fees charged or allowed on taxation are nowhere near the sort of figures which Mr Duffield was suggesting even if a professional receiver were appointed. There is I suspect little distinction between Mrs Giles properly supported by professionals and a professional receiver for a short period until Mrs Giles can take over with some professional support thereafter. In my view the figure assessed by the judge is not ungenerous as to the likely charges whichever route the Court of Protection takes. I would not disturb the judge's award on this aspect. h  
j

*Panel brokers*

- a [88] Davis J in *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB), [2004] 3 All ER 367 heard as a preliminary point the question whether a claimant who was not a patient and subject to the Court of Protection should be entitled to claim the fees that he or she would incur on investment advice on receipt of the damages. He analysed the decisions over the years which had
- b dealt with this topic. The key authorities prior to the decision in the House of Lords, *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345, commenced with *Francis v Bostock* (1985) Times, 9 November, where Russell J reasoned as follows:

- c 'The award I make is compensatory. The whole object of the exercise upon which I have embarked by the progress of multipliers and multiplicands is to achieve a figure which compensates the plaintiff once and for all. The calculation of that figure, so far as future economic loss is concerned, seeks to achieve such a sum as will enable the plaintiff to recover her annual economic loss for the rest of her life, whilst in the
- d process dissipating the fund. The result is what should be achieved by the award itself. Having acknowledged that proposition however, the court is not concerned with the disposal of the award once it is made. The plaintiff may spend it as she wishes. The defendant, in my judgment, should not be called upon to find further moneys to assist the plaintiff in the proper
- e administration of an award which, in itself, affords adequate compensation. Furthermore in my view the employment of financial advisers and the like is a consequence of my award and not a consequence of negligence of the defendant. The claim fails on the ground of remoteness.'

- f [89] That was to be contrasted with the reasoning in the later case of *Anderson v Davis* [1993] PIQR Q87 where Mr Rodger Bell QC, sitting as a deputy judge of the High Court reasoned as follows (at 101):

- g 'That judgment of Russell J., as he then was, has been followed in other cases and it is with some trepidation that I decided not to follow it here, for the following reasons. First, in a case like this, which is one where any wise plaintiff without financial or investment expertise would be bound to require skilled advice on the management of his fund, I can see no difference, in principle, between an expense which is necessary under the
- h Rules of the Supreme Court or pursuant to the direction of the judge on the one hand, and an expense which is enforced by circumstance, or which will probably be enforced by circumstance, save that the Court of Protection fees are bound to be judged as reasonable expenses, whereas other management fees may or may not be judged to be reasonable, in all the circumstances. Secondly, if the plaintiff has, in commonsense and good
- j judgment, to spend management fees to use his fund to provide true compensation, that seems to me to be part of the economic loss which the Court is enabling him to recover. Put another way, if he does not take such management advice, at a cost to him, the reality is that the award will not compensate him as the Court intends it to do by making its award of damages.'

[90] The course which *Wells's* case took through the courts is conveniently summarised by Davis J ([2004] 3 All ER 367 at [15]):

[15] In *Wells's* case (and two related cases) the first instance judges were prepared to depart from the traditional approach in fixing the appropriate multiplier. They adopted a discount rate by reference to ILGS (index-linked government stock). In essence, their reasoning was that (applying the fundamental principle) the question was not whether it would be prudent for a claimant to invest in equities but whether investment of the award in ILGS would achieve the necessary object of compensation with greater precision: and in their view investment in ILGS would do that. That necessarily connoted a significantly lower discount rate (and hence higher amount of award of damages) than under the traditional approach. The Court of Appeal reversed these decisions. The Court of Appeal held, among other things, that a claimant in such a case was not to be put in some separate category distinct from the ordinary prudent investor; that ordinary principles of prudent investment had not in this context become outmoded by reason of the introduction of ILGS; and that, applying the fundamental principle, the traditional approach (on the basis that a claimant would probably be advised to invest in a mixed portfolio) remained valid. That decision of the Court of Appeal was reversed by the House of Lords. (It may in passing be noted that at least two of the cases considered in *Wells's* case involved patients: but the House of Lords did not seem to draw any distinction in that regard.) The House of Lords decided that a claimant recovering a substantial lump sum award in personal injury litigation was not to be regarded as in the same position as an ordinary prudent investor: and that the applicable discount rate was to be fixed by reference to ILGS. The House of Lords decided that, on that approach, the appropriate discount rate was to be 3%, to be of general application in the typical case but to await the fixing of a rate by the Lord Chancellor under his delegated powers conferred by the Damages Act 1996.

[91] He also summarises the prescription of discount rates by the Lord Chancellor under the 1996 Act as follows:

[16] The 1996 Act in the relevant respects provides as follows:

"1.—(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates of return for different classes of case."

It had been made known that the Lord Chancellor was awaiting the outcome of *Wells's* case before making an order under s 1(1).



a [17] On 25 June 2001 the Lord Chancellor (Lord Irvine of Lairg) made  
such an order (the Damages (Personal Injury) Order 2001, SI 2001/2301),  
giving accompanying reasons. He fixed the discount rate at 2.5%. Very  
soon thereafter, objections were made that Lord Irvine LC had been  
b provided with incorrect information as to the average gross redemption  
yield on ILGS for the three years up to June 2001. In consequence, Lord  
Irvine LC reconsidered the matter. Having done so, he maintained a  
discount rate of 2.5%, and declined to withdraw his previous order of  
25 June 2001. He gave reasons dated 27 July 2001, expressly stating that he  
had considered the matter "completely afresh".

c [18] Lord Irvine LC concluded that he should set a single rate to cover  
all cases; should set a rate easy for parties and their lawyers to apply in  
practice, and to the nearest 0.5%, to be used in conjunction with the  
*Actuarial Tables with explanatory notes for use in Personal Injury and Fatal*  
*Accident Cases* (the Ogden Tables); and should set a rate which should  
endure for the foreseeable future. He abjured an inclination to "tinker"  
d with the rate to take account of transient shifts in market conditions. He  
made clear that he proposed to apply the fundamental principle, and stated  
(p 2 of his reasons): "It is accordingly unrealistic to require severely injured  
claimants to take even moderate risks when they invest their damages  
awards." He indicated that any approach to setting the discount rate must  
be "fairly broad-brush". He indicated that he did not consider that he was  
obliged to follow the basic reasoning of the House of Lords in *Wells's* case  
e as to the averaging of gross redemption yields on ILGS in deciding on a rate  
of 3%. Lord Irvine LC concluded that the average gross redemption yield  
on ILGS before tax was 2.46% and that "the net average yield on  
Index-Linked Government Stock, as adjusted to take account of tax, lay in  
the range between 2% and 2.5%". Given his decision to set the rate to the  
nearest 0.5%, the discount rate was thus to be either 2.5% or 2.0%; and he  
f stated that *Wells's* case did not require him to set one rate or the other.  
Stating that he had regard to the fundamental principle and to matters  
relevant to the setting of a discount rate which was just as between  
claimants and defendants as groups, he concluded that as at 25 June 2001  
he should have set the rate at 2.5%.

g [19] In so concluding, Lord Irvine LC went on to state that he noted that  
the real rate of return to be expected from ILGS tended to be higher the  
lower the rate of inflation was assumed to be. He stated that he considered  
it reasonable to assume a rate of inflation for the reasonable future lower  
than 3% and that in turn "provides comfort that a discount rate set at 2.5%  
h is reasonable".

[92] Davis J rejected the claim that investment costs should be included in  
the claim for damages and his reasons are compelling. The essence of that  
reasoning can be discerned from the following sentences:

j '[49] ... It is plain enough from the reasoning of the House of Lords in  
*Wells's* case, and it also, in my view, is implicit in Lord Irvine LC's reasons,  
that investment costs are contemplated as arising in respect of the  
investment advice anticipated to be obtained by a claimant. But  
investment advice (on the claimant's own approach) relates to the setting  
of the appropriate discount rate. Thus although the annual investment

costs can be presented as an element of the multiplicand to which the appropriate multiplier is to be applied, in my judgment they are, for these purposes, in substance to be regarded as within the "territory" (to use a word employed in argument) of the applicable discount rate.'

His conclusion included the following observation on the decision in this case at first instance:

[64] ... It also follows that I agree with the decision of Cooke J in *Eagle v Chambers* in disallowing panel brokers' fees: for my present view is that, for these purposes, there is no distinction to be drawn between Court of Protection cases, in this particular regard, and other cases.'

[93] As recorded in the conclusion of Davis J, Cooke J in the instant case refused to award the panel brokers' fees, which the Court of Protection will be bound to charge the fund.

[94] Mr de Wilde did not make a full frontal attack on Davis J's decision in so far as that decision related to non-patients. His attack was confined to a submission that a patient under the protection of the court had no choice about how the funds would be invested and would thus be charged the panel brokers' fees in accordance with the prescribed rules whether they liked it or not, and that distinguished a patient from a non-patient. In the result the question whether Davis J was right in relation to non-patients has not been fully argued out, but Mr Faulks argued that Davis J was clearly right, and that there simply should not be a distinction between patients and non-patients.

[95] I have found Davis J's reasoning extremely convincing. Part of that reasoning comes to this. A defendant must pay by way of compensation damages assessed on the basis that the return on the money will be by way of investment in gilts even though the practice is to gain a higher return by investing more broadly. To order the defendant to pay the costs of taking the advice so as to enable the investment to be made more broadly so as to enable the claimant to recover more than that which he would have recovered if investments had been maintained in gilts is to make the defendant lose both on the swings and the roundabouts, and to provide the claimant with a head of damage which flows from a decision as to how to invest and not from the accident. A claimant is entitled to use his money as he likes, but if he wishes to increase the sum awarded and awarded on the most advantageous basis to the claimant, he must set off the fees charged against the gains made and not recover the fees from the defendant.

[96] All that is as true of a claimant who is a patient as it is of a claimant who is not a patient. Thus again in agreement with Davis J, my strong inclination is to feel that as a matter of principle different answers should not be reached depending on whether a claimant is a patient or not.

[97] The argument for a distinction is that it is the accident which has made the claimant a patient; the patient has no choice as to how funds will be invested; the Court of Protection will invest more widely taking the advice of a panel of brokers, and it is by virtue of the rules that the fees of the panel brokers will be charged. I cannot accept that this distinction is valid. First there is in fact no compulsion on the Court of Protection to invest more widely. It happens to be its present policy but the policy is not 'set in stone': see eg Lord Lloyd of Berwick in *Wells's case* [1998] 3 All ER 481 at 489, [1999] 1 AC 345 at 369. Thus it is not by virtue of being a patient that the wider investment takes

a place, it is because of a decision to invest more widely which is no different from the decision taken by any person seriously injured or (as will be more likely) any competent adviser who will be looking after a fund on behalf of a seriously injured person. Second it seems to me to be wrong to equate the Court of Protection to some body independent of the patient or person injured. It is because the patient cannot take the decisions as to whether to invest more widely that a Court of Protection is required. That decision to invest more widely should not be looked at as anything other than the decision of the patient if he or she were capable of making the same. Third the rules which give the court power to charge the panel brokers' fees are necessary, but they are actually no different from the fees that a non-patient will be charged if the non-patient decides to use brokers to make more of the funds that he has been awarded.

[98] In my view the judge was right not to award the panel brokers' fees which are likely to be charged by the Court of Protection while looking after the fund representing the damages and I would dismiss this ground of appeal.

d *Interest*

[99] The judge rightly took the view that this case should have been tried by the end of 1996. The accident occurred on 22 June 1989; no writ was issued until limitation had practically expired; nothing was done to move the action forward over many years. There was no explanation from Mr Duffield who had the conduct of the claim from the outset as to why there had been the delay. The judge took the view that seven years of the delay was inexcusable and that accordingly in assessing interest the claimant was being kept out of her money not by any failure by the defendant to pay but by the lack of progress of the case by her advisers. As was pointed out by Croom-Johnson LJ in *Spittle v Bunney* [1988] 3 All ER 1031 at 1041, [1988] 1 WLR 847 at 859:

'In *Jefford v Gee* [1970] 1 All ER 1202 at 1208, [1970] 2 QB 130 at 146, which first established the guidelines on which interest should be awarded in personal injury actions, it was explicitly stated by Lord Denning MR that interest should not be "awarded as compensation for the damage done", but should only be "awarded to a plaintiff for being kept out of money which ought to have been paid to him". Where the case takes a long time to come on for trial because there has been unjustifiable delay by the plaintiff, he has been kept out of his money by his own default for part of the period. It is a "special reason" for not giving some of the interest. *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816 made that addition to the guidelines.' (Lord Denning MR's emphasis.)

[100] The judge undoubtedly took a tough view. That is clear from the fact that he went further even than the defendant in his submissions was asking him to go. But his logic is inescapable, and in truth Mr de Wilde's submission that two years was the appropriate deduction was a submission one must assume was being made on behalf of Mr Duffield's insurers rather than the claimant. Two years' interest one must assume was something the insurers would recompense the claimant for, and the question is whether the amount of recompense should be that which the judge decided, ie seven years or some lesser sum.

[101] The difficulty for Mr de Wilde on this issue is that there is no basis for saying the judge misdirected himself or came to a view which was clearly wrong. The logic of the judge's ruling was, as I have already said, impeccable. If (and it cannot be gainsaid because there is simply no explanation for the delay) there was a period of seven years for which the claimant or her advisers were responsible then they were being kept out of their money not because the defendant refused to pay but by their own conduct. He submits that he cannot find any case where more than two years has been deducted, and he took us to a decision of Latham J, *Barry v Alerex Construction (Midlands) Ltd* [2000] PIQR Q263, where the period of delay was five years and the judge deducted two years' interest. But that is simply an example of the judge exercising his discretion in that case, and does not show that the judge in this case was misdirecting himself. I would dismiss this ground of appeal.

#### GEWA

[102] Sadly the claimant's injuries are such that she needs 24-hour care. Furthermore she probably does not have the capacity to decide for herself whether windows should be opened or not. It is true that Maggie Sargent's evidence that the claimant did need a central control unit was not challenged by Tessa Gough—her evidence was that she would not resist the provision of this unit if one was not available on the NHS. The judge is not bound to accept the evidence of experts, and it was open to him to take the view that this unit was unnecessary. I would dismiss the appeal on this aspect.

#### Cleaning

[103] The expert evidence was consistent on both sides allowing for extra cleaning. In Tessa Gough's appendix an allowance is made for that extra cleaning, but the judge has decided that the carers would do that cleaning. My difficulty in this instance is, although respecting the judge's right not to accept even the unanimous views of experts, I cannot find any evidence to support the view that the carers would in fact do all the necessary cleaning. Indeed Mr de Wilde referred us to a passage in the evidence which indicated that carers would not, for example, clean the oven. If this had been the only item in relation to which an appeal had been launched, I accept it is unlikely that this court would have contemplated interfering with the judge, but, it being an item which has had to be considered with many others, I consider that it is right to restore Tessa Gough's figures relating to extra cleaning, and would allow the appeal on this item.

#### BUXTON LJ.

[104] I gratefully adopt the account of the case given by Waller LJ, and also the great majority of his conclusions. I add some words of my own only on the one issue upon which I have the misfortune to differ from him; and by way of comment upon one other issue.

#### Panel brokers' fees

[105] The judge disallowed this head of claim because he thought that it was inconsistent with the decision of the House of Lords in *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345: since the multiplier is fixed according to the discount rate appropriate



a to index-linked government stock (ILGS), a defendant should not be able to charge for expenses incurred in investing the lump sum thus produced on a different basis. The same view is taken by Davis J in what was, if I may be permitted to say so, a detailed and helpful judgment in *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB), [2004] 3 All ER 367, a non-patient case. As Waller LJ has pointed out in at [94], above, we did not have the benefit of full argument on the judgment of Davis J. I am however content to assume that it was correct in respect of the case of non-patients that it addressed. I venture to differ from the judge's conclusion, following Davis J, because I consider that the special position in which a patient has been placed by the tortfeasor gives rise to special considerations in her case. But before indicating why that is so I need none the less to make some observations about the approach in a non-patient case.

[106] The House of Lords decided *Wells's* case as it did because it considered that an injured plaintiff was not like an ordinary prudent investor, but was entitled to the greater security for the future provided by ILGS. It is the defendant who has put the plaintiff in the position of having to manage, now, a very large lump sum that must last for the rest of his life: rather than be like everyone else, and meet his expenses as they arise from income as it arises. That rationale was reinforced by Lord Irvine LC in his reasons for fixing the rate, cited by Davis J ([2004] 3 All ER 367 at [46]): 'It is accordingly unrealistic to require severely injured claimants to take even moderate risks when they invest their damages award.'

[107] The emphasis in that statement is upon what the claimant is required to do. To equiparate the injured claimant with the ordinary prudent investor, as this court had done in *Wells's* case, forced upon the claimant a hazard as to the eventual outcome of the court's lump sum award that, first, might undermine the process by which that award had been made; and, second, placed upon the claimant burdens that, if they were to be borne by anyone, should be borne by the defendant. The claimant was accordingly saved the cost of managing the lump sum in order to achieve the rate of return on which it had been predicated: investment in ILGS, although not without cost, would not require the active involvement of the prudent investor.

[108] At the same time, however, the ordinary claimant, once he has money in hand, can use it as he wishes. Because what he does is a matter of choice, and not forced on him by the defendant or by the system, he cannot impose on the defendant expenses or losses arising from his use of the money: whether he indulges in investment on the Stock Exchange or investment on the race-track. But the patient is in a different position. Because of what the tortfeasor has done to him, he has no control over his affairs, but is in the hands of the Court of Protection. The Court of Protection's fees are an inescapable result of the severity of the injury. The brokers' fees are chargeable whatever their level of success. In other words, when a tortfeasor renders his victim a patient, he not only, as in any case of serious injury, imposes on the claimant the wholly unreal world of a single lump sum to provide for the whole of the rest of his life; but also deprives the claimant of the normal power to decide how that lump sum should be managed.

[109] I quite understand the argument that attracts Waller LJ at [97], above, that the Court of Protection is simply the agent for the claimant, just as his broker would be the agent for a non-brain damaged claimant; and that in each

case the defendant should not be charged with the cost of the agent trying to do better for the claimant than the ILGS return on the basis of which the lump sum of damages was calculated. But in the ordinary case the claimant chooses his agent. In the case of a patient, not only has he not chosen his agent, in the events that have occurred the need for and the identity of the agent have been brought about by, have been imposed on the patient by, the tortfeasor. In those circumstances, the tortfeasor should pay for what is not merely a foreseeable but in fact an inevitable cost of that agency. a

### Interest

[110] I agree that the judge plainly had power in law to adjust the interest payment, and that we cannot interfere with his exercise of discretion as to the amounts deducted. I merely wish to observe that this case underlines the unsatisfactory nature of this area of the law. c

[111] As Farquharson LJ put it in *Corbett v Barking Havering and Brentwood Health Authority* [1991] 1 All ER 498 at 528, [1991] 2 QB 408 at 446: 'The power to deprive a tardy litigant of interest when he is guilty of unjustifiable delay is an essential discipline.' This power exists, and is exercised, even if the litigant himself was not guilty of delay; or even, as a patient or infant (like the plaintiff in *Corbett's* case), was incapable of either expedition or delay. It is a machinery that belongs to the pre-Woolf era, when cases were allowed to drift on for years without any effective sanctions available to the court apart from the draconian remedy of strike-out (see *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 at 546–547, [1968] 2 QB 229 at 245 per Lord Denning MR). The addition of indiscriminate interventions ex post facto of the kind now under review was therefore perhaps understandable. But in a case where the defendant has suffered no loss through the delay (and in the present case we do not know whether or not that is so, because defendants are not required to demonstrate any loss before this sanction is imposed) deprivation of interest so far as the claimant is concerned only adds injury to the insult that she has already suffered because of the dilatoriness of her lawyers. Now that we have moved into the era of the CPR (and the present case very far predates that era) gross delays simply should not occur. But if they do, an opportunity should be taken in an appropriate case to reconsider this whole area of jurisprudence, not least by taking into account whether the defendant has used the machinery now available, in a culture that does not permit him simply to stand by, to progress the case or secure its dismissal. d  
e  
f  
g

[112] That is for the future. For the present, the claimant's only recourse is against her solicitors. The severity of the judge's sanction demonstrates that he thought this to be a particularly serious case. It is rendered the worse by there having been absolutely no explanation of the delay, despite the same solicitor having had the conduct of the case throughout, and thus being fully informed of its progress. The claimant must be advised as to her rights in this matter. The judge's observations have no doubt been brought to the attention of the Master of the Court of Protection. If however the case has not been notified to the claimant's solicitors' liability insurers that must be done immediately. I would be disappointed if they did not take the terms of the judgment of Cooke J very seriously. h  
j

**SCOTT BAKER LJ.**

a [113] I have had the advantage of reading in draft the judgments of Waller  
and Buxton LJJ. On the one issue on which they differ, namely panel brokers'  
fees, I am convinced by the reasoning of Waller LJ. Furthermore, it seems to  
me it would be most unsatisfactory for there to be a distinction between  
patients and non-patients for the assessment of damages in this regard. This  
b question apart I agree with both judgments.

*Appeal allowed in part. Cross-appeal dismissed.*

Aaron Turpin Barrister.

# R (on the application of Ashbrook) v Secretary of State for the Environment, Food and Rural Affairs

[2004] EWHC 2387 (Admin)

QUEEN'S BENCH DIVISION

COLLINS J

8, 29 OCTOBER 2004

*Commons – Erection of any building or fence – Consent of Secretary of State – Whether public inquiry required – Law of Property Act 1925, s 194(1).*

The local authority managing Wisley Common applied to the Secretary of State under s 194<sup>a</sup> of the Law of Property Act 1925 to erect a stock fence on the common. Under s 194(1) of the 1925 Act such work was not lawful without consent, and in giving or withholding consent the Secretary of State 'shall have regard to the same considerations and shall, if necessary, hold the same inquiries' as were directed by the Commons Act 1876 to be taken into consideration and held by the relevant minister before forming an opinion whether an application to inclose commons was to be acceded to or not. Under the 1876 Act those making the relevant decision (the Inclosure Commissioners) were to take into consideration any inclosure application made to them, and if satisfied by the information so furnished to them, or by any 'further inquiries made by themselves', that a prima facie case had been made out, and that having regard to the benefit of the neighbourhood as well as to private interests, it was expedient to proceed further, they were to order 'a local inquiry to be held'. The Secretary of State followed her usual procedure of inviting the submission of objections or representations and subsequently gave consent to the fence under s 194. The General Secretary of the Open Spaces Society, a body active in promoting measures to protect commons from attempts to impede access or to inclose, applied for judicial review to quash the consent contending that the effect of reference in s 194 to the provisions of the 1876 Act was that Secretary of State could not give consent without a public local inquiry.

**Held** – On the true construction of s 194 of the 1925 Act, the Secretary of State was entitled to give consent under the section without causing a public local inquiry to be held. The words 'if necessary' in s 194(1) were meaningless unless they enabled something not to be done which otherwise would have had to be done. Under the 1876 Act the commissioners had a discretion as to what, if any, 'further inquiries' they should make, but they had no discretion as to the holding of a 'local inquiry' if the preconditions were satisfied. Thus the words 'if necessary' could have a sensible effect in relation to the holding of a local inquiry. The only obstacle to that sensible construction of s 194 was the use of the plural in 'hold the same inquiries' rather than the singular 'inquiry'. Holding an inquiry suggested some sort of hearing at which information was to be obtained. The expression was not appropriate if all that was meant was that information was

<sup>a</sup> Section 194, so far as material, is set out at [9], below



a sought by X from Y. Thus the expression 'hold the same inquiries' in s 194(1) would suggest that what was being referred to was the local inquiry which the 1876 Act required the commissioners to arrange to be held rather than the further inquiries made by commissioners themselves. The use of the plural did not present a real difficulty. Section 194 was dealing with generic matters and so the use of the plural was not impossible. The general rule had long been that the singular included the plural and the Interpretation Act 1978 provided, as had its predecessor, that words in the plural included the singular. Furthermore, it would be an absurd situation if every application, however minor the works, which fell within s 194 had to be considered in a public local inquiry. The application would therefore be dismissed (see [15], [17]–[21], below).

### c Notes

For the restrictions on the erection of buildings and fences and other works on commons, and for local inquiry on application for inclosure, see 6 *Halsbury's Laws* (4th edn) (2003 reissue) paras 550, 620.

d For the Law of Property Act 1925, s 194, see 37 *Halsbury's Statutes* (2003 reissue) 333.

### Case referred to in judgment

*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

### Application for judicial review

f Kate Ashbrook, the General Secretary of the Open Spaces Society, with permission of Charles J given on 6 May 2004, applied: (i) for a declaration that on the true construction of s 194 of the Law of Property Act 1925 the Secretary of State for the Environment, Food and Rural Affairs was not entitled to give a consent under that section without causing a public local inquiry to be held; and (ii) for an order quashing the decision of the Secretary of State on 1 October 2003 giving consent to erection of a stock fence on Wisley Common, Surrey. The facts are set out in the judgment.

g George Laurence QC and David Ainger (instructed by *Zermansky & Partners*, Leeds) for the claimant.

Jonathan Karas (instructed by the Solicitor for the Department for the Environment, Food and Rural Affairs) for the Secretary of State.

h *Cur adv vult*

29 October 2004. The following judgment was delivered.

### j COLLINS J.

[1] The claimant is the General Secretary of the Open Spaces Society (the OSS). It was founded in 1865 under the title 'The Commons Preservation Society', largely because of the perceived threat to commons which resulted from plans to sell Putney Heath and to empark Wimbledon Common. Since then the OSS has been active in promoting measures to protect commons from

attempts to impede access or to inclose. It is consulted by the defendant on all applications made to her which affect commons.

[2] This claim concerns Wisley Common in Surrey. It lies at the south west of the junction between the M25 and the A3. In August 2000 Surrey County Council, which manages the common since the owner cannot be traced, issued a document asking for public assistance in determining its future management. The OSS in its response made it clear that it was resolutely opposed to fencing on common land. Following consultation, Surrey County Council wrote a letter dated 28 November 2001 to the OSS which enclosed the leaflet announcing its final decision, namely that a stock fence was considered to be the best all round solution and that an application would be made to the defendant pursuant to s 194 of the Law of Property Act 1925 to erect a fence, part of which would be on the common land and so would require consent.

[3] Wisley Common is a designated Site of Special Scientific Interest (SSSI) which supports a number of scarce heathland species. The heathland has diminished since 1948 because of the lack of grazing which has allowed scrub and trees to encroach and bracken to take over from the heather. Clearance of the invading vegetation by mechanical means and the use of volunteers had not proved particularly effective, whereas temporary grazing in selected areas within electric fences had. It was decided that low intensity grazing was the only viable means of preserving the heathland and some of the rarer fauna and flora which it supported. The OSS does not quarrel with the proposal to introduce grazing, which is supported by English Nature and other bodies concerned with the preservation of wildlife. Some means is needed to avoid stock straying onto the main roads. The county council's position was summarised in the letter of 28 November 2001 thus:

'We believe fencing Wisley Common is essential because its SSSI/pSPA [potential special protection area] status can only be protected and its biodiversity enhanced by grazing the entire heathland area. Its proximity to two of the busiest motorways and trunk roads in the south-east require that it is essential to protect public safety by fencing and this is "an overriding need".'

[4] The OSS continued to object to fencing. It claimed that the problem of straying could be controlled without a fence by shepherding. It contended that the proposal was not of benefit to the neighbourhood and would have an adverse effect on the public's enjoyment of the common: it was severely contrary to the public interest.

[5] On 1 October 2003 the defendant, believing she was entitled to do so in accordance with s 194 of the 1925 Act, gave her consent to the erection of the stock-proof fencing. The OSS obtained advice from leading counsel and on 27 November 2003 wrote to the Treasury Solicitor asserting that the legislation required that a local public inquiry should be held and indicating that proceedings for judicial review would be brought to quash the consent. This claim was lodged on 19 December 2003. Following a refusal of permission on the papers, Charles J granted permission on 6 May 2004. The claimant seeks a declaration that on the true construction of s 194 of the 1925 Act the defendant is not entitled to give consent under it without causing a public local inquiry to be held and an order quashing the decision of the defendant.

a [6] The claimant does not contend that the decision to give consent is irrational or that there are any grounds to challenge it other than that based on the alleged need for a local inquiry. Mr Laurence QC candidly accepted that the holding of an inquiry would not be likely to change the outcome. But he correctly submitted that, if on its true construction s 194 required that an inquiry be held, a decision reached without holding an inquiry would not be lawful.<sup>7</sup> It is somewhat strange that this argument has only been raised in 2003 since the defendant and her predecessors have been construing s 194 in the same way since 1925. Furthermore, the OSS have been consulted on all applications made under s 194 and have not before now objected to the defendant's construction.

c [7] In dealing with an application under s 194, the defendant puts an advertisement in the local press inviting the submission of objections or representations. These are copied to the applicant whose comments are in their turn copied to the person who made the objections or representations. Once the case officer is satisfied that all relevant information has been provided, the decision will be made unless it is considered that an inquiry should be held.

d This will happen according to criteria published by the Department for the Environment, Food and Rural Affairs (DEFRA), namely:

e '(a) Where a significant number of objections to the proposed works have been received, or (b) where the issues appear complex, or (c) if it is considered that further information about the proposals is needed and that this could only be obtained by holding a public local inquiry.'

f [8] Mr Hopkinson, the head of the Common Land Branch in DEFRA, a statement from whom is before me, points out that, if a public inquiry is to be held in every case in which the application is *prima facie* allowable, there would be a significant waste of resources. If the claimant is correct, even an application for relatively minor works which everyone agrees should take place because they would obviously be beneficial could not be approved without a public local inquiry. He has produced figures which show that between 1999 and 2003 only about 10%–15% of decisions were made following a public local inquiry. The OSS, who would have been aware of all of them, has never suggested that the defendant has failed to reach satisfactory in the sense of reasonable decisions. Mr Hopkinson also stated that in 51% of applications in which no inquiry was held there were no objectors and in 91% there were three or fewer.

h [9] With that introduction, I must now set out the relevant statutory provisions. Section 194 of the 1925 Act applies to any land which is subject to rights of common at the commencement of the Act, namely 1 January 1926 (s 194(3)). Section 194(1) provides:

j 'The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister [now the Secretary of State] thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act 1876 to be taken into consideration and held by the Minister before

forming an opinion whether an application under the Inclosure Acts 1854 to 1882 shall be acceded to or not.'

Section 193 of the 1925 Act gives members of the public 'rights of access for air and exercise' to certain common land.

[10] Inclosure of commons was a very contentious issue in the nineteenth century. Lords of the manor who generally owned common land were concerned to make the best use of it for themselves, whether for agriculture or to build on as the population grew. The Inclosure Act 1845 is entitled: 'An Act to facilitate the Inclosure and Improvement of Commons and Lands held in common ...' The battle for the preservation of common land for the benefit of members of the public and to enable access to it to be maintained culminated in s 194 of the 1925 Act, but this repeated earlier statutes and the language is identical to that in some of them. Some subsequent statutes or subordinate legislation have used the same words. The 1876 Act states in its preamble:

'Whereas by the Inclosure Acts, 1845 to 1868, upon the application and with the consent of such of the persons interested in any common ... the Inclosure Commissioners are empowered by provisional order ... to authorise the inclosure of such common, provided such inclosure is made on such terms and conditions as may appear to the Commissioners to be proper for the protection of any public interests, and provided also that the Commissioners are of opinion that such inclosure would be expedient, having regard as well to the health, comfort and convenience of the inhabitants of any cities, towns, villages or populous places in or near any parish in which the land proposed to be inclosed ... may be situate (herein-after included under the expression the benefit (sic) of the neighbourhood) ...'

[11] Section 7 sets out the terms and conditions which may need to be included in any order made so as to comply with the obligation to have regard to the benefits of the neighbourhood. Section 10 contains a number of rules which have to be observed by the commissioners with respect to an application for a provisional order for the regulation or inclosure of a common. The rules would today be dealt with by means of regulations since they govern procedure. They require the publication of a notice of application by whatever means the commissioners consider appropriate, provided that a notice is always to be inserted in at least one paper circulating in the neighbourhood (s 10(1)). The application must be in writing and be accompanied by a map (s 10(2)). Section 10(3) I should cite. It reads:

'On making their application in respect of any common, the applicants shall furnish the ... Commissioners, in answer to questions previously submitted or otherwise in such manner as the ... Commissioners may from time to time direct, with information bearing on the expediency of the application considered in relation to the benefit of the neighbourhood as well as to private interests ...'

Section 10(4) sets out in more detail what must be dealt with in the evidence submitted and specifies that, in the case of an application for inclosure, the applicants must identify the advantages to be derived from inclosure as



a opposed to regulation and 'the reasons why an inclosure is expedient when viewed in relation to the benefit of the neighbourhood'.

[12] Section 10(5) deals with evidence in relation to private interests, that is to say, the interests of those interested in the common, who would normally be the owners or the commoners. Finally and most importantly for the purposes of this claim, s 10(6) provides:

b 'The ... Commissioners shall take into consideration any application made to them as in this Act provided, and if satisfied by the information furnished to them as aforesaid, or by any further inquiries made by themselves or an Assistant Commissioner, that a *prima facie* case has been made out, and that, regard being had to the benefit of the neighbourhood  
c as well as to private interests, it is expedient to proceed further in the matter, they shall order a local inquiry to be held by an Assistant Commissioner.'

d Section 11 deals with the procedure applicable to the holding of a public local inquiry. It requires that notices of the meeting be posted on the church door of the parish church and elsewhere which encourage anyone interested in the application to attend the inquiry and to be heard. Section 11(6) enables the assistant commissioner himself to make any inquiries he considers advisable.

e [13] Section 7 of the 1876 Act then sets out the matters which the commissioners (for whom the minister is to be substituted when considering s 194) must take into consideration. They are identified (although as a single matter) as 'the question whether such application will be for the benefit of the neighbourhood'. Section 10(6) requires them explicitly to take into consideration 'any application made to them as in this Act provided'. That  
f must mean an application which includes all the information which s 10 requires it to contain, some of which may have resulted from questions asked or information sought by the commissioners (s 10(3) and (4)).

[14] There was no provision in the rules set out in s 10 of the 1876 Act for written representations to be made by those who wished to comment on or object to any application. No doubt commissioners would not have ignored any such material, but the need for a local inquiry can readily be understood in times when adult literacy was by no means as widespread as it now is. Furthermore, the issue of regulation and, more particularly, inclosure of commons had much more immediate political interest than now because of continuing attempts by owners to inclose or to reduce public access to commons. In his book *Commons, Forests and Footpaths* written in 1910, Lord  
h Eversley, the founder of what has become the OSS, dealing with the situation towards the end of the nineteenth century says:

j 'The spirit of encroachment may appear to slumber for a time, but in reality it is always on the watch for opportunities. The fear of resistance may deter the inclosure of Open Spaces in populous districts, but it is not of much avail to prevent the filching of bits of rural Commons.'

So it was that in 1893 there was passed the Law of Commons Amendment Act which was designed to prevent owners of common land circumventing the 1876 Act by reliance on the Statute of Merton (the Commons Act 1236) or the

Statute of Westminster the Second (the Commons Act 1285). The 1893 Act provided by s 3:

'In giving or withholding their consent under this Act, the [Secretary of State] shall have regard to the same considerations, and shall, if necessary, hold the same inquiries as are directed by the Commons Act 1876 to be taken into consideration and held by the [Secretary of State] before forming an opinion whether an application under the Inclosure Acts shall be acceded to or not.'

The wording is the same as that contained in s 194(1) of the Law of Property Act 1925 and Mr Laurence submits that the construction of s 3 of the 1893 Act should determine the true construction of s 194.

[15] Although the promoter of s 3 of the 1893 Act was Lord Thring, who, Mr Laurence informed me, was, before being ennobled, an eminent parliamentary draftsman, the wording of it is not as clear as it should have been. It requires the Secretary of State (1) to have regard to the same considerations as are directed by the 1876 Act to be taken into consideration and (2) if necessary, to hold the same inquiries as are directed by the 1876 Act to be held before forming an opinion whether an application shall be acceded to or not. The words 'if necessary, hold the same inquiries' have created the argument in this case. The word 'inquiry' has more than one shade of meaning, although each involves the seeking of information. If one makes an inquiry, one is asking for information and the expression means little more than asking a question. If one holds an inquiry, the word suggests some sort of hearing at which information is to be obtained. The expression 'hold an inquiry' is not appropriate if all that is meant is that information is sought by X from Y. Thus the expression 'hold the same inquiries' would suggest that what is being referred to is the local inquiry which s 10(6) of the 1876 Act requires the commissioners to arrange to be held if satisfied that a *prima facie* case has been made out and it is expedient to proceed further. It is not apt to refer to the 'further inquiries made by themselves ...' in the earlier part of s 10(6). The difficulty in the way of that construction is the use of the plural, since the local inquiry is in the singular. But that does not seem to me to be a real difficulty. Section 194 of the 1925 Act and s 3 of the 1893 Act are dealing with generic matters and so the use of the plural is not impossible. For example, in s 10(1) of the 1876 Act, although the section commences by reference to 'an application', reference is to 'The applicants'. I recognise, of course, that there may be more than one applicant making an application, but the general rule has for long been that the singular will include the plural. And the Interpretation Act 1978 provides, as did its predecessor, that words in the plural include the singular.

[16] Mr Laurence has made detailed inquiries to try to obtain a report of what Lord Thring said in promoting s 3 of the 1893 Act in an endeavour to rely on the principle established in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. He has been unsuccessful because no report exists (1893 being before *Hansard* was established as the official report). In any event, I would only have been able to have regard to such material if there were an ambiguity in the provision. Furthermore, what was intended in 1893 may not provide the answer to the construction in 1925 because there is always the

a possibility that Parliament believed in 1925 that the provision in question had a different meaning and enacted it in accordance with that belief. Thus if the principle in *Pepper v Hart* could be used, it would be necessary to see whether any guidance was given by the minister responsible for s 194. Since I do not think there is an ambiguity in s 194 in that there are good reasons to construe it in accordance with the construction applied by the defendant, I do not need to consider it nor should I be influenced by what was said when s 194 was being discussed in Parliament.

[17] Mr Laurence recognises that his construction means that every application, however minor the works, which falls within s 194 must be considered in a public local inquiry if it is to be approved. This will be the case whether or not there have been any objections and even if the works would in everyone's view be beneficial and desirable. That is an absurd situation and it is not made any less absurd by the recognition that in 1876 that was what Parliament required. Regulation suggests something rather more extensive than the execution of what might be minor works and inclosure obviously affects the very existence of the common. In the light of the importance attached to the preservation of commons, which were under threat from owners, so that they would provide areas of recreation for people generally, it is not at all surprising that Parliament wanted to ensure that local people in particular should be able to make their representations.

[18] A further difficulty in the way of Mr Laurence's construction is that there is no sensible effect to be given to the words 'if necessary'. He submits that their omission would have made no difference and that they were inserted so that it could not be argued that an inquiry had to be held even though no prima facie case was established and it was decided that it was not expedient to proceed. Such a construction if the words 'if necessary' had been omitted would in my view have been wholly unreasonable and I cannot imagine that anyone, let alone a former parliamentary draftsman, would have regarded it as something which needed to be guarded against. It is, incidentally, worth noting that in the Land Settlement (Facilities) Act 1919, which dealt with the compulsory acquisition of land by local authorities for the purpose of small holdings or allotments, in s 28(2) it was provided that any proposed acquisition of common land was subject to consent by the Secretary of State which must be exercised in accordance with the 1876 Act approach. Section 28(2) uses the same language as s 3 of the 1893 Act but omits the words 'if necessary'. That was obviously because the effect of a compulsory purchase would be the extinction of the common or the material part of it and that was serious enough to require a local inquiry. But it also makes the point that Parliament did not consider that the omission of the words produced the absurd result that an inquiry was required even when the Secretary of State had decided that the application should not proceed.

[19] Mr Laurence submits that the words 'hold the same inquiries' in s 194(1) should read 'make or hold the same inquiries'. But he accepts, as he must, that under s 10(6) of the 1876 Act the commissioners had a discretion what if any inquiries they should make. They only had no discretion as to the holding of an inquiry if the preconditions were satisfied. That being so, the words 'if necessary' are indeed mere surplusage and meaningless unless they enable something not to be done which would otherwise have to be done. Thus they can have a sensible effect in relation to the holding of an inquiry and

that is of course consistent with the failure to refer in the section to the making  
of inquiries. a

[20] It is clear that the only obstacle to a sensible construction of s 194(1) is  
the use of the plural 'inquiries' rather than the singular 'inquiry'. Everything  
else points to the correctness of the defendant's construction. The use of the  
plural, for the reasons I have already given, is not an obstacle. I have no doubt  
whatever that Mr Laurence's submissions must be rejected and that the b  
construction adopted by the defendant, which has been unchallenged for nearly  
80 years, is correct.

[21] This claim must accordingly be dismissed.

*Application dismissed.*

Dilys Tausz c  
Barrister.



**Jindal Iron and Steel Co Ltd and others v  
Islamic Solidarity Shipping Company  
Jordan Inc**  
[2004] UKHL 49

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD  
HOFFMANN AND LORD SCOTT OF FOSCOTE

3, 4, 25 NOVEMBER 2004

*Shipping – Bill of lading – Care of Cargo – Bill of lading incorporating Hague-Visby Rules – Goods damaged in course of loading – Bill of lading incorporating voyage charterparty – Charterparty purporting to transfer responsibility for loading, stowage and discharge of cargo to cargo owners – Whether rules precluding transfer of responsibility – Hague-Visby Rules, art III, rr 2, 8.*

The defendants were the owners of a vessel and the claimants were the sellers and the purchasers of a cargo shipped aboard the vessel as evidenced by bills of lading issued on behalf of the defendants. The bills incorporated the voyage charterparty which purported to transfer responsibility for loading, stowage and discharge from the shipowners to shippers, charterers and consignees. The Hague-Visby Rules applied to the shipment. Article III, r 2<sup>a</sup> of the rules provided that, inter alia, the carrier was to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. Under art III, r 8<sup>b</sup> any agreement in a contract of carriage relieving the carrier or ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in that article or lessening such liability otherwise than as provided in the rules, was null and void and of no effect. The cargo was discharged at the end of the voyage and the claimants brought proceedings alleging damage to the cargo caused by rough handling. A preliminary issue arose as to whether the agreement in the charterparty transferring responsibility was invalidated by art III, r 8 as contended by the claimants, who argued that art III, r 2 imposed a duty on shipowners. The defendants relied on binding authority that the rules did not invalidate such an agreement. The claimants were unsuccessful in the High Court and the Court of Appeal and appealed to the House of Lords.

**Held** – There was no case for departing from the principle in existing authority that an agreement transferring responsibility for loading, stowage and discharge of the cargo from the shipowners to shippers, charterers and consignees was not invalidated by art III, r 8 of the rules. That principle had stood for almost 50 years and it had not been shown that it had worked unsatisfactorily or had led to unjust results. Moreover, it had formed the basis of countless bills of lading and charterparties, risks would have been assessed in reliance of that principle, and it

<sup>a</sup> Article III, r 2 is set out at [3], below

<sup>b</sup> Article III, r 8 is set out at [3], below

was likely to form the basis of many open transactions. The appeal would therefore be dismissed (see [1]–[2], [15], [17], [27]–[29], [32]–[34], below).

Dictum of Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158 at 163 applied.

*GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957 followed.

Decision of the Court of Appeal [2003] 1 All ER (Comm) 747 affirmed.

## Notes

For the carrier's duty to take care of cargo, see 43(2) *Halsbury's Laws* (4th edn reissue) para 1830.

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*Arawa, The* [1977] 2 Lloyd's Rep 416; *rvsd* [1980] 2 Lloyd's Rep 135, CA.

*Associated Metals and Minerals Corp v M/V The Arktis Sky* (1992) 978 F 2d 47, US Ct of Apps (2nd Cir).

*Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd's Rep 1, CA.

*Brys & Gylsen Ltd v J and J Drysdale & Co* (1920) 4 Ll L Rep 24.

*Chandris v Isbrandtsen-Moller Co Inc* [1950] 1 All ER 768, [1951] 1 KB 240; *rvsd* [1950] 2 All ER 618, [1951] 1 KB 240, CA.

*CHZ Rolimpex v Eftavrysses Cia Naviera SA, The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586.

*D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1983] 1 Lloyd's Rep 219, CA.

*East and West Steamship Co v Hossain Bros* (1968) 20 PLD SC 15.

*Filikos Shipping Corp of Monrovia v Shipmair BV, The Filikos* [1981] 2 Lloyd's Rep 555; *affd* [1983] 1 Lloyd's Rep 9, CA.

*Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

*Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2004] 1 AC 715, [2003] 2 WLR 711.

*Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507, Aus FC.

*International Ore & Fertiliser Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9.

*Ismail v Polish Ocean Lines* [1976] 1 All ER 902, [1976] QB 893, [1976] 2 WLR 477, CA.

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*Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371, NSW CA.

*Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158, [1954] 2 QB 402, [1954] 2 WLR 1005.

*R v G* [2003] UKHL 50, [2003] 4 All ER 765, [2004] 1 AC 1034, [2003] 3 WLR 1060.

*R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15, [2001] 2 AC 19, [2000] 3 WLR 843, HL.

- a *Renton (GH) & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, [1957] AC 149, [1957] 2 WLR 45, HL.
- Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 All ER 495, [1961] AC 807, [1961] 2 WLR 269, HL.
- Shipping Corp of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, Aus HC.
- b *Tubacex Inc v M/V Risan* (1995) 45 F 3d 951, US Ct of Apps (5th Cir).
- Vallejo v Wheeler* (1774) 1 Cowp 143, 98 ER 1012, [1558–1774] All ER Rep 411.

### Cases referred to in list of authorities

- c *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725, [1959] AC 133, [1958] 2 WLR 688, HL.
- Aktieselskabet de Danske Sukkerfabrikker v Bajamar Cia Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210.
- Buchanan (James) & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 3 All ER 1048, [1978] AC 141, [1977] 3 WLR 907, HL.
- d *Canadian Transport Co Ltd v Court Line Ltd* [1940] 3 All ER 112, [1940] AC 934, HL.
- Ceylon (Government of) v Chandris* [1965] 3 All ER 48.
- CMA CGM SA v Classica Shipping Co Ltd* [2004] EWCA Civ 114, [2004] 1 All ER (Comm) 865.
- Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] 1 All ER 495, [1998] AC 605, [1998] 2 WLR 206, HL.
- e *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345, HL.
- Foreman and Ellams Ltd v Federal Steam Navigation Co Ltd* [1928] 2 KB 424.
- Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1928] AC 223, [1928] All ER Rep 97, HL.
- f *International Packers London Ltd v Ocean SS Co Ltd* [1955] 2 Lloyd's Rep 218.
- Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1972] 2 All ER 898, [1973] AC 435, [1972] 3 WLR 143, HL.
- MacWilliam (JI) Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] EWCA Civ 556, [2003] 3 All ER 369, [2004] QB 702, [2004] 2 WLR 283.
- g *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] 2 All ER 740, [1959] AC 589, [1959] 3 WLR 232, PC.
- McDonnell v Congregation of Christian Bros Trustees (formerly Irish Christian Bros)* [2003] UKHL 63, [2004] 1 All ER 641, [2004] 1 AC 1101, [2003] 3 WLR 1627.
- Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd's Rep 506, CA.
- h *Morris v KLM Royal Dutch Airlines, King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 All ER 565, [2002] 2 AC 628, [2002] 2 WLR 578.
- Northern Shipping Co v Deutsche Seereederei GmbH, The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255, CA.
- Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 All ER 34, [1983] 1 AC 854, [1982] 3 WLR 1149, HL.
- j *Quinn v Leathem* [1901] AC 495, [1900–3] All ER Rep 1, HL.
- Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2003] 4 All ER 987, [2004] 1 AC 309, [2003] 3 WLR 1091.
- Saudi Prince, The (No 2)* [1988] 1 Lloyd's Rep 1, CA; *affg* [1986] 1 Lloyd's Rep 347.

*Scruttons v Midland Silicones Ltd* [1962] 1 All ER 1, [1962] AC 446, [1962] 2 WLR 186, HL.

*Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, [1931] All ER Rep 666, HL.

*Transworld Oil (USA) Inc v Minos Cia Naviera SA, The Leni* [1992] 2 Lloyd's Rep 48.

*Unicoopjapan and Marubeni-Iida Co Ltd v Ion Shipping Co, The Ion* [1971] 1 Lloyd's Rep 541.

### Appeal

The claimant shippers and consignees, Jindal Iron and Steel Co Ltd and Hiansa SA respectively, appealed with permission on the preliminary issue set out at [9], below from the decision of the Court of Appeal (Waller, Tuckey LJ and Black J) dated 13 February 2003 ([2003] 1 All ER (Comm) 747) on the claimants' appeal from the decision of Nigel Teare QC, sitting as a deputy judge of the High Court, dated 25 June 2002 ([2002] 2 All ER (Comm) 364) deciding, *inter alia*, the preliminary issue in favour of the defendant shipowners, Islamic Solidarity Shipping Co Jordan Inc, owners of the vessel, Jordan II. The claimant charterers, TCI Trans Commodities AG, did not take part in the appeal. The facts are set out in the opinion of Lord Steyn.

*Simon Rainey QC and Nicholas Craig* (instructed by Jackson Parton) for the cargo owners.

*Timothy Young QC and Sudhanshu Swaroop* (instructed by More Fisher Brown) for the defendant.

Their Lordships took time for consideration.

25 November 2004. The following opinions were delivered.

### LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Steyn. I agree with it, and would dismiss the appeal for the reasons which he gives.

### LORD NICHOLLS OF BIRKENHEAD.

[2] My Lords, I too would dismiss this appeal. I express no view on the correctness of the interpretation of art III, r 2 of the Hague and the Hague-Visby Rules adopted by Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158, [1954] 2 QB 402 and by your Lordships' House in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, [1957] AC 149. But for the reasons given by my noble and learned friend Lord Steyn I agree this interpretation should not now be disturbed.

### LORD STEYN.

[3] My Lords, this appeal concerns the interpretation of the Hague and Hague-Visby Rules. By art III, rr 2 and 8, they provide as follows:



a '2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried ...

b 8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.'

Article IV, r 2 reads as follows:

c 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from ... (i) Act or omission of the shipper or owner of the goods, his agent or representative ... (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier ...'

d The central issue is whether (as shippers and consignees argue) art III, r 2 of the rules defines the irreducible scope of the contract of service to be provided by the carrier by sea or (as the carrier argues) art III, r 2 merely stipulates the manner of performance of the functions which the carrier has undertaken by the contract of service. In cases where the parties to a contract of carriage agree that loading, stowage and discharge are to be performed by e shippers, charterers, and consignees, the specific question is whether the carrier is nevertheless liable to cargo owners when the latter, or their stevedores, perform those functions improperly or carelessly. In other words, the question is whether such an agreement, which transfers f responsibility for these operations from the shipowners to shippers, charterers or consignees, is invalidated by art III, r 8.

[4] Long-standing precedent is to the effect that such a reallocation of risk by agreement is permissible and that in the postulated circumstances the carrier is not liable: see *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158, [1954] 2 QB 402 per Devlin J; *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, [1957] AC 149. Cargo owners unsuccessfully challenged the existing rule in the High Court (before Mr Nigel Teare QC, sitting as a deputy High Court judge) ([2002] EWHC 1268 (Comm), [2002] 2 ER (Comm) 364) and before the Court of Appeal (Waller and Tuckey LJ and Black J): *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2003] EWCA Civ 144, [2003] 1 All ER (Comm) 747. Cargo owners invite the House to reverse the existing rule.

#### I THE CHARTERPARTY AND BILLS OF LADING

j [5] Islamic Solidarity Shipping Co Jordan Inc are the owners of the vessel *Jordan II*. By a charterparty on the *Stemmor* form dated 4 December 1997 at Hamburg the owners chartered the vessel to TCI Trans Commodities AG for a voyage from Mumbai in India to Barcelona and Motril in Spain. Jindal Iron and Steel Co Ltd and Hiansa SA are respectively the sellers and purchasers of 435 steel coils. The goods were shipped from Mumbai aboard the vessel as

evidenced by two bills of lading on the Congenbill form, both dated 2 January 1998, which were issued on behalf of the shipowners at Mumbai. The bills of lading contained or evidenced contracts of carriage to Motril, in Spain. The bills of lading named Jindal Iron and Steel Co Ltd as the shippers and Hiansa SA as consignees. The relevant provisions on the face of the bills of lading were as follows: 'Freight payable as per CHARTERPARTY dated 04.12.97.' On the reverse of the bill of lading, the relevant terms of the contract of carriage provided as follows:

'(1) All terms and conditions, liberties and exceptions of the Charter party, dated as overleaf, are herewith incorporated ...

(2) General Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.

Trades where Hague-Visby Rules apply.

In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968—the Hague-Visby Rules—apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading.'

The bills of lading incorporated the voyage charterparty. The Hague-Visby Rules as enacted in Indian legislation were applicable to this shipment. They correspond to the draft Hague Rules as enacted in the United Kingdom by the Carriage of Goods by Sea Act 1924, which in material respects are the same as the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.

[6] Clauses 3 and 17 of the charterparty, so far as material, provided:

'3. Freight to be paid at and after the rate of US\$ ... per metric ton F.I.O.S.T.—lashed/secured/dunnaged ...

17. Shippers/Charters/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel.'

The acronym FIOST stands for Free In and Out Stowed and Trimmed. There was, therefore, under the charterparty an agreement that the 'Shippers/Charterers/Receivers' were to put the cargo on board, stow it, lash it, secure it, dunnage it and discharge it free of expense to the vessel. It was plainly an agreement designed to transfer responsibility for these particular functions from the shipowners to shippers, charterers and consignees. The cargo owners no longer contest the decisions at first instance and in the Court of Appeal to this effect.

[7] Both the bills of lading and the charterparty are governed by English law.

## II THE CLAIMS

- a [8] In February 1998 the cargo was discharged at Motril. The shippers and consignees alleged that the cargo was damaged by rough handling during loading and/or discharging, and/or inadequate stowage due to failure to provide dunnage, failure to secure the coils and/or stacking them so that the bottom layers were excessively compressed.

## b III THE PRELIMINARY ISSUE

- [9] Title to sue has been assumed to vest in either the shippers or consignees. On the assumption that the allegations of the claimants are correct the parties agreed to the trial of a preliminary issue. The principal issue was whether the agreement in the charterparty (evidenced by cl 3 and 17), which c purported to transfer responsibility for loading, stowage and discharge from the shipowners to shippers, charterers and consignees, is invalidated by art III, r 8. That is now the only issue before the House.

## IV THE SUBMISSIONS IN OUTLINE

- d [10] The dispute before the House is between shipowners, shippers and consignees: the voyage charterers did not take part in the appeal. The principal submissions of cargo owners (the appellants) were as follows. First, that art III, r 2 of the Hague and Hague-Visby Rules imposed upon the shipowners as carrier of the goods under the bills of lading the duty to perform the functions described therein and the responsibility for the proper and careful performance e of those functions (which involve loading, stowing and discharging the cargo). Secondly, that the agreement evidenced by cl 3 and 17 of the charterparty transferring responsibility for handling, stowing and discharging the cargo is invalidated by art III, r 8. Recognising that the decision of the House in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, [1957] AC f 149 stands in the way of this argument, counsel for cargo owners invite the House to depart from that decision under the *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77, [1966] 1 WLR 1234. The shipowners' position is straightforward. While they accept that the whole contract of carriage is subject to the Hague-Visby Rules, they contend that the extent to which loading, stowage and discharging are brought within the carrier's obligations g may properly be a matter for agreement between the parties. They say that properly construed the rules do not invalidate an agreement transferring the responsibility of the shipowners for those functions to the shipper, charterer or consignee. In any event, they rely on the binding authority of the decision of the House in *Renton* to that effect.

## h V THE EXISTING RULE

- [11] Under the common law the duty to load, stow and discharge the cargo prima facie rested on shipowners but it could be transferred by agreement to cargo interests. In *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] j 2 All ER 158, [1954] 2 QB 402 Devlin J observed that the effect of art III, r 2 of the Hague-Visby Rules was not to override freedom of contract to reallocate responsibility for the functions described in that rule. He said ([1954] 2 All ER 158 at 163, [1954] 2 QB 402 at 417-418):

"The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do

whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in *CARVER'S CARRIAGE OF GOODS BY SEA*, 9th ed., (1952) p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.'

It is true that, in the language of precedent, this was an obiter dictum. But it was a carefully considered statement by one of the most distinguished commercial judges of the twentieth century, who believed firmly in the principle that it is the task of a judge to administer the law as it stands: see the entry for Lord Devlin, written by Professor Tony Honoré, in the *Oxford Dictionary of National Biography* (2004) vol 15, pp 985–988.

[12] Two years after the decision in *Pyrene* the very same point came before the House for decision in *Renton*. In the present case the Court of Appeal held ([2003] 1 All ER (Comm) 747 at [33], [34] per Tuckey LJ), and it is now common ground, that the ratio decidendi of the House in *Renton*, is to the effect that an agreement transferring responsibility for loading, stowage and discharge of the cargo from the shipowners to shippers, charterers and consignees is not invalidated by art III, r 8. In these circumstances it is not necessary to analyse the facts of the case and the detailed treatment of the issues by the Law Lords sitting in *Renton*. Such an analysis is to be found in the lucid judgments of the judge ([2002] 2 All ER (Comm) 364 at [49]–[55]) and Tuckey LJ in the Court of Appeal ([2003] 1 All ER (Comm) 747 at [30]–[34]). The majority in *Renton* consisted of Lord Morton of Henryton, Lord Cohen and Lord Somervell of Harrow. Lord Morton cited the observation of Devlin J in *Pyrene* in full ([1956] 3 All ER 957 at 966, [1957] AC 149 at 169–170). He expressed agreement with it but added that 'not only is the construction approved by *DEVLIN, J.*, more consistent with the object of the rules but it is also the more natural construction of the language used'. Lord Cohen agreed with Lord Morton ([1956] 3 All ER 957 at 968, [1957] AC 149 at 173). Lord Somervell referred to art III, r 2, and observed ([1956] 3 All ER 957 at 968, [1957] AC 149 at 174):

'It is, in my opinion, directed and directed only to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by *DEVLIN, J.*, in *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.* ([1954] 2 All ER 158 at 163, [1954] 2 QB 402 at 417–418) in relation to the



words “shall properly and carefully load”. I agree with his statement, which has already been cited.’

Thus there was a clear ratio decidendi in *Renton*. That Viscount Kilmuir LC and Lord Tucker decided *Renton* on a different ground does not detract from the controlling force of the decision.

[13] This view has consistently been applied in subsequent cases: see *Ismail v Polish Ocean Lines* [1976] 1 All ER 902 at 905–906, [1976] QB 893 at 900 per Lord Denning MR; *The Arawa* [1977] 2 Lloyd’s Rep 416 at 424–425 per Brandon J; *Filikos Shipping Corp of Monrovia v Shipmair BV, The Filikos* [1981] 2 Lloyd’s Rep 555 at 557–558 per Lloyd J; *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1983] 1 Lloyd’s Rep 219 at 222 per Kerr LJ; *CHZ Rolimpex v Eftavrysses Cia Naviera SA, The Panaghia Tinnou* [1986] 2 Lloyd’s Rep 586 at 589 (my judgment); *Iverans Rederei A/S v KG MS Holstencruiser Seeschiffahrtsgesellschaft mbH & Co, The Holstencruiser* [1992] 2 Lloyd’s Rep 378 at 380 per Hobhouse J; *Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd’s Rep 1 at 5 per Beldam LJ.

[14] The existing position is summarised in the twentieth edition of *Scrutton on Charterparties and Bills of Lading* (1996) as follows (pp 430–431):

‘The whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier’s obligations is left to the parties themselves to decide. Thus, if the carrier has agreed to load, stow or discharge the cargo, he must do so properly and carefully, subject to any protection which he may enjoy under Article IV. But the Rules do not invalidate an agreement transferring the responsibility for these operations to the shipper, charterer or consignee.’

In my view this is an accurate statement of the existing law.

#### VI THE COURSE OF THE ARGUMENT IN THE HOUSE

[15] Before considering the arguments on interpretation, it is necessary to draw attention to the fact that the rule in *Renton* has stood for almost 50 years. It is probable that an enormous number of transactions have taken place on the assumption that *Renton* represents the law. Moreover, it seems likely that there are many open transactions, not yet finalised by judgment, arbitration award or settlement, which were concluded in reliance on the rule in *Renton*. Against this background, counsel for cargo owners invited the House to rule that *Renton* was wrongly decided. Even if exceptionally a prospective overruling of a decision of the House could be permitted, it would be of no use to cargo owners: compare *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15 at 19e, [2001] 2 AC 19 at 27B per Lord Slynn of Hadley; [2000] 4 All ER 15 at 19h–j, [2001] 2 AC 19 at 27E per Lord Browne-Wilkinson; [2000] 4 All ER 15 at 21h–j, [2001] 2 AC 19 at 29F (my opinion); [2000] 4 All ER 15 at 28c–d, [2001] 2 AC 19 at 36E per Lord Hope of Craighead; [2000] 4 All ER 15 at 40a–d, [2001] 2 AC 19 at 48H–49C per Lord Hobhouse of Woodborough. Cargo owners ask the House not to regard the impact of past transactions as a factor of significance and to decide retrospectively that *Renton* was wrongly decided in 1957.

[16] Against this background an observation in *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153, 98 ER 1012 at 1017 is apposite. Lord Mansfield observed:

'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.'

Recently, in *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12 at [13], [2003] 2 All ER 785 at [13], [2004] 1 AC 715, Lord Bingham of Cornhill reaffirmed in an international trade law case the importance of this consideration. That is, of course, not to say that the House might not be persuaded under the Practice Statement to depart from an earlier decision where that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results: see *R v G* [2003] UKHL 50 at [35], [2003] 4 All ER 765 at [35], [2004] 1 AC 1034 per Lord Bingham. But, in a case such as the present, if that high threshold requirement is not satisfied, it would not be proper to reverse the earlier decision.

[17] At the end of the oral argument of counsel for the appellants, the House was satisfied that it had not been shown that the *Renton* decision worked unsatisfactorily and led to unjust results. Despite the careful and helpful arguments placed before the House by counsel for cargo owners, the House decided that it was unnecessary to call on counsel for the shipowners to address the House on any aspect of the case. I will explain my reasons for agreeing to this decision more fully later in this judgment. But it is necessary to set out the shape of the arguments on interpretation. It is, however, necessary to emphasise again that the House did not hear any oral argument on behalf of the shipowners. But the House did have the benefit of studying in advance the excellent printed cases prepared by both sides.

## VII THE INTERPRETATION OF THE RULES

### *The text*

[18] In interpreting art III, r 2, the starting point is the language of the text. Counsel for cargo owners was assisted by the fact that in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158, [1954] 2 QB 402 Devlin J accepted that the phrase 'shall properly and carefully load' fits more closely the interpretation which he rejected. Moreover, at first instance the judge similarly accepted that this is so: see [2002] 2 All ER (Comm) 364 at [62]. It is true that in *Renton* Lord Morton (with whom Lord Cohen agreed) thought that Devlin J's interpretation was also supported by the natural construction of the language. I would not accept this part of the reasoning in *Renton*. Two points in particular made by counsel for cargo owners militate against it. First, the language appears to provide for a single standard of carrying out properly and carefully not only loading and discharging but also caring for the goods carried. Devlin J certainly did not suggest that the owner may by agreement under art III, r 2, transfer responsibility for caring for the cargo during the voyage. Secondly, the French text of the Hague Rules and Hague-Visby Rules provides as follows:

'Le transporteur sous réserve des dispositions de l'article 4, procédera de façon appropriée et soigneuse au chargement, à la manutention, à

*a* l'arrimage, au transport, à la garde, aux soins et au déchargement des marchandises transportées.' (My emphasis.)

*b* In context the word 'procédera' means 'to undertake': *Robert-Collins Dictionnaire Français~Anglais, Anglais~Français* (2nd edn) p 560 sv 'procéder'; *Le Nouveau Petit Robert* (1979) sv 'procéder'. The French text is the authoritative language of the Hague Rules and the English and French texts are equally authentic in the case of the Hague-Visby Rules. The French text tends to support the interpretation put forward by cargo owners. (It is to be noted that in *Pyrene Devlin J* referred to the French text: [1954] 2 All ER 158 at 165, [1954] 2 QB 402 at 421.) For my part, the concession of Devlin J was realistic. It follows that the common thread and ratio decidendi of the majority judgments in *Renton* is a purposive rather than literal reading of art III, r 2.

*c* [19] Devlin J did not base his interpretation on linguistic matters. He relied on the broad object of the rules. It has often been explained that the Hague Rules and Hague-Visby Rules represented a pragmatic compromise between the interests of owners, shippers and consignees. The Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations. It achieved this by regulating freedom to contract on certain topics only: see *Chandris v Isbrandtsen-Moller Co Inc* [1950] 1 All ER 768 at 773-774, [1951] 1 KB 240 at 247. In interpreting art III, r 2, its purpose and context is all-important. For example, it is obvious that the obligation to make the ship seaworthy under art III, r 1, is a fundamental obligation which the owner cannot transfer to another. The rules impose an inescapable personal obligation: see *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 All ER 495, [1961] AC 807. On the other hand, art III, r 2, provides for functions some of which (although very important) are of a less fundamental order eg loading, stowage and discharge of the cargo. Those who are not attracted to literal interpretations of an international convention, reliant principally on linguistic matters, may find it entirely possible to conclude that the context and purpose of art III, r 2, would not be undermined by permitting owners to transfer responsibility for loading, stowage and discharge to shippers and others. Devlin J thought that it was difficult to believe that the rules were intended to impose a universal rigidity about such essentially practical secondary functions. This reasoning is supported by the reality that in practice shore-based stevedores rather than the crew load and discharge vessels. Who must pay them? This cannot unreasonably be viewed as an economic matter which the parties may determine by their specific contracts. A literal interpretation of the rules no doubt leads to the conclusion that, where shippers and consignees select and pay for stevedoring, as they often do in practice, cargo claimants may recover compensation from owners for the negligence of cargo owners or the negligence of their stevedores. The point was touched on by Greer J in *Brys & Gylsen v J and J Drysdale & Co* (1920) 4 Ll L Rep 24. He said (at 25):

*j* 'It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty.'

A purposive interpretation such as Devlin J preferred, which permits transfer of the responsibility for such functions to the party who selects and pays for the stevedores, avoids these unreasonable results. On balance I am satisfied that Devlin J adopted a principled and reasonable approach to the interpretation of art III, r 2. And his interpretation was not based on any technical rules of English law: it was founded on a perspective relevant to the interests of maritime nations generally. Moreover, it may be right to say that where conflict arises between purely linguistic considerations and the broad purpose of an international convention, the latter should generally prevail. In my view the case for the adoption of Devlin J's interpretation, if it were proper to reconsider the matter afresh today, is formidable.

### *Travaux préparatoires*

[20] With the aid of Michael F Sturley's *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (1990) vols 1–3, counsel for cargo owners took the House on an extended tour of the travaux. It is, of course, a well-established supplementary means of interpretation: see art 32 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964); *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696, [1981] AC 251. It is, however, equally well settled that the travaux can only assist if, as Lord Wilberforce put it in *Fothergill's* case [1980] 2 All ER 696 at 703, [1981] AC 251 at 278, they 'clearly and indisputably point to a definite legislative intention'. The general thrust of the travaux closely matches the interpretation put forward by cargo owners. The judge recognised this. But he also pointed out that nowhere in the travaux is there any statement that art III, r 2, prevents an owner and merchants from reallocating responsibility for loading, stowage and discharge of the cargo to the merchants. It is not enough to show that the draftsmen proceeded on the basis of the normal common law rule that loading, stowage and discharging is the duty of the shipowner, without considering the effect of different contractual arrangements. If the issue had been directly confronted by draftsmen, it is far from obvious that they would have concluded that a shipowner should be liable to cargo owners for damage caused by cargo owners themselves when they undertook the relevant duty and did it badly. In these circumstances the judge held that the requirements enunciated in *Fothergill's* case were not satisfied. In my view he was entirely right to do so. The travaux cannot therefore assist the argument of the cargo owners.

### *The views of the textbook writers*

[21] Since the decision of the House in *Renton* in 1956 no English textbook writers have challenged its correctness. The editors of *Scrutton on Charterparties and Bills of Lading* (20th edn, 1996) pp 430–431 treat it as correctly stating the law; the editors of *Contracts for the Carriage of Goods By Land, Sea and Air* (1993–2000) para 1.1.3.5, is to the same effect; the editors of *Carver on Bills of Lading* (2001) discuss the rival arguments (pp 469–470 (paras 9-114 to 9-115)) but do not argue that *Renton* should be reversed.

### *The decisions in foreign jurisdictions*

[22] Counsel placed great reliance on decisions of the Second Circuit Court of Appeal in *Associated Metals and Minerals Corp v M/V The Arktis Sky* (1992) 978



a F 2d 47 and the Fifth Circuit Court of Appeal in *Tubacex Inc v M/V Risan* (1995) 45 F 3d 951 in which it was held that loading, stowing and discharging under s 3(2) of the United States Carriage of Goods By Sea Act are 'non delegable' duties of the carrier. In neither of these decisions is there any reference to the earlier English decisions in *Pyrene* and in *Renton*. Counsel for the cargo owners pointed out that *The Arktis Sky* has been followed at first instance in South Africa: see *The MV Sea Joy* (1998) (1) SA 487 at 504. And with reference to Tetley *Marine Cargo Claims* (4th edn in preparation) Ch 25 he said that in France a shipowner may not contract out of responsibility for improper stowage by a FIOST clause.

b [23] On the other hand the *Renton* decision has been followed in Australia: see *Shipping Corp of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 and *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507; compare, however, doubts expressed in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371 at 380, 387–388, 418 per Handley, Sheller and Cole JA respectively. Similarly, New Zealand courts have applied *Renton*: see *International Ore & Fertiliser Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9. In Pakistan the English rule has been adopted: see e.g. *East and West Steamship Co v Hossain Brothers* (1968) 20 PLD SC 15. In India (the country of shipment in the present case) the English rule is followed: see *The New India Assurance Co Ltd v M/S Splosna Plovba* (1986) AIR Ker 176 (Balakrishna, Menon and K Sukumaran JJ).

c [24] Internationally there is no dominant view. The weight of opinion in foreign jurisdictions is fairly evenly divided. The argument that the law as enunciated in *Renton* ought to be brought into line with subsequently-decided United States decisions, which did not address the arguments in *Pyrene* and *Renton*, is rather weak. This plank of the cargo owners case cannot therefore materially assist in the challenge to the decision of the House in *Renton*.

#### f Third party bill of lading holders

g [25] It is true, as counsel for cargo interests emphasised, that third party bill of lading holders will in practice often not have seen the charterparty or had advance notice of relevant charterparty clauses. This is a point of some substance. It is, however, an inevitable risk of international trade and cannot affect the correct interpretation of art III, r 2.

#### No concluded view

h [26] Everything ultimately turns on what is the best contextual interpretation of art III, r 2. I have already discussed this matter without venturing a concluded view.

#### VIII IS A DEPARTURE FROM RENTON JUSTIFIED?

j [27] It is now necessary to return to the question whether, if it is to be assumed that the cargo owners' interpretation is correct, it would be right to depart from a decision of the House which has stood for nearly half a century. An opportunity arose in 1968 to improve the operation of the Hague Rules. But an international conference took the view that only limited changes were necessary: see *Carver's Carriage by Sea* (13th edn, 1982) vol 1, pp 302–303 (para 448). If the decision in *Renton* had worked unsatisfactorily in practice, one would have expected that to have emerged at the conference which led to the

Protocol signed at Brussels on 23 February 1968 and the adoption of the Hague-Visby Rules. The interpretation assigned to art III, r 2, by the English courts was an important part of the corpus of law governing the application of the Hague Rules. It would have been well known in shipping circles. Yet art III, r 2, remained in unaltered form in the new rules. The issue was not raised in any way: Anthony Diamond QC 'The Hague-Visby Rules' [1978] LMCLQ 225. If in the United Kingdom there had been dissatisfaction with the effect of the *Renton* decision, one would have expected British cargo interests to have raised it when Parliament considered the Bill which was to become the Carriage of Goods by Sea Act 1971. If invited to do so, Parliament could have considered whether *Renton* should be reversed. The matter was not raised at all. Instead, art III, r 2, was re-enacted in unaltered form: see for the best account of the position placed before Parliament the speech of Lord Diplock, Hansard (316 HL Official Report (5th series) cols 1028–1034). If there had been dissatisfaction with the impact of the *Renton* decision, one would have expected it to have been a matter of discussion in trade journals and publications in the United Kingdom. There have been no such criticisms. And since the decision in *Renton* no academic writers have argued that *Renton* should be reversed.

[28] Since *Renton* was decided shipowners, charterers, shippers and consignees have acted on the basis that it correctly stated the law. It has formed the basis of countless bills of lading, voyage charterparties and time charterparties. Charterparties would frequently have incorporated the Hague or Hague-Visby Rules on the express basis that the shipowner transferred responsibility for stowage of cargo to cargo interests. Similarly, insurances have been placed, P & I club rules have been drafted, and the Inter-Club New York Produce Exchange Agreement concluded (see Wilford, Coghlin and Kimball *Time Charters* (5th edn, 2003) p 341 (para 20.39)), on the basis that *Renton* accurately reflected the law. Risks would often have been assessed in reliance on the decision of the House in *Renton* as to how they should be borne. But for the reliance on *Renton* it is likely that different freight rates and insurance premiums would sometimes have been charged. Moreover, at the very least there must be many outstanding disputes which would now be affected by a departure from *Renton*. After all FIOST clauses are in wide use. And cargo damage caused by loading, stowage and discharging is an everyday occurrence in maritime transport. The House has no idea how many such transactions are still open. There may be many.

[29] For these reasons, even if I had been persuaded that the cargo owners' interpretation of the Hague and Hague-Visby Rules was correct, in my view the case against departing from *Renton* is nevertheless overwhelming.

[30] There is, however, another factor. The operation of the Hague Rules and Hague-Visby Rules is under constant review. On 22 October 1990, at Geneva, the United Nations Conference on Trade and Development (UNCTAD) published *Charterparties: A Comparative Analysis*. With specific footnote references to *Pyrene* and *Renton* the report stated:

'341. ... charterparty terms relating to the loading, stowing and discharge of cargo may have a profound effect upon third party holders of charterparty bills of lading (even if the bill of lading is subject to the Hague and Hague-Visby Rules) where the words in the bill of lading incorporating the charter are widely framed. If the incorporating words in the bill of lading are sufficiently widely framed the third party bill of lading holder

a may find for example that he is unable to claim against the shipowner  
under the bill of lading for damage to cargo caused in the course of loading  
or stowing the cargo. This would be so if the charterparty contained terms  
removing from the shipowner the responsibility for loading and stowing.  
These terms, if there was a wide incorporating clause, would be read as  
b part of the bill of lading contract. They would not be nullified by the  
requirements of article [III], r. 2 of the Hague Rules that "the carrier shall  
properly and carefully load, handle, stow, carry, keep, care for and  
discharge the goods carried" because according to English law those words  
do not define the scope of the contract service but the terms upon which  
the agreed service is to be performed.

c 342. In regard to loading, stowage or discharging, the Hague Rules, on  
these authorities, only impose obligations if the shipowner has  
contractually undertaken to perform those obligations. If under the terms  
of a charterparty the shipowner is relieved to that extent of the obligations  
of performance, the shipowner will also be relieved of responsibility for  
loading, stowing or discharging as against a third party bill of lading holder,  
d always providing that the bill of lading and charter contain sufficiently  
widely drawn clauses. This will be so even if the bill is subject to the Hague  
or Hague-Visby Rules: and even if the third party bill of lading holder has  
neither seen the charterparty referred to, nor has any advance notice of the  
relevant charterparty clauses.

e 343. Other charterparty clauses which may affect a third party bill of  
lading holder particularly are law clauses, lay time and demurrage clauses  
and lien clauses.'

The report showed in successive paragraphs how the position of third party bill  
of lading holders is part of a larger picture affecting, for example, lay time and  
demurrage clauses and lien clauses (paras 346 and 347). The report concluded:

f '354. It can be seen from the foregoing that charterparty terms can have  
an impact upon third party bill of lading holders in several important  
respects and it is suggested that in considering in any standardisation,  
harmonisation or improvement of charterparty terms and the necessity for  
international legislative action, due account should be taken of the  
g interests of third party bill of lading holders as well as those of charterers  
and shipowners.'

That is, of course, the way in which such problems affecting international trade  
law are best addressed.

h [31] The United Nations Commission on International Trade Law  
(UNCITRAL) is currently undertaking a revision of the rules governing the  
carriage of goods by sea. This exercise involves a large-scale examination of the  
operation of the Hague-Visby Rules. It apparently extends to art III, r 2. It will  
take into account representations from all interested groups, including  
i shipowners, charterers, cargo owners and insurers. By itself this factor makes  
it singularly inappropriate to re-examine the *Renton* decision now.

#### IX CONCLUSION

[32] I would express no concluded view on the issue of the interpretation of  
art III, r 2. I would refuse to depart from the *Renton* decision. I would dismiss the  
appeal.

**LORD HOFFMANN.**

[33] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would dismiss this appeal.

**LORD SCOTT OF FOSCOTE.**

[34] My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Steyn. For the reasons he has given, with which I agree and to which I have nothing to add, I too would dismiss this appeal.

*Appeal dismissed.*

Dilys Tausz Barrister.



**a** **Sirius International Insurance Co (Publ) v  
FAI General Insurance Ltd and others**  
[2004] UKHL 54

**b** **HOUSE OF LORDS**

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

8, 9 NOVEMBER, 2 DECEMBER 2004

- c** *Bank – Documentary credit – Irrevocable credit – Payment – Retrocession agreement made conditional upon provision of letter of credit – Agreement not to draw down under letter of credit without prior agreement of applicant to payment of reinsurance claim – Applicant acknowledging indebtedness to reinsurer – Whether acknowledgment of indebtedness satisfying condition of prior agreement of applicant to payment of claim.*
- d** A Lloyd's syndicate sought reinsurance on its liabilities. The first defendant offered to act as reinsurer but the syndicate required an 'A' rated reinsurer, which the defendant was not. Accordingly, the syndicate required the policy to be fronted by an acceptably rated reinsurer. The claimant agreed to 'front' the reinsurance by writing the policy for the syndicate, and then retroceding it 'back to back' to the defendant. By undertaking to act as fronting reinsurer the claimant assumed the risk, in the event of the insolvency or default of the first defendant, of having nevertheless to pay the syndicate. The claimant required security and insisted on a letter of credit from a bank. A side letter which was negotiated between the claimant and the first defendant provided: 'We [the claimant] therefore undertake that we will not agree or pay any claim presented to [the claimant] by [the syndicate] without [the first defendant's] prior agreement in writing, nor will we draw down under [the letter of credit], unless (1) [the first defendant] has agreed that [the claimant] should pay a claim but has not put [the claimant] in funds to do so, notwithstanding the simultaneous settlements clause in our retrocession contract ...' The bank which produced the irrevocable standby letter of credit was not aware of the terms of the side letter.
- e** The syndicate claimed against the claimant under the reinsurances, and a dispute developed as to whether the reinsurances written by the claimant and, consequent upon that, the retrocessions written by the first defendant, should respond to the claims. The syndicate, its brokers and the claimant entered into a funding agreement whereby, inter alia, the brokers agreed to fund the syndicate in respect of its paid losses due under the reinsurances and the claimant agreed to permit the brokers to commence proceedings on its behalf under the retrocessions. The claimant commenced arbitration proceedings against the first defendant claiming to be entitled to payment by the first defendant under the retrocessions, which necessarily involved the question whether the claimant was liable to the syndicate. Provisional liquidators (the second, third and fourth defendants) were appointed over the first defendant and the proceedings were automatically stayed. The application to lift the automatic stay on the arbitration was compromised between the claimant and the second to fourth defendants by a Tomlin order. Paragraph 1 of the schedule to the order provided: '[The first defendant] is indebted to [the claimant] in the sum of \$US22,500,000 and the
- f**
- g**
- h**
- j**

[claimant] shall be entitled to prove in the liquidation or scheme of arrangement of [the first defendant] in the said sum of \$US22,500,000.' The provisions of paras 2 and 3 were that the claimant should draw down on the letter of credit and pay the proceeds into an escrow account. Paragraph 4 provided: 'For the avoidance of doubt, the position and all arguments of the [claimant] and the [defendants] in respect of the [letter of credit] are preserved in respect of the proceeds notwithstanding the terms of this Schedule.' The claimant's demand for payment of the sums drawn down and held in escrow according to the order was not acceded to and proceedings were commenced. The conditions upon which the claimant could draw down the letter of credit and whether those conditions were satisfied were ordered to be tried as preliminary issues. The judge held that the first condition of the side letter had been satisfied by the terms of para 1 of the schedule to the Tomlin order, noting that the commercial substance was that the first defendant had agreed that the claimant should pay a claim. The court also considered the autonomous status of the letter of credit. The defendants appealed. The Court of Appeal reversed the judge's decision, deciding, on a literal interpretation, that the first defendant was entitled to the proceeds of the letter of credit in escrow account and the claimant appealed. The issue before the House of Lords was solely that of the correct contextual interpretation of the side letter and the schedule to the Tomlin order.

**Held** – On the true construction of para 1 of the schedule to the Tomlin order the first condition of the side letter was satisfied. The settlement contained in the Tomlin order had to be construed as a commercial instrument. The aim of the inquiry was not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry was objective: the question was what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question was to be gathered from the text under consideration and its relevant contextual scene. Literalism should if possible be resisted in the interpretive process. The appeal would therefore be allowed (see [1], [2], [18], [19], [23], [24], [27], [28], [39], [40], below).

Decision of the Court of Appeal [2004] 1 All ER 308 reversed.

## Notes

For the principles of construction, see 13 *Halsbury's Laws* (4th edn reissue) para 163.

## Cases referred to in opinions

*Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229, [1985] AC 191, [1984] 3 WLR 592, HL.

*Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251, [2001] 2 WLR 735.

*Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 WLR 392n, [1984] 1 Lloyd's Rep 251, CA.

*Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

- a** Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL.
- On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc [2002] UKHL 13, [2002] 2 All ER 949, [2003] 1 AC 368, [2002] 2 WLR 919.
- b** **Cases referred to in list of authorities**
- Alan (WJ) & Co Ltd v El Nasr Export and Import Co [1972] 2 All ER 127, [1972] 2 QB 189, [1972] 2 WLR 800, CA.
- Alghussein Establishment v Eton College [1991] 1 All ER 267, [1988] 1 WLR 587, HL.
- Aspen Planners Ltd v Commerce Masonry and Forming Ltd (1979) 25 OR (2d) 167, Ont HC.
- c** Baltic Shipping Co v Translink Shipping Ltd and Translink Pacific Shipping Ltd [1995] 1 Lloyd's Rep 673.
- Bank of China v NBM LLC [2001] EWCA Civ 1933, [2002] 1 All ER 717, [2002] 1 WLR 844.
- d** Bank of Nova Scotia v Angelica-Whitewear Ltd (1987) 36 DLR (4th) 161, Can SC.
- BC (430872) Ltd v KPMG Inc (2004) 238 DLR (4th) 13, BC CA.
- Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd (in administrative receivership) (5 August 2003, unreported), NSW SC.
- Brikom Investments Ltd v Carr [1979] 2 All ER 753, [1979] QB 467, [1979] 2 WLR 737, CA.
- e** Britten Norman Ltd (in liq) v State Ownership Fund of Romania [2000] Lloyd's Rep Bank 315.
- Cargill International SA v Bangladesh Sugar and Food Industries Corp [1996] 4 All ER 563; *affd* [1998] 2 All ER 406, [1998] 1 WLR 461, CA.
- CDN Research and Development v Bank of Nova Scotia (1982) 39 OR (2d) 13, Ont DC.
- f** Cheall v Association of Professional, Executive, Clerical and Computer Staff [1983] 1 All ER 1130, [1983] 2 AC 180, [1983] 2 WLR 679, HL.
- City and Westminster Properties (1934) Ltd v Mudd [1958] 2 All ER 733, [1959] Ch 129, [1958] 3 WLR 312.
- g** Consolidated Oil Ltd v American Express Bank Ltd [2002] CLC 488, CA.
- Couchman v Hill [1947] 1 All ER 103, [1947] KB 554, CA.
- Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd [1999] 1 All ER (Comm) 890.
- Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re (formerly known as Group Josi Reassurance SA) v Walbrook Insurance Co Ltd [1994] 4 All ER 181, [1995] 1 WLR 1017; *affd* [1996] 1 All ER 791, [1996] 1 WLR 1152, CA.
- h** Discount Records Ltd v Barclays Bank Ltd [1975] 1 All ER 1071, [1975] 1 WLR 315.
- Doherty v Allman (1878) 3 App Cas 709, HL.
- Dong Jin Metal Co Ltd v Raymet Ltd [1993] CA Transcript 945.
- Eliau and Rabbath v Matsas and Matsas, JD McLaren & Co Ltd and Midland Bank Ltd [1966] 2 Lloyd's Rep 495, CA.
- j** Ermis Skai Radio & Television v Banque Indosuez SA (24 February 1997, unreported).
- Ficom SA v Sociedad Cadex Ltda [1980] 2 Lloyd's Rep 118.
- Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812, Vic CA.
- Hammersmith London BC v Creska (No 2) [2000] L & TR 288.

- Harbottle (RD) (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862, [1978] QB 146, [1977] 3 WLR 752. a
- Hill v Mercantile and General Reinsurance Co plc, Berry v Mercantile and General Reinsurance Co plc* [1996] 3 All ER 865, [1996] 1 WLR 1239, HL.
- Hongkong and Shanghai Banking Corp v Kloeckner & Co AG* [1989] 3 All ER 513, [1990] 2 QB 514, [1990] 3 WLR 634.
- Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, CA. b
- IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, CA.
- Inflatable Toy Co Pty Ltd v State Bank of New South Wales* [1994] 34 NSWLR 243, NSW SC.
- Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA. c
- Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.
- Intraco Ltd v Notis Shipping Corp, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA.
- Mahonia v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911. d
- Malas (t/a Hamzeh Malas and Sons) v British Imex Industries Ltd* [1958] 1 All ER 262, [1958] 2 QB 127, [1958] 2 WLR 100, CA.
- Manifest Shipping Co v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2001] 1 All ER 743, [2003] 1 AC 469, [2001] 2 WLR 170.
- Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL. e
- Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] 1 All ER (Comm) 368; *rvsd in part* [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 WLR 1975.
- New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1, [1918–19] All ER Rep 552, HL.
- Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, Vic SC. f
- Owen (Edward) Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976, [1978] QB 159, [1977] 3 WLR 764, CA.
- Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (28 June 1982, unreported), NSW SC.
- Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA. g
- Rosen v Pullen* (1981) 126 DLR (3d) 62, Ont HC.
- SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567, CA.
- Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388.
- Singh (Gian) & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC. h
- Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146.
- Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep 579.
- Solo Industries UK Ltd v Canara Bank Ltd* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800.
- Standard Trust Co (in liq) v Bank of Nova Scotia* (2001) 201 Nfld & PEIR 8, Nfld CA. j
- Sztejn v J Henry Schroder Banking Corp* (1941) 31 NYS 2d 631, NY SC.
- Themehelp Ltd v West* [1995] 4 All ER 215, [1996] QB 84, [1995] 3 WLR 751, CA.
- Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171.



- a *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611; *affd* [1998] 1 Lloyd's Rep 250, CA.
- United City Merchants (Investments) Ltd v Royal Bank of Canada* [1979] 1 Lloyd's Rep 267; *affd* [1981] 3 All ER 142, [1982] QB 208, [1981] 3 WLR 242, CA; *rvsd* [1982] 2 All ER 720, [1983] 1 AC 168, [1982] 2 WLR 1039, HL.
- b *United Trading Corp SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n.
- Urquhart Lindsay and Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318, [1921] All ER Rep 340.
- Wood Hall Ltd v Pipeline Authority* (1979) 24 ALR 385, Aus HC.

c **Appeal**

- The claimant, Sirius International Insurance Corp (Publ), appealed with permission of the Appeal Committee of the House of Lords given on 8 July 2003 from the decision of the Court of Appeal (May, Carnwath LJ, and Wall J) on 4 April 2003 ([2003] EWCA Civ 470, [2004] 1 All ER 308) reversing the decision of d Jacob J on 23 July 2002 ([2002] EWHC 1611 (Ch), [2002] 2 All ER (Comm) 745) in the trial of certain preliminary issues which fell to be determined in proceedings between the claimant and the first defendant, FAI General Insurance Co Ltd, and the provisional liquidators of the first defendant, Anthony McMahon, Thomas Riddell and John Wardrop, concerning the drawdown of a letter of credit. The e facts are set out in the opinion of Lord Steyn.

- Geoffrey Vos QC and Peter Arden* (instructed by *Reynolds Porter Chamberlain*) for Sirius.
- f *Gabriel Moss QC and Philip Marshall QC* (instructed by *Ince & Co*) for FAI and the provisional liquidators.

Their Lordships took time for consideration.

- g 2 December 2004. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

- [1] My Lords, left to myself, I should have accepted the interpretation put by the respondents on the Tomlin order agreed between the parties on 6 April 2001. But no issue of principle on the construction of contracts divides the parties. The h Tomlin order is expressed in terms which are one-off. If the appellants' argument on construction is accepted no point of law of general public importance arises. I must acknowledge that the judge ([2002] EWHC 1611 (Ch), [2002] 2 All ER (Comm) 745, [2003] 1 WLR 87) adopted the construction favoured by a majority of my noble and learned friends. My own reasons for favouring a different j construction differ from those of the Court of Appeal ([2003] EWCA Civ 470, [2004] 1 All ER 308, [2003] 1 WLR 2214). This being so, no purpose is served by expounding the interpretation which I myself would have put on the Tomlin order, and I am content to accept that favoured by the majority. I would accordingly agree that the appeal should be allowed.

**LORD NICHOLLS OF BIRKENHEAD.**

[2] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Steyn and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I would allow this appeal.

**LORD STEYN.**

[3] My Lords, when leave to appeal was granted by an Appeal Committee, it may have appeared that important issues regarding the so-called autonomy principle applicable to letters of credit issued by banks would have to be resolved. Certainly that was the main thrust of the petition. In the result it has turned out to be unnecessary to examine the arguments about the autonomy principle. Instead it has become clear that the appeal should be decided on the basis of the correct contextual interpretation of two related documents. Those two documents are a side letter to a letter of credit, agreed between the party setting up the letter of credit and the beneficiary, and a schedule to a Tomlin order settling a dispute that had arisen between the parties. These two documents are not in standard form. The interpretation of these documents is, like the construction of all texts, a matter of law but it does not involve a question of general public importance. The House would not ordinarily have given leave to appeal in such a one-off case. But the House is now seized with it, and the issue must be resolved.

**THE COMMERCIAL CONTEXT**

[4] Sirius International Insurance Co (Publ) (Sirius) is a company incorporated under the laws of Sweden. It carries on business as an insurer and reinsurer. FAI General Insurance Ltd (FAI) is a company incorporated under the laws of New South Wales. It also carries on business as an insurer and reinsurer. It is part of the insolvent HIH insurance group. FAI is in provisional liquidation in Australia and in England. The second to fourth respondents are FAI's English provisional liquidators, who were appointed as such by an order made by Hart J on 23 March 2001.

[5] In early 1997 a syndicate at Lloyds, Agnew, wished to reinsure its liabilities on its onshore energy account. FAI offered to act as reinsurer but Agnew required an 'A' rated reinsurer. FAI was not 'A' rated. Accordingly, Agnew required the policy to be fronted by an acceptably rated reinsurer. Sirius was an 'A' rated reinsurer. By its letter dated 15 October 1997, Sirius agreed to 'front' the reinsurance by writing the policy for Agnew, and then retroceding it 'back to back' to FAI. For fronting the reinsurance Sirius received an annual fee of \$US65,000.

[6] Sirius duly wrote the reinsurance for Agnew for two periods: 1 December 1996–31 December 1997 and 31 December 1997–31 December 1998 and FAI duly wrote the retrocessions for Sirius for the same periods. The premiums for the two years were respectively \$US2m and \$US1.6m. These sums went to FAI. To summarise: Agnew was the insurer; Sirius was the fronting reinsurer, and FAI was the retrocessionaire.

[7] By undertaking to act as fronting reinsurer Sirius assumed the risk, in the event of the insolvency or default of FAI, of having nevertheless to pay Agnew. The fact that FAI was not an 'A' rated insurance company underlined the fact of the risk. Not surprisingly, Sirius required security. Sirius insisted on a letter of

a credit from a bank. A side letter, dated 3 September 1999, which was negotiated between Sirius and FAI, provided:

b 'We [Sirius] therefore undertake that we will not agree or pay any claim presented to Sirius by [Agnew] without FAI's prior agreement in writing, nor will we draw down under [the letter of credit], unless (1) FAI has agreed that Sirius should pay a claim but has not put Sirius in funds to do so, notwithstanding the simultaneous settlements clause in our retrocession contract (see below) or (2) [Agnew] obtains a judgment or binding arbitration award against Sirius which Sirius is obliged to pay.'

Paragraph 3 of the side letter also recorded that—

c 'FAI has already agreed to a simultaneous settlements clause which provides that FAI shall pay their share of any loss under the retrocession simultaneously with Sirius' payment to Agnew.'

d Thereafter, FAI (by now acting by its parent HIH) produced a draft letter of credit. The terms of the letter of credit, which incorporated the ICC Uniform Customs and Practice for Documentary Credits (1993 revision), were approved by Sirius. On 24 January 2000, Westpac Banking Corporation (Westpac), an Australian bank, produced an irrevocable standby letter of credit for \$US5m in the terms agreed by the parties. Westpac was not aware of the terms of the side letter.

#### e THE DISPUTE

f [8] By this time, Agnew had claimed against Sirius under the reinsurances, and a dispute had developed as to whether the reinsurances written by Sirius and, consequent upon that, the retrocessions written by FAI, should respond to the claims. On 23 March 2000, Lambert Fenchurch Ltd (Agnew's brokers), Agnew and Sirius entered into a funding agreement whereby, inter alia, Lambert Fenchurch agreed to fund Agnew in respect of its paid losses due under the reinsurances and Sirius agreed to permit Lambert Fenchurch to commence proceedings on its behalf to enforce Sirius' rights under the retrocessions. Prior to the funding agreement, Sirius had suggested an ad hoc arbitration between g Agnew and FAI. FAI refused to engage in such an arbitration. In May 2000, Sirius started arbitration proceedings against FAI claiming to be entitled to payment by FAI under the retrocessions which issue necessarily involved the question whether Sirius was liable to Agnew. On 15 March 2001, provisional liquidators were appointed in Australia over FAI. On 23 March 2001, provisional h liquidators were appointed in England by Hart J. This had the effect, under s 130(2) of the Insolvency Act 1986, of automatically staying the arbitration proceedings.

#### i THE TOMLIN ORDER

j [9] Sirius applied to court for a lifting of the automatic stay on the arbitration, which was by then about to come to a lengthy substantive hearing. By that time the provisional liquidators were running FAI. The application to lift the automatic stay on the arbitration was compromised between Sirius and the provisional liquidators of FAI by a Tomlin order dated 6 April 2001. The material terms of the Tomlin order were as follows:

1. FAI General Insurance Co Ltd ("FAI") is indebted to the applicant [Sirius] in the sum of \$US22,500,000 and the applicant shall be entitled to prove in the liquidation or scheme of arrangement of FAI in the said sum of \$US22,500,000. a

2. [Sirius] shall draw down on Westpac's irrevocable standby letter of credit no 772 dated 3 February 2000 ("the LOC").

3. [Sirius] pay the proceeds of the LOC ("the proceeds") into an escrow account to be held together with accrued interest thereon by Reynolds Porter Chamberlain pending the resolution of the parties' claims (if any) in respect of the LOC. b

4. For the avoidance of doubt, the position and all arguments of the applicant and the respondents in respect of the LOC are preserved in respect of the proceeds notwithstanding the terms of this schedule. c

5. Save for the parties' rights with respect to the LOC and the agreements associated to the LOC, the terms herein shall be in full and final settlement of all claims raised by either party in the arbitration proceedings ...'

On about 12 June 2001, the letter of credit was drawn down in accordance with its terms and the proceeds were placed in escrow pursuant to the Tomlin order. d

#### THE PROCEEDINGS

[10] On 31 July 2001, Reynolds Porter Chamberlain, on behalf of Sirius, demanded payment of the sums held in escrow. The demand was not acceded to and these proceedings were commenced by Sirius by application dated 19 September 2001. On 27 May 2002, Mr Registrar Baister directed that certain questions be determined as preliminary issues: namely (a) what were the conditions upon which Sirius could draw down the letter of credit and (b) whether those conditions were satisfied. e

[11] On 23 July 2002, Jacob J decided that the first condition of the side letter had been satisfied by the terms of para 1 of the Tomlin order and gave directions for the future conduct of the application and also gave FAI permission to appeal: see *Sirius International Insurance Corp (Publ) v FAI General Insurance Co Ltd* [2002] EWHC 1611 (Ch), [2002] 2 All ER (Comm) 745, [2003] 1 WLR 87. In respect of the first condition of the side letter Jacob J observed (at [26]): f

'... [Counsel for FAI] submitted that FAI had never agreed that Sirius should pay a claim. [Counsel for Sirius] says that FAI in effect did so by cl 1 of the Tomlin schedule. By that clause FAI acknowledged an indebtedness of \$US22.5m to Sirius. Everyone knew that there was a back-to-back arrangement in place, that the \$US22.5m would inure for Agnew's benefit. So in substance, submitted [counsel for Sirius], FAI agreed to payment by Sirius. They knew exactly who was really getting the benefit of clause 1 of the settlement agreement. I think that is right. No one ever thought that the right to the \$US22.5m was really that of Sirius. The commercial substance is that FAI had agreed that Sirius should pay a claim.' g

[12] On 4 April 2003, the Court of Appeal reversed the decision of the judge. The Court of Appeal held that the first condition of the side letter had not been satisfied and decided that FAI was entitled to the proceeds of the letter of credit: *Sirius International Insurance Corp (Publ) v FAI General Insurance Co Ltd* [2003] h

j



a EWCA Civ 470, [2004] 1 All ER 308, [2003] 1 WLR 2214. On the point of interpretation May LJ concluded (at [21]):

b '[Counsel for Sirius] accepted that the second condition of the 3 September 1999 agreement was not and is not fulfilled. He accepted that the first condition was not fulfilled before the Tomlin order. He accepted that the literal words of para 1 do not express an agreement by FAI that Sirius should pay Agnew's claim. Creative construction or implication is required to interpret it as doing so. He accepts, I think, that an award in contested arbitration proceedings would not have fulfilled the first condition. But the Tomlin order, he says, embodied an agreement not an award, and the agreement that Sirius should be entitled to prove in FAI's liquidation or administration for \$US22.5m necessarily carried with it an agreement by FAI that Sirius should pay Agnew's claim. I do not think so.'

c Carnwath LJ agreed (at [34]), and Wall J came to the same conclusion (at [39]). The Court of Appeal held that FAI were entitled to the proceeds of the letter of credit in the escrow account. The effect was Sirius became an unsecured creditor in the insolvency of FAI.

[13] Sirius now appeals to the House of Lords.

#### THE ISSUES

[14] The statement of issues agreed between the parties reads as follows:

e '(1) Whether para 1 of the Tomlin order, on its true construction, constituted an agreement by FAI that [Sirius] should pay Agnew and thereby satisfied the first of the conditions for draw-down set out in the agreement.

f (2) Whether, having regard to paras 4 and 5 of the Tomlin order, any of the provisions of that order can be construed as taking away FAI's argument that it was entitled to the proceeds of the letter of credit as a result of non-compliance with the conditions of draw-down in the agreement.

g (3) Whether, in the event that [Sirius] could not establish that the agreed conditions for draw-down were satisfied, it follows that draw-down in breach of the agreement gave rise to an entitlement on the part of FAI to the proceeds of the letter of credit, as opposed to a claim in damages. This question raises the following issues: (a) whether the effect of the autonomy principle, which is applicable to letters of credit and all other documentary credits, is such as to give [Sirius] the right to the proceeds, leaving FAI with its claim in damages; or (b) whether, in the circumstances of this case, FAI is entitled to the proceeds.'

h

#### THE POINT OF CONSTRUCTION

[15] The principal question is whether the first condition of the side letter was satisfied by the terms of para 1 of the Tomlin order.

j [16] The judge ended his trenchant judgment by saying ([2002] 2 All ER (Comm) 745 at [28]):

'I reach this conclusion without regret. The truth is that FAI got the benefit of Sirius fronting the deal. The price of that was the provision of the letter of credit. The letter of credit was properly drawn down. It was there to meet just the eventualities that happened.'

This was a reference to the merits of the underlying dispute. In the construction of commercial documents a hard-headed approach is necessary. The merits of the underlying dispute, predating the Tomlin order, were as such entirely irrelevant to the determination of the question of construction. But the *matrix* of the Tomlin order may cast light on its meaning. a

[17] Turning now to the two documents to be considered, the meaning of the first condition of the side letter is not in doubt. It stipulates as a precondition for draw-down under the letter of credit that— b

‘FAI has agreed that Sirius should pay [to Agnew] a claim but has not put Sirius in funds to do so, notwithstanding the simultaneous settlements clause ...’

No dispute about the meaning of this precondition emerged during the oral hearing of the appeal. The critical question is whether the terms of para 1 of the Tomlin order satisfied this condition. c

[18] The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene. d

[19] There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Cia Naviera SA v Salen Rederierna AB*, *The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed: e

‘... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.’ f

In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at 372, [1997] AC 749 at 771, I explained the rationale of this approach as follows:

‘In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.’ g

The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 edn) vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the nineteenth century. The example is as follows. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process. This approach was affirmed by the decisions of the House in the *Mannai Investment* case [1997] 3 All ER 352 at 376, [1997] AC 749 at 775 per Lord Hoffmann and in *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Investors Compensation Scheme Ltd v Hopkin & Sons (a firm)*, *Alford v West* h  
j

a *Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913 per Lord Hoffmann.

b [20] From the surrounding circumstances preceding the making of the Tomlin order, and the text of the Tomlin order, it can be inferred that the parties had two major immediate objectives. First, they desired to compromise an arbitration that would have been long and costly. This objective was achieved by para 5 of the Tomlin order. Secondly, the letter of credit had been extended but was due to expire on 15 November 2001. Both parties wanted to obtain a draw-down of the letter of credit on terms which left open the issue of the entitlement of the proceeds of the draw-down. Paragraph 2 of the Tomlin order provided for the draw-down.

c [21] That brings me directly to the effect of para 1 of the Tomlin order read in context of the remainder of the paragraphs of the schedule to it. At first glance there are countervailing indications. Counsel for Sirius emphasised the unqualified acknowledgment of indebtedness in a specific sum in para 1. While literally para 1 recorded the indebtedness of FAI to Sirius, counsel for Sirius argued that by reason of the back-to-back fronting arrangement, and the simultaneous settlement clause referred to in the side letter itself, para 1 necessarily meant that FAI acknowledged the indebtedness of Sirius to Agnew in the same sum. At the very least, he argued, it meant that FAI accepted that the insured events had occurred and that liability in the sum of \$US22.5m had been incurred under the matching reinsurances and retrocessions. As against this

d counsel for FAI relied heavily on the words in para 4 that 'all arguments of [Sirius] and [FAI] are preserved in respect of the proceeds notwithstanding the terms of this schedule'. His primary argument was that para 1 must be read as entirely subordinate to para 4. He submitted that the very fact that it was agreed that the proceeds would be paid into an escrow account, rather than be paid over to Sirius, supported this argument.

f [22] If this argument of FAI is accepted, it follows inexorably that by virtue of the terms of the settlement in the Tomlin order Sirius abandoned the chance of ever fulfilling either condition of the side letter. That must be so since the arbitration proceedings were compromised. In his judgment the judge trenchantly commented on such an outcome ([2002] 2 All ER (Comm) 745):

g ' [21] ... If one follows the logic of [the] argument through, its effect is that the letter of credit was agreed at the time to be unenforceable. It might as well have been torn up by the agreement ...

[22] This is such a bizarre conclusion that it cannot be right ...'

h On this point May LJ came to the same conclusion. He said ([2004] 1 All ER 308 at [19]):

j 'In my judgment, the judge was correct to reject FAI's extreme submissions based on paras 4 and 5 of the schedule to the Tomlin order. The short point is that paras 4 and 5 cannot, in my view, be read as leaving open for future contention that which para 1 compromised. Paragraph 1 compromised the arbitration proceedings. It did not purport to determine questions arising out of the letter of credit. Available arguments as to the letter of credit were preserved, but the indebtedness of FAI to Sirius under the retrocessions was determined.'

Carnwath LJ agreed with the judgment of May LJ and in a separate judgment Wall J took the same view. In my view the outcome contemplated by the argument of counsel for FAI is so extraordinary as to be commercially implausible. a

[23] I would accept the argument of counsel for Sirius and reject the argument of counsel for FAI. It does not follow from this conclusion that the reservation of rights under para 4, and the payment of the proceeds into the escrow account, is to be given no meaning. These features of the settlement were intended to enable the English provisional liquidators to decide whether, and if so, in what manner, they might wish to challenge Sirius' right to the proceeds of the letter of credit. One must bear in mind that the provisional liquidators took office only 13 days before the Tomlin order and probably knew very little about the background. The reservation of rights would, for example, have entitled them to rely, for example, on dishonesty in the underlying transaction if that could be established. Only in such an attenuated sense were rights reserved. Given this reservation of rights, the arrangement to pay the proceeds into an escrow account was not surprising. b

[24] For all these reasons I would reject the primary argument of counsel for FAI. c

[25] That leaves the reasoning of the Court of Appeal to the effect 'that the literal words of para 1 do not express an agreement by FAI that Sirius should pay Agnew's claim' (see [2004] 1 All ER 308 at [21], [39] per May LJ and Wall J respectively). It is indeed true that literally para 1 did not so provide. But it is also clear that the words of para 1 necessarily meant that FAI agreed that, under the back-to-back reinsurances, and the simultaneous settlements procedure, that Sirius should pay Agnew. If it were necessary I would reach this conclusion on the basis of a constructional implication. I do not, however, think that it is necessary to resort to an implication. In my view the judge was right to conclude that on a correct interpretation of para 1 of the Tomlin order the first condition of the side letter was satisfied. With due respect to the members of the Court of Appeal their interpretation was uncommercial and literalistic. d

[26] Given this conclusion it is common ground that all remaining issues fall away. e

[27] For these reasons, as well as the reasons given by my noble and learned friend Lord Walker of Gestingthorpe, I would allow the appeal against the order of the Court of Appeal and restore the order of Jacob J. f

#### LORD WALKER OF GESTINGTHORPE.

[28] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with it, and for the reasons which he gives I would allow this appeal. But because of the differences of opinion between your Lordships on the first issue, the issue of construction, I wish to add a few observations in my own words. g

[29] The House has to construe two contractual documents which interact on each other. One is a letter dated 3 September 1999 written by Ms Monica Cramer Manhem, a senior vice-president of the principal company in the group which includes the appellant, Sirius International Insurance Co (Publ) (Sirius). The letter is part of an exchange of correspondence between reinsurance executives, and none of the correspondence appears to have been drafted by lawyers. The other document is the schedule to a Tomlin order made on 6 April 2001. The h



a order was made on what had originally been an application to lift a stay of arbitration proceedings between Sirius and the first respondent, FAI General Insurance Ltd (FAI). It had the effect of bringing the arbitration proceedings to an abrupt end. What further effect it had is a matter of acute controversy, on which Jacob J ([2002] EWHC 1611 (Ch), [2002] 2 All ER (Comm) 745, [2003] 1 WLR 87) and the Court of Appeal ([2003] EWCA Civ 470, [2004] 1 All ER 308, b [2003] 1 WLR 2214) reached different conclusions.

[30] The Tomlin order was drafted by competent and experienced lawyers (the House was not told its exact provenance, but both sides had solicitors and counsel of high standing). But it seems to have been produced under severe time constraints, and at a time when (because of the recent appointment of provisional liquidators with solicitors and counsel who were new to the matter) one side at c least was by no means well informed about the tangled history of these reinsurances. Sirius (and the brokers, Lambert Fenchurch Ltd, who were in substance conducting the arbitration in the name of Sirius) had much more opportunity to become acquainted with the complexities of the position but for them too FAI's dramatic plunge into insolvency was a new factor calling for d specialised advice.

[31] When a commercial dispute arises it is sometimes convenient to both sides to reach a limited agreement involving some immediate action, but to leave other issues unresolved, to be compromised or litigated at some future time. In the present case it is reasonably clear—whatever other difficulties there are about e the construction and effect of the schedule to the Tomlin order—that both sides wanted to achieve two immediate objectives. One was to put an end to the arbitration proceedings, in which a long and expensive hearing was due to start very soon. The other was to obtain draw-down on the letter of credit (which had been extended but was to expire on 15 November 2001) while leaving open the issue of entitlement to the proceeds of the draw-down.

f [32] When parties are under severe time pressure, and one or both of them have inadequate information, such a limited agreement may be all that the parties can achieve. But in such difficult circumstances they may have to accept that the immediate action on which they do agree inevitably alters the context of the issues which remain unresolved. For instance, a consent order for sale of equipment g subject to a finance lease may raise the question whether relief from forfeiture, which the lessee was seeking from the court, is still available (see the decision of this House in *On Demand Information plc (in administrative receivership) v Michael Gerson (Finance) plc* [2002] UKHL 13, [2002] 2 All ER 949, [2003] 1 AC 368, especially at [36]–[39] per Lord Millett).

h [33] So in this case the two important points on which the parties did agree inevitably had an effect on the issues which were not resolved. Paragraphs 1 and 5 of the schedule had the effect of putting a final end to the arbitration. It was no longer possible for Sirius to obtain declaratory relief (sought, in addition to a money award, in the arbitration) to the effect that Sirius was bound to pay Agnew and FAI was bound to pay Sirius. Moreover, paras 2 and 3 of the schedule had j the effect that Westpac Banking Corporation (Westpac), the issuer of the letter of credit, dropped out of the picture. The escrow account was a sort of substitute for the letter of credit but it was of a different kind, as the element of 'the great and fundamentally important separation' (the expression used by Donaldson MR in *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251 at 256) between banker and reinsurers was no longer there. The deceptively simple

language of para 4 of the schedule must in my view be approached with these points in mind. a

[34] The terms in the schedule, and para 4 in particular, must also be viewed, like any other contractual document, in their commercial context. In this House there was not much common ground between counsel as to how the commercial context of the Tomlin order should be characterised. The courts below saw much more of the extensive documentary evidence than has been placed before your Lordships. But the limited evidence before the House discloses some uncontroversial facts which may be material. (a) The order of Mr Registrar Baister made on 27 May 2002 (that is, more than a year after the Tomlin order) shows that there was still no agreement as to what the basic contractual documents were. Between August 1999 and January 2000 there had been a lengthy exchange of correspondence (identified in the affidavit dated 18 September 2001 of Mr Timothy Brown of Reynolds Porter Chamberlain and the witness statement dated 2 November 2001 of Ms Kathryn Carr of Ince & Co) from which the effective contractual terms had to be identified and extracted. b

(b) In an affidavit made on 5 April 2001 (that is, the day before the Tomlin order) Mr Timothy Bull of Reynolds Porter Chamberlain deposed (in relation to the letter of 3 September 1999) to his belief that '[t]he agreement does not say so however the intention is that FAI's written agreement would not be unreasonably withheld'. Whether or not this was admissible or cogent on the issue of construction of the letter, it appears to have been the only clear instance of an argument about the letter of credit put forward openly before the making of the Tomlin order. c

(c) There is mention (in a letter dated 31 July 2001 from Reynolds Porter Chamberlain to Freshfields Bruckhaus Deringer (Freshfields), and also in an affidavit of Mr Timothy Brown of Reynolds Porter Chamberlain sworn on 18 September 2001) of a suggestion put forward on behalf of the provisional liquidators that (in the words of the letter) 'the security given by the [letter of credit] must be "downgraded" as a result of FAI's insolvency to security for any distribution in the estate of FAI'. This suggestion was evidently put forward after the appointment of the provisional liquidators but before the Tomlin order. d

(d) However, it does not seem to have been a considered view, since on 7 August 2001 Freshfields (for the provisional liquidators) stated that their clients had still not had an opportunity to acquaint themselves with the facts and take a view as to the merits of Sirius' claim. In order to do so they would need (among other things) to contact Ince & Co (who had acted for FAI at the time). Freshfields' state of knowledge on 6 April 2001 must have been even more deficient. e

(e) In her witness statement of 2 November 2001 Ms Carr put forward further arguments (based on allegations of champerty and misrepresentation) on behalf of the provisional liquidators but there is no suggestion that these arguments were live at the date of the Tomlin order. f

[35] Against that background I turn to para 4 of the schedule to the Tomlin order: g

'For the avoidance of doubt, the position and all arguments of [Sirius] and [FAI and the provisional liquidators] in respect of the [letter of credit] are preserved in respect of the proceeds notwithstanding the terms of this schedule.' j

Meticulous verbal analysis of this paragraph is not appropriate, at any rate not to the exclusion of common sense, or its commercial context. Nevertheless I make

a three short verbal points. First, the words 'For the avoidance of doubt,' although sometimes loosely used, suggest that the paragraph is going to spell out what is fairly obvious (or at any rate unsurprising) rather than subverting the other provisions of the schedule. Second, the reference to arguments being 'preserved' cannot in the circumstances sensibly restrict the parties to arguments which had already been articulated and advanced (compare the mirror-image issue of the release of unknown claims considered by this House in *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [2002] 1 AC 251); at the time when the Tomlin order was made there seems to have been doubt even as to the identity of the relevant contractual documents. Any arguments, whether or not already canvassed, could be put forward (the parenthesis '(if any)' in para 3 is consistent with that). Third, the repetition of 'in respect of' ('the arguments ... in respect of the [letter of credit] are preserved in respect of the proceeds') is not careless drafting but serves to emphasise the intended parallel between the letter of credit before draw-down and the proceeds after draw-down.

d [36] Then there are the most controversial words in para 4, 'notwithstanding the terms of this schedule'. Plainly they are intended to have some sort of overriding effect: in particular, since the issues left unresolved centre on the letter of credit, to require entitlement to the letter of credit to be determined as if there had been no draw-down. That hypothetical approach may give rise to more difficulties than the parties had fully thought through, but it is consistent with their commercial objectives.

e [37] Does the schedule intend the hypothesis to be stretched further, so as to require the apparently unqualified acknowledgment in para 1 of FAI's liability to be disregarded in determining entitlement to the proceeds of the letter of credit? The judge thought that that would be an extraordinary result. He said ([2002] 2 All ER (Comm) 745):

f '[21] ... If one follows the logic of [the] argument through, its effect is that the letter of credit was agreed at the time to be unenforceable. It might as well have been torn up by the agreement ...

[22] This is such a bizarre conclusion that it cannot be right ...'

g [38] In the Court of Appeal May LJ took the same view. He said ([2004] 1 All ER 308):

h '[19] In my judgment, the judge was correct to reject FAI's extreme submissions based on paras 4 and 5 of the schedule to the Tomlin order. The short point is that paras 4 and 5 cannot, in my view, be read as leaving open for future contention that which para 1 compromised. Paragraph 1 compromised the arbitration proceedings. It did not purport to determine questions arising out of the letter of credit. Available arguments as to the letter of credit were preserved, but the indebtedness of FAI to Sirius under the retrocessions was determined.'

j Carnwath LJ agreed with May LJ; and Wall J expressed similar views.

[39] The ground on which the Court of Appeal disagreed with the judge was not as to a far-reaching counterfactual hypothesis introduced by para 4, but as to the proper meaning of para 1, construed in its commercial context. On that point, for all the reasons given by Lord Steyn, I respectfully prefer the reasoning of the judge to that of the Court of Appeal. As the judge said (at [26]): 'The

commercial substance is that FAI had agreed that Sirius should pay a claim.' For these reasons I would allow the appeal. a

**LORD BROWN OF EATON-UNDER-HEYWOOD.**

[40] My Lords, I find myself in precisely the same position as my noble and learned friend, Lord Bingham of Cornhill. I too was inclined to the construction of the Tomlin order contended for by the respondents. For the reasons given by Lord Bingham, however, I too am content to agree that the appeal should be allowed. b

*Appeal allowed.*

Celia Fox Barrister.



**Crouch v King's Healthcare NHS Trust**  
**Murry v Blackburn, Hyndburn and Ribble Valley**  
**Healthcare NHS Trust**

[2004] EWCA Civ 1332

COURT OF APPEAL, CIVIL DIVISION

WALLER, MANCE LJ AND SIR CHRISTOPHER STAUGHTON

22, 23 JULY, 15 OCTOBER 2004

*Costs – Order for costs – Discretion – Payment into court – Effect of offer to settle without payment in by public authority – CPR Pt 36.*

The practice of various NHS trusts in cases involving money claims against them was to send offers of settlement in standard form, by reference to which they hoped to persuade courts to make orders for costs in their favour as if they had made payments into court under CPR Pt 36<sup>a</sup>. Under CPR 36.20 where a claimant failed at trial to better a CPR Pt 36 payment, the court would order the claimant to pay any costs incurred by the defendant after the latest date on which the offer could have been accepted, unless the court considered it unjust to so order. CPR 36.1(2) provided that nothing in CPR Pt 36 prevented a party making an offer to settle in whatever way he chose, but if that offer were not made in accordance with CPR Pt 36, it would only have the consequences specified in CPR Pt 36 if the court so ordered. The standard form offers were stated to be open for 21 days. The NHS trusts agreed to pay a claimant's reasonable costs until acceptance of the offer. If the offer were accepted later the trust would only settle on the basis that the claimant would be responsible for his own costs and for the trust's reasonable costs thereafter. The NHS trusts stated that they did not intend to make payment into court, but stressed that, being public authorities, there was no doubt that they would make payment. They drew attention to the court's power to exercise discretion on costs matters. The latest version of the standard offer letter set out in some detail why a NHS trust was bound to be good for the money. In the first of two appeals brought by NHS trusts in circumstances where offer letters had been sent, the NHS trust had been ordered, at the conclusion of the action in which the claimant had not bettered the amount offered, to pay all the claimant's costs, on the basis that he was the successful party and that where a defendant to a money claim wished to obtain the benefit of CPR Pt 36 he could do so only by making a payment into court. In the second appeal the issue was been whether the NHS trust had been entitled to withdraw its offer, the judge having held that by agreement the provisions of CPR Pt 36 had applied. The object of the appeals was to obtain approval for the practice of sending such offer letters so that NHS trusts could be confident that such offers would have the effect of placing claimants at risk for costs from 21 days from the date of the offers, and that such offers would effectively be treated as having the costs consequences envisaged by CPR Pt 36 for payments into court.

<sup>a</sup> CPR Pt 36, so far as material, is set out at [6], below

**Held** – At the conclusion of proceedings, where a party had made an offer to settle by way of a letter such as the latest standard offer letter used by the NHS trusts, the court could have regard to all the circumstances, and ask itself whether it was right to apply the presumption as to costs under CPR 36.20, or make some different order depending on the circumstances of the case, so giving proper effect to the fact that a payment into court had not been made. In so doing the court was entitled to take into account the factors stressed by the NHS trusts and that the latest standard form of offer was as sound as a payment in. Unless there were some special factor about the circumstances of the case, the court should treat such an offer in the same way as a payment in. Accordingly, in the first of the instant appeals the offer should have so been treated, and the appeal would be allowed. In the second appeal the judge's exercise of his discretion would not be disturbed and the appeal would be dismissed (see [26]–[28], [42], [43], [45], [47], [50]–[52], below).

*Cutts v Head* [1984] 1 All ER 597, *Amber v Stacey* [2001] 2 All ER 88, and *Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo* [2001] 2 Lloyd's Rep 275 explained.

Per curiam. There is no reason in principle why parties by agreement should not treat an offer in writing as if it were a payment into court so as to bring into play the consequences that flow from CPR Pt 36 (see [27], [51], [52], below).

## Notes

For offers to settle and payments into court and for the court's discretion as to costs, see, respectively, 37 *Halsbury's Laws* (4th edn reissue) para 807 and 10 *Halsbury's Laws* (4th edn reissue) paras 16, 17.

## Cases referred to in judgments

*Amber v Stacey* [2001] 2 All ER 88, [2001] 1 WLR 1225, CA.  
*Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 586, CA.  
*Cumper v Potchecary* [1941] 2 All ER 516, [1941] 2 KB 58, CA.  
*Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290, [1984] 2 WLR 349, CA.  
*Flynn v Scougall* [2004] EWCA Civ 873, [2004] 3 All ER 609.  
*Marsh v Frenchay Healthcare NHS Trust* (2001) Times, 13 March.  
*MRW Technologies Ltd v Cecil Holdings Ltd* [2001] All ER (D) 381 (Jun).  
*Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275.  
*Walker v Wilsher* (1889) 23 QBD 335, CA.

## Cases referred to in skeleton arguments

*Aylwen v Taylor Joynson Garrett (a firm)* [2001] EWCA Civ 1171, [2002] PNLR 1.  
*Frazer & Haws Ltd v Burns* (1934) 49 Ll L Rep 216, CA.  
*Gaskins v The British Aluminium Co Ltd* [1976] 1 All ER 208, [1976] 1 QB 524, [1976] 2 WLR 6, CA.  
*Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, CA.  
*Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.  
*Millar v Building Contractors (Luton) Ltd* [1953] 2 All ER 339, [1953] 1 WLR 780.  
*Proetta v Times Newspapers Ltd* [1991] 4 All ER 46, [1991] 1 WLR 337, CA.  
*Scammell v Dicker* [2001] 1 WLR 631, CA.  
*Smith v Manchester Corp* (1974) 17 KIR 1, CA.  
*Williams v Boag* [1940] 4 All ER 246, [1941] 1 KB 1, CA.

a Appeals

*Crouch v King's Healthcare NHS Trust*

The King's Healthcare NHS Trust appealed from the decision of Judge Latham on 3 September 2003 at the Wandsworth County Court ordering that the NHS trust pay all the costs of Peter Crouch in his successful action against the NHS trust for damages for personal injury. Mr Crouch did not appear in the appeal. The facts are set out in the judgment of Waller LJ.

*Murry v Blackburn, Hyndburn and Ribble Valley Healthcare NHS Trust*

The Blackburn Hyndburn and Ribble Valley Health Care NHS Trust appealed with permission granted by Scott Baker LJ on 26 May 2004 from the decision of Wright J on 5 March allowing Pema Lucy Murry, acting by her mother and litigation friend, Kathryn Murry, in proceedings for damages for personal injury against the NHS trust, to accept an offer made by letter by the NHS trust on 21 February 2003 and approving a settlement on the terms of the offer letter, subject to making an order that the claimant pay the costs from the date originally set for trial of the action. The facts are set out in the judgment of Waller LJ.

Philip Havers QC (instructed by Kennedys and Hempsons, Manchester) for the NHS trusts.

Simeon Maskrey QC (instructed by Osborne Morris & Morgan, Leighton Buzzard) for the claimant in the Murry appeal and as advocate to the court in the Crouch appeal.

*Cur adv vult*

f 15 October 2004. The following judgments were delivered.

**WALLER LJ.**

[1] These two appeals have been argued together because both involve considering the effect of 'offers to settle' made in cases involving money claims where payments into court have not been made in accordance with CPR Pt 36.3. No point was taken in the courts below as to the admissibility of the offers on the issues before the courts although as I shall explain, the basis on which they were admissible or on which they could be taken into account may be of relevance. In one appeal (the Crouch appeal) the facts were that the claimant (Mr Crouch) won the case but failed to beat the offer. The judge held that the defendants had not successfully protected their position on costs because they had not paid money into court under Pt 36, resulting in the defendants being ordered to pay all the costs. In the other (the Murry appeal) the question is whether by agreement the provisions of Pt 36 which would have applied if there had been a payment in, applied and if so, whether the judge exercised his discretion properly by refusing to allow the withdrawal of the offer.

[2] The defendants and appellants in both appeals are NHS health care trusts who because of the implications for them of paying into court substantial sums of money, have developed a practice of sending an 'offer of settlement' by reference to which they hope to persuade courts to make the same orders for costs in their favour as if they had made a payment into court. The form of what has become a standard letter has changed from time to time. The appeals relate

to different stages in the development of the standard letter. In the Murry appeal the letter expressed itself as being an 'offer ... pursuant to Part 36' without reference to Pt 44. In the Crouch appeal the letter states that: 'This offer is made ... under the provisions of Part 36 and 44 of the Civil Procedure rules.'

[3] Both letters then contained paragraphs in almost identical wording save as to the dates for acceptance of the offer. I can take the words from the Crouch letter:

'This offer is open for 21 days from the date you receive this letter which we calculate as until close of business on 29 August 2003. We also agree to pay the claimant's reasonable costs up until acceptance of it on or before the same date. Should your client decide to accept this offer after 29 August 2003 then we will agree he may do so only on the basis that your client will be responsible both for their own costs and for our reasonable costs thereafter or we otherwise agree liability for costs or with leave of the court. Please note that we do not intend to pay the amount of our offer into court. Please further note that as we are a public authority you should be in no doubt that we will pay the amount of our offer if the claimant accepts it in accordance with the terms on which we make the offer. With regard to the court's power to exercise discretion on the matter of costs in these circumstances, we respectfully refer you to *Amber v Stacey* [2001] 2 All ER 88, [2001] 1 WLR 1225. Please acknowledge safe receipt of this letter.'

[4] In later versions of the standard letter it seems from statements put in on behalf of the NHS trusts which we have read without prejudice to their admissibility at the appeal stage, it is intended that the following words should appear in place of the final main paragraph, which I quote now because they reflect to some extent the submissions of Mr Havers QC for the NHS trusts, and reflect reliance on *Southampton Container Terminals Ltd v Schiffahrts-Gesellschaft Hansa Australia MBH & Co, The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275 in place of *Amber's* case for reasons which will become apparent:

'Please note that for the following reasons the defendant does not intend to pay the amount of its offer into court:

1. The defendant is an NHS public authority. You should therefore be in no doubt that its offer is a genuine one that it will pay promptly if the claimant accepts it in accordance with the terms on which we make the offer; and

2. As an NHS public authority the defendant respectfully submits that rather than paying NHS funds into court, it is preferable for the amount of its offer (which would be paid out of NHS funds) to continue to be available for provision of patient services pending resolution of this case either by agreed terms of settlement or court order.

3. As an NHS body, there is no doubt that the defendant will be able to pay the amount of its offer. We respectfully refer you to the National Health Service (Residual Liabilities) Act 1996 which by s 1 provides that:

"(1) If a National Health Service trust, a Health Authority or a Special Health Authority ceases to exist, the Secretary of State must exercise his statutory powers to transfer property, rights and liabilities of the body so as to secure that all of its liabilities are dealt with.



(2) For the purposes of subsection (1), a liability is dealt with by being transferred to—(a) the Secretary of State; (b) a National Health Service trust; (c) a Health Authority; or (d) a Special Health Authority.”

You will appreciate that the court has the power to exercise discretion on the matter of costs in these circumstances and we respectfully refer you to *Southampton Container Terminals Ltd v Schiffahrtsgesellschaft “Hansa Australia”*

*MGH & Co (The MV “Maersk Colombo”)* [2001] 2 Lloyd’s Rep 275. Please acknowledge safe receipt of this letter.’

[5] The object of the appeals apart from seeking to reverse the judges’ exercise of discretion in the particular cases, is to obtain the approval of the Court of Appeal for the practice of sending such offer letters as opposed to making payments into court, so that for the future an NHS trust can feel confident first that such ‘offers’ will have the desired effect of placing claimants at risk for costs from 21 days from the date of the offers, and second that such offers will effectively be treated as having the consequences envisaged by Pt 36 for payments into court, particularly the presumption in favour of an order for costs being made in favour of the NHS trust where such offers are not bettered, provided under Pt 36.20 where there has been a payment in.

#### THE PROVISIONS OF PTS 36 AND 44

[6] The relevant provisions of Pt 36 are the following:

‘36.1(1) This Part contains rules about—(a) offers to settle and payments into court; and (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders ...

#### **Part 36 offers and Part 36 payments – general provisions**

36.2(1) An offer made in accordance with the requirements of this Part is called—(a) if made by way of a payment into court, “a Part 36 payment”; (b) otherwise “a Part 36 offer” ...

(Rule 36.3 sets out when an offer has to be made by way of a payment into court)

(2) The party who makes an offer is the “offeror”.

(3) The party to whom an offer is made is the “offeree”.

(4) A Part 36 offer or a Part 36 payment—(a) may be made at any time after proceedings have started; and (b) may be made in appeal proceedings ...

#### **A defendant’s offer to settle a money claim requires a Part 36 payment**

36.3(1) Subject to rules 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment.

(2) A Part 36 payment may only be made after proceedings have started ...

#### **Form and content of a Part 36 offer**

36.5(1) A Part 36 offer must be in writing.

(2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.

(3) A Part 36 offer must—(a) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or

issue; (b) state whether it takes into account any counterclaim; and (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2). a

(4) A defendant may make a Part 36 offer limited to accepting liability up to a specified proportion.

(5) A Part 36 offer may be made by reference to an interim payment ...

(6) A Part 36 offer made not less than 21 days before the start of the trial must—(a) be expressed to remain open for acceptance for 21 days from the date it is made; and (b) provide that after 21 days the offeree may only accept it if—(i) the parties agree the liability for costs; or (ii) the court gives permission. b

(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if—(a) the parties agree the liability for costs; or (b) the court gives permission ... c

(8) If a Part 36 offer is withdrawn it will not have the consequences set out in the Part.

### Notice of a Part 36 payment d

36.6(1) A Part 36 payment may relate to the whole claim or part of it or to an issue that arises in it.

(2) A defendant who makes a Part 36 payment must file with the court a notice ("Part 36 payment notice") which—(a) states the amount of the payment; (b) states whether the payment relates to the whole claim or to part of it or to any issue that arises in it and if so to which part or issue; (c) states whether it takes into account any counterclaim; (d) if an interim payment has been made, states that the defendant has taken into account the interim payment; and (e) if it is expressed not to be inclusive of interest, gives the details relating to interest set out in rule 36.22(2) ... e

(3) The offeror must—(a) serve the Part 36 payment notice on the offeree; and (b) file a certificate of service for the notice. f

(4) [omitted]

(5) A Part 36 payment may be withdrawn or reduced only with the permission of the court ... g

### Costs consequences where claimant fails to do better than a Part 36 offer or a Part 36 payment

36.20(1) This rule applies where at trial a claimant—(a) fails to do better than a Part 36 payment; or (b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer. h

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court ... j

[7] There are other provisions of Pt 36 which I will not quote, but which are relevant in appreciating the benefits of being within the Pt 36 framework, eg precise identification of the time when an offer is made or accepted (r 36.8); and the ability to get an offer or payment notice clarified (r 36.9).

[8] The relevant provisions of Pt 44 are r 44.3(1), (2), (4) and (5):

**'Court's discretion and circumstances to be taken into account when exercising its discretion as to costs'**

44.3(1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

(2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36) ...

(5) The conduct of the parties includes—(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim ...'

**THE FACTS OF THE CROUCH APPEAL**

[9] Mr Crouch is a dentist who brought an action for damages for personal injury claiming that through the defendant trust's negligence he had suffered loss of dexterity in his left hand. He claimed for past loss of earnings some £73,750, and for future loss of earnings some £91,597.50 plus interest of £12,670. By a letter in the then standard form dated 8 August 2003 the defendant NHS trust offered £35,000 in settlement of the whole claim including interest. At the trial the judge, Judge Latham, awarded Mr Crouch £9,000 for pain suffering and loss of amenity, and a lump sum of £20,000 for loss of earnings, including a sum for handicap on the open labour market. (Mr Crouch appealed that award and the Court of Appeal by a judgment given on 14 June 2004 dismissed the appeal.) Following judgment before the judge, an application was made by the defendant trust that since Mr Crouch had not bettered the sum offered by the offer letter not only should they not be ordered to pay Mr Crouch's costs, but he should be ordered to pay the trust's costs from 21 days of the date of the letter.

[10] The judge did not accede to that application and ordered the trust to pay all Mr Crouch's costs on the basis that he was the successful party reasoning that where a defendant to a money claim wished to obtain the benefit of Pt 36, he could only do so by making a payment into court. The criticism of the judge is that he did not consider whether, even if Pt 36 was not engaged directly, he did not have a discretion either under r 36.1(2), or r 44.3. This court is asked to exercise a discretion afresh and make an order that Mr Crouch pay the costs from 21 days of the date of the letter as if the defendant trust had made a payment in. A separate point is taken relating to Mr Crouch's conduct of the litigation but having regard to the views I have formed on the main aspect of the appeal, it is unnecessary to go into those points.

[11] I can say straight away, that in my view the proper exercise of a discretion, whether under r 36.1(2) or under r 44.3 in the circumstances of the Crouch appeal, would have been to disallow Mr Crouch's costs as from 21 days

after receipt of the offer, and to order Mr Crouch to pay the trust's costs as from that same date. It is convenient to consider the problem raised by the Murry appeal before providing my reasons so that consideration of Pt 36 and a failure to make a payment into court can be considered in relation to both appeals. a

#### THE MURRY APPEAL

[12] In April 1995 Pema Murry suffered severe perinatal injuries. She issued proceedings through her mother as litigation friend against the Blackburn NHS Trust. The trial on liability and quantum was set down for 24 March 2003. On 21 February 2003 the trust wrote their then standard offer letter, referring as I have indicated only to Pt 36 and not Pt 44, offering to pay £150,000 inclusive of Compensation Recovery Unit (CRU) repayments and interest. The letter stated it was open for 21 days and contained the paragraph expressing the intention of not paying the money into court referring to *Amber v Stacey* as set out above. b  
c

[13] The offer was initially rejected by telephone on 11 March 2003; it was then accepted on 13 March 2003, ie within the 21 days, and the trial date was vacated save for an approval hearing on 24 March 2003. Public funding was withdrawn and that was subject to appeal at the time of the approval hearing. Counsel for the claimant at the approval hearing stated that he could not advise approval pending the appeal on public funding. The approval hearing was adjourned. Limited public funding was restored; the details of the limitation are unknown. d

[14] There was thereafter a meeting on 18 June 2003 where the offer of 21 February 2003 was rejected by those advising the claimant, and the trust's solicitors set out their understanding of what had occurred at the meeting and further stated that their instructions were to 'make no further offers'. The action was then proceeding again for trial when on 23 January 2004 those advising the claimant wrote stating that they wished to accept the offer of £150,000, and that their client was prepared to seek the court's approval provided that any outstanding moneys due in respect of the CRU were also paid, plus costs to date. There is no dispute this was a counter-offer. The trust responded that as their offer had been rejected on 18 June 2003, there was no offer to accept. e  
f

[15] On 2 March 2004 the advisers for the claimant wrote to the trust stating: 'For the avoidance of doubt we accept the offer of 21st February 2003, which offer has never been withdrawn whether with or without the permission of the court.' g

[16] The trust's response was to assert that their offer was not open for acceptance. Those advising the claimant then restored the matter before Wright J seeking to argue first that there was an offer which had in fact been accepted, and in the alternative that the trust's original offer was to allow the offer made in the letter to be treated as a Pt 36 payment into court with the consequence that under r 36.6(5) it could not be withdrawn without the permission of the court. Under the guidance of authorities relating to the withdrawal of payments under that provision, it was submitted that since there was no change in the risk to the defendants as between the date of the offer and the date of the application to withdraw, permission to withdraw the offer should be refused. h  
j

[17] Before Wright J the NHS trust maintained its position that there was no offer capable of being accepted and thus that they did not need the permission of the court to withdraw their offer. Mr Maskrey QC had two arguments to counter this submission, one of which was that since there had been an original



a acceptance of this offer, permission to withdraw was necessary. This found no favour with the judge, but his second argument was that the NHS trust had agreed to accept that the Pt 36 provisions should apply. This argument was accepted by the judge in these terms:

b 'The view that I have come to therefore is a situation I regard as (a) unusual and (b) difficult. By effectively asking for and receiving the indulgence sought in their letter of 21 February, Messrs Hempsons did indeed give an undertaking implicit, if one wishes to put it that way, that they would not withdraw the offer otherwise and in accordance with the terms of Pt 36 as though the offer had been converted into a payment into court and that therefore they would not withdraw it otherwise than with permission.'

c [18] The judge then considered whether the situation was one in which the claimant should be entitled to accept the offer or whether it was one in which the defendant trust should be entitled to withdraw the offer. The factors recorded by the judge as being relied on by Mr Faulkes QC who at that time represented the defendant trust were twofold: (1) the stress and distress caused to witnesses who had been ready for trial in March 2003, having been then stood down and were now being asked to be ready again; and (2) the costs incurred in dealing with correspondence since March 2003 and in attending a meeting on 18 June. Those two grounds were rejected by the judge as entitling the trust to withdraw their offer. The judge then examined the change in the advice that the claimant was receiving as compared with the position in March 2003, and took the view that the claimant should be entitled to accept the offer. Accordingly he allowed the claimant to accept the offer and approved a settlement on those terms subject to making an order that the claimant pay the costs from 24 March 2003 and there being no order for costs of the hearing dated 5 March 2004.

f [19] The judge granted permission to appeal by reference to the point as to whether Pt 36 applied, but, when the defendant trust came to put in their notice of appeal, they did not seek to appeal that aspect. They simply sought to argue that the judge had exercised his discretion wrongly in refusing to allow the NHS trust to withdraw their offer, raising points which found no reference in the judge's judgment. Mr Maskrey was to submit that this was hardly surprising because they had not been canvassed as points before the judge. They were, as more fully expanded by Mr Havers in argument: (1) that when the offer was made in March 2003 the trust understood the claimant had public funding, and there was therefore a risk of fighting a trial without hope of recovery of costs; (2) the offer originally made had been rejected; (3) further costs had been incurred during the intervening year which would be irrecoverable; and (4) the judge failed to consider whether the trust were not entitled a year later and in the unknown position on public funding to place a different value on the case.

g [20] Following a protest as to whether the judge would have granted permission to appeal if the discretion aspect were the only matter to be appealed, clarification was sought by the NHS trust from Scott Baker LJ as to whether they could pursue the discretion aspect alone and he confirmed that they could.

j [21] The claimant put in a respondent's notice challenging the order of the judge that the claimant should pay the costs since 24 March 2003 and that there should be no order for costs of the hearing of 5 March 2004.

[22] For reasons which will appear, I am very doubtful whether the judge's decision that some form of agreement had been reached that Pt 36 should apply could be right, but that aspect has not been appealed and it would be unfair on

the claimant to decide the appeal by reference to that point. As regards the exercise of discretion the subject of the appeal and cross-appeal, again for reasons which will appear, in my view the exercise of the judge's discretion should not be disturbed. a

But before giving fuller reasons I should consider the position of letters offering money sums in settlement where those sums could and on one view should have been paid into court to obtain or suffer the consequences envisaged by Pt 36. b

#### DISCUSSION ON STATUS OF THE OFFER LETTERS

[23] What Mr Havers for his clients desires is that this court should rule that offer letters such as those at present sent by the NHS should have the approval of this court in the sense of binding judges to exercise their discretion in the future as though the letters were Pt 36 payments. The decision not to appeal the first point in *Murry* is dictated by this desire. He on behalf of his clients states that the NHS trust will allow the letters to be treated as though for all the world they were in fact payments in. This he submits will bring all the consequences of Pt 36 into play including the need to obtain permission to withdraw the offer, the right to clarification etc, and although he would not go there quite directly the presumption contained in r 36.20 that unless it was unjust to do so that costs from the date of the last day for accepting the offer should be paid by the claimant if the offer was not beaten. c  
d

[24] Despite the fact that Wright J's ruling that Pt 36 did apply to the offer in this case has not been appealed, if some general guidance is going to be given, the starting point must be to consider whether offer letters of this sort can be taken as equivalent to payments into court with the consequences of the machinery of Pt 36 applying. e

[25] The appeals raise two quite different points. The question whether an NHS trust can or has bound itself not to withdraw an offer without the permission of the court, is a very different question from that which arises in the *Crouch* appeal as to the effect of an offer on the court exercising its discretion in relation to costs. It is the latter point which is of most significance to the defendants, and they only argue the first point to enforce the second. f

[26] In my view it certainly is not open to any defendant to decree unilaterally that where a money claim is being made against it, it will not make a payment into court but will make a written offer on the basis that Pt 36 will apply as though he had made a payment into court. Part 36 is quite clear that in relation to money claims, to have the consequences that flow from Pt 36 a payment into court is required. This flows from the words in brackets under r 36.2(1), the heading above r 36.3 and the wording of r 36.3. It is also supported by the provisions of r 36.10 relating to offers made prior to the commencement of the proceedings, where after commencement in a money claim the offer must be paid into court. I shall explore below in a little detail how this came about, and how what at first sight may seem illogical, that there is in a money claim a requirement to pay into court before the consequences envisaged by r 36.20 will be presumed, whereas only a Pt 36 offer letter is required in any other case including a Pt 36 offer made by the claimant in a money claim. g  
h  
j

[27] Can the parties by agreement treat an offer in writing as if it were a payment into court so as to bring into play the Pt 36 consequences? I see no reason in principle why they should not, but I am doubtful about the basis on which the judge in this instance reached the conclusion as a result of non-action by the claimant that such an agreement had been reached. His finding has not

- a been appealed and as I have indicated, it would be unfair in this case to reverse it, but I would say that unless there is clear agreement by the claimant that he does accept that the defendant need not pay into court on the basis that the Pt 36 machinery will apply, following which the defendant has acted in reliance on that agreement and not paid into court, the court should be slow to spell out such a contract. It would furthermore seem to me that the terms of the contract must
- b be clear if they are to have the consequences desired by the NHS including some express reference to the offer being incapable of being withdrawn without the permission of the court. Since I understand that the NHS have no desire to go down this route, I will explore the matter no further.

- c [28] Can the court rule that the offer should be treated as a Pt 36 payment? It seems that there have been instances where the NHS has sought such a direction from the court during the proceedings as opposed to at the end of the proceedings when the court comes to consider the status of the offer. I can see no reason why under r 36.1(2) a defendant may not during the currency of proceedings take an offer letter to the court and seek a direction that it should be treated as a Pt 36 payment with the consequences which flow from that being so. The defendant
- d trusts are reluctant to have to incur the expenditure of going down this route if it can be avoided. As to whether it can be avoided, that turns on what should be the court's attitude to such offers at the conclusion of proceedings when considering the question of costs, to which question I now turn.

- e [29] There are two authorities in which consideration has been given to the correct approach to offers of money settlements in money claims where payments into court could have been made: *Amber v Stacey* [2001] 2 All ER 88, [2001] 1 WLR 1225 and *The Maersk Colombo* [2001] 2 Lloyd's Rep 275. Clarke LJ in *The Maersk Colombo* distinguished *Amber v Stacey* and I will consider that latter authority first.

- f [30] In *Amber v Stacey* a county court summons was issued on 24 September 1997; a written offer was made by the defendant to pay £4,000 on 1 October 1997, the letter saying that the sum would be paid into court if it was not accepted. The offer was rejected. The defendant paid into court £2,000 on 7 August 1998, and a further £1,000 on 20 January 2000. The judge awarded damages amounting to £2,058.52. The defendant's counterclaim alleging the works were worth no more
- g than £1,500 and for the sum of £675 was dismissed. He ordered the claimant to pay the costs 'from 11 February 1999 and from the date of the defendant's letter of 1 October 1997'. Sir Anthony Evans in his judgment felt no difficulty with the judge's ruling disallowing the claimant's costs from 1 October, but found more difficult the order to pay the defendants' costs from that date which put the
- h defendant in the same position 'as he would have done if the defendant had made the payment in and had succeeded on all issues at the trial' (see [2001] 2 All ER 88 at 95, [2001] 1 WLR 1225 at 1232 (para 36)). He pointed out that the defendant had said he would pay in the £4,000, and did not do so, indeed he paid in a lesser sum much later, and he pointed out that the defendant failed on his counterclaim.
- j He varied the order to one making the claimant pay one-half of the defendant's costs from 1 October. Simon Brown LJ agreed with the variation proposed, and it is the principles which appear from his judgment which influenced Judge Latham in refusing to award the NHS its costs against Mr Crouch. The principles which appear from Simon Brown LJ's judgment come from the following paragraphs ([2001] 2 All ER 88 at 96, [2001] 1 WLR 1225 at 1232-1233):

'39 ... Clear though it is that the claimant behaved thoroughly unreasonably from first to last, and tempting though it is therefore to uphold the recorder's order in full measure, I share [Sir Anthony Evans'] view that it was wrong to treat the letter of 1 October 1997 for all the world as though it constituted a payment into court. There are to my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of Pt 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers ...

41. Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms on which the dispute can be settled. They are clearly to be encouraged, and written offers, although obviously relevant, should not be treated as precise equivalents.'

[31] In *The Maersk Colombo* the defendant made an offer which was effectively 'without prejudice save as to costs' expressed to be open for 21 days. The claimant had suggested that the defendant needed to make a payment into court to obtain the benefits of Pt 36 and the defendant did ultimately make a payment in. David Steel J, who was not referred to *Amber v Stacey* since it had not been decided at the time of his ruling, ordered the claimant to pay the costs from 21 days from the date of the letter.

[32] In the Court of Appeal following the decision in *Amber v Stacey* the claimant submitted that David Steel J had effectively treated the offer as a Pt 36 payment in and that in the light of *Amber v Stacey* that was a wrong exercise of his discretion. Clarke LJ explained the circumstances in the following way ([2001] 2 Lloyd's Rep 275):

'[81] In order to evaluate that submission it is necessary to consider the facts, the relevant provisions of the CPR, the way in which the Judge exercised his discretion and the decision in *Amber v Stacey*. The facts may be shortly stated. On May 27, 1999 the defendants' solicitors wrote to the claimants' solicitors on behalf of their clients offering £956,867, plus interest at 8 per cent from Feb 19, 1995 until the date of payment, plus costs in full and final satisfaction of the claimants' claims. The offer was stated to be open for 21 days which, for the avoidance of doubt, was said to be up to and including June 17, 1999. The claimants expressly reserved the right to draw the letter to the attention of the Court on the question of costs. It was thus what we used to call an open offer and what is often known as a *Calderbank* offer.

[82] On June 9, 1999 the defendants served a notice to admit the fact that the crane would not have been struck if it had been parked at anchor position 223.5 at the time of the collision. On June 11 the defendants admitted liability subject to an allegation of contributory negligence. On the same day, they wrote saying that their offer would remain open after June 17, 1999, but stated that if the claimants wished to accept the offer after that date they could only do so if the parties agreed the liability for costs or if the Court gave permission. That last point was, I think, included because of the provisions of CPR 36.5(6). On June 22 the claimants wrote admitting the fact asserted in the notice to admit.

[83] Until then the claimants had not responded in any way to the offer. On the same day, June 22, they wrote saying that under CPR Part 36, in



a order to have "the costs consequences usually associated with such proposals", the defendants should have made a payment into Court and reserving their clients' position. On July 2, 1999, the defendants paid the sum of £956,867 into Court. That sum was stated to be exclusive of interest, but interest of £361,701.72 was offered in addition. No attempt was made by the claimants at any stage either to accept the offer or to take the payment in.'

b [33] Clarke LJ after considering the provisions of Pts 36 and 44, distinguished *Amber v Stacey* on the grounds that it was part of Sir Anthony Evans' reasoning that the circumstances of that case included the fact that the defendant had failed on certain issues including his counterclaim, and the fact that the defendant had not paid in the sum of £4,000 when he had said that was what he was going to do.

c Clarke LJ also referred to the passages in the judgment of Simon Brown LJ quoted above and said this:

d [97] I respectfully agree with Lord Justice Simon Brown that offers should not be treated as precise equivalents of payments into Court and that they have many advantages. In particular the money is then readily available and no question can arise as to whether the offeror can or will pay if the offer is accepted. It should thus be appreciated that offerors who do not make a payment-in do so at their peril in the sense that the Court may not be willing to reflect the offer in its order for costs.

e [98] However, the Court retains a wide discretion under CPR 36.1(2) to make the same order as it would have made under CPR 36.20 even in the absence of a payment-in. All depends upon the circumstances of the particular case. As I have tried to demonstrate, this is a very different case from *Amber v Stacey*. The Judge had all relevant considerations in mind and, in my opinion, reached the just result. There is in my judgment nothing in that case to lead to the conclusion that he made any error of principle and I would therefore dismiss the appeal on costs.'

f [34] The conclusion of the Court of Appeal in *The Maersk Colombo* was that what used to be called a *Calderbank* offer even in a simple money claim could have the same effect as a payment into court. It seems to me that it is right first to recognise how that has happened. I will endeavour to trace a brief history of offers to settle and their consequences for costs. Originally the rule was absolute that 'without prejudice' offers could not be referred to for any purpose (see *Walker v Wilsher* (1889) 23 QBD 335). Therefore offers to settle simply could not be taken into account and the exercise of discretion had to be carried out as if they did not exist. *Calderbank* offers became recognised in matrimonial proceedings following the decision of the Court of Appeal of that name, *Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93. *Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290 in the judgment of Oliver LJ provides an illuminating history of the way in which the law had approached settlement offers and approved *Calderbank* offers outside the matrimonial context. It is of some interest that the only point in the case was whether the offer made in that case, which was not a money claim, was admissible on the question of costs. If it was admissible, the court were clearly of the view that there would be only one view to take on costs and that was that the plaintiff should pay the same because he had not bettered the offer.

j [35] Part of the reasoning why offers of settlement 'without prejudice save as to costs' should be admissible was that there were other areas where 'payments

in' could not be made and where 'offers' could accordingly be made so as to have costs consequences, eg in arbitrations with sealed bids, in Admiralty cases where for example proportions as to blame were at stake, and indeed under the old RSC Ord 16, r 10 where a third party or a joint tortfeasor could make an offer reserving the right to bring it to the attention of the court after liability has been determined (see [1984] 1 All ER 597 at 607–608, [1984] Ch 290 at 309). But in both the judgment of Oliver LJ and Fox LJ in *Cutts v Head* they stated that in ordinary money payment claims a *Calderbank* offer should not be used and Oliver LJ in passage with which Fox LJ agreed ([1984] 1 All ER 597 at 610, [1984] Ch 290 at 312) put it this way:

'I would add only one word of caution. The qualification imposed on the without prejudice nature of the *Calderbank* letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised, be disposed in such a case to treat a *Calderbank* offer as carrying the same consequences as payment in.'

[36] When Lord Woolf was considering the introduction of the new rules, his view as to whether a payment in should be necessary in a money claim went through changes. At first in his *Interim Report on Access to Justice* (June 1995) Lord Woolf thought that payments in should be abolished altogether and that *Calderbank* offers even in money claims should replace them leaving complete flexibility. Such offers would have been able to be withdrawn at any time; the length of time they remained open would be a matter that could be considered in the context of a costs award. In his *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (July 1996) after submissions from the Law Society he accepted that offers should be backed by payments in, the payment in being secondary and optional, ie the passage in Oliver LJ's judgment quoted above from *Cutts v Head* would no longer apply. As regards withdrawal his suggestion was that they should be open for 21 days and that courts should be directed to ignore offers of lesser periods in exercising their costs discretion. He recognised this differed from the payment in provision under the old rules 'where the circumstances in which a payment in can be withdrawn are extremely narrow' (see ch 11, para 5).

[37] The recommendations of Lord Woolf have not been accepted in their entirety and in the result we have Pt 36 as it is and indeed Pt 44 as it is. As I have already indicated it seems to me quite clear that on its terms where the case involves a money claim, the defendant in order to have the protection of the consequences that flow from Pt 36 and the presumption in r 36.20 must pay into court. Why he should then not be able to withdraw that offer without the permission of the court when a defendant in a non-money claim who makes a Pt 36 offer can do so (compare r 36.5(6) with r 36.6(5)) seems somewhat harsh and indeed harsher still when it is clear that a claimant can make a Pt 36 offer in a case involving a money claim, and be free to withdraw it at any time without permission of the court, where a defendant cannot. But that seems to be the effect of the rules.

a [38] Consideration in the courts below of the NHS offers has started from the point of view that the offers could be referred to. Does this mean that where the machinery is there for a payment in that the observations of Oliver LJ in *Cutts v Head* are not applicable under the CPR? I recognise that cases under the old rules should not clutter our thinking under the new rules, but at first sight if there is this deliberate distinction drawn between payment in money claims, and offers of other sorts, the logic of Oliver LJ would still seem applicable, but it is important in my view to recognise what he was deciding.

b [39] As I have emphasised *Cutts v Head* was concerned with admissibility of the without prejudice offer even though the offer was expressed to be 'save as to costs'. Having held the offer which in that case was not in a simple money case, was admissible, the court then held that 'in the ordinary way' in a simple money claim the offer should be backed by a payment in, and further stated that 'as at present advised' the court would not treat a *Calderbank* offer as carrying the same consequences. That phraseology seems to me to recognise that *Calderbank* offers even in money claims were admissible in evidence but the court was saying in the exercise of the court's discretion in money claims they should ordinarily not be recognised as affecting the discretion to be exercised in relation to costs.

d [40] Do the new Civil Procedure Rules give any guidance as to whether the position should be the same? Part 36 recognises the existence of the 'without prejudice' rule when in r 36.19 it states that '(1) A Part 36 offer will be treated as without prejudice save as to costs', and:

e '(2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.'

f Furthermore r 44.3 recognises the existence of the without prejudice rule when referring to 'all the circumstances' including 'any payment into court or admissible offer to settle'.

g [41] The question whether the *Calderbank* offer was admissible or should be ignored completely on the basis suggested by Oliver LJ in *Cutts v Head* received little attention in either of the cases before us or so far as I can see in *The Maersk Colombo*. The 'without prejudice' argument was referred to in *Amber's* case in the Court of Appeal, but as a result of what occurred in the court below was not further argued. It seems to me important to be clear whether an offer of settlement in *Calderbank* form but in a money claim can be considered at all because, if it is inadmissible, or if the rule should be that even if admissible in a money claim a payment in is the only offer which can be taken into account, that provides a comprehensible approach. If however the offer is admissible, and it is something to which the court should have regard, it is much less easy to see why, unless it could be shown the offer was sham or non-serious in some way, it should not in normal circumstances have the same result as if the sum had been paid in.

h [42] It is in this context where it seems to me that r 36.1(2) has its most important impact. It seems to me that this provision was almost certainly aimed at the views expressed in *Cutts v Head* and allows a *Calderbank* offer to be made even in money claims. It then provides the court with the power to make orders that such offers should have the consequences specified in Pt 36. As regards r 44.3, in my view the dicta of Oliver and Fox LJ recognised that an offer 'without prejudice save as to costs' would be strictly admissible in the context of costs even though they were of the view that in money claims such offers should usually be ignored where no payment in had been made. *Calderbank* offers even in money

claims are therefore 'admissible' and by virtue of r 44.3 can be taken into account amongst all other circumstances in considering the proper order for costs. a

[43] I am doubtful whether there is any real difference in exercising the discretion under r 44.3 as opposed to r 36.1(2). I say that because the court will not ask first whether Pt 36 applies so as to be bound to apply the presumption under r 36.20. It will have regard to all the circumstances, and ask itself whether it is right to apply the presumption or make some different order depending on the circumstances of the case. This gives proper effect to the fact that a payment into court has not been made, ie the presumption will not automatically apply, and an order in accordance with the presumption will only be made if in all the circumstances of the case it is a just order to make. b

#### THE CROUCH APPEAL CONCLUSION c

[44] In the Crouch case, the judge took into account the NHS trust's offer but purporting to follow the principles set out in Simon Brown LJ's judgment in *Amber v Stacey* ordered the NHS trust to pay Mr Crouch's costs. He was in effect thinking that Simon Brown LJ was reverting to the dictum of Oliver LJ in *Cutts v Head*. In holding that view he was in fact wrong, because even in *Amber v Stacey* the claimant did not receive his costs and was ordered to pay part of the defendants' costs, ie the offer was not ignored altogether. It seems to me therefore the judge was plainly wrong in the way he exercised his discretion. d

[45] In exercising a discretion afresh it seems to me that the court is entitled to take into account the factors that the NHS trust will stress in their latest standard letter which are the points which Mr Havers emphasised on their behalf in his submission. Essentially the trust is bound to be good for the money. This form of offer from an NHS trust is as sound as a payment in, and, unless there is some factor special about the circumstances of the case, a court should treat such an offer in the same way as a payment in. On that basis Mr Crouch should be ordered to pay the NHS trust's costs as from 21 days after the date of the letter. e  
f

#### THE MURRY APPEAL CONCLUSION

[46] The offer made was one which in my view the NHS trust was entitled to withdraw, and I would not have upheld the judge's finding of a contract, but that finding has not been appealed. We must therefore approach the case on the basis that an application was being made to withdraw a payment in under Pt 36. The authorities relating to the exercise of the court's discretion on such applications under Pt 36 have adapted what was the approach under the former Rules of the Supreme Court as exemplified by Goddard LJ in *Cumper v Potheary* [1941] 2 All ER 516, [1941] 2 KB 58. May LJ recently in *Flynn v Scougall* [2004] EWCA Civ 873, [2004] 3 All ER 609 referred to the relevant authorities and set out the correct approach in the following terms (at [39]): g  
h

'In *MRW Technologies Ltd v Cecil Holdings Ltd* [2001] All ER (D) 381 (Jun), Garland J heard an appeal against a master's order giving a defendant permission under r 36.6(5) to withdraw a Pt 36 payment. He said, in my view correctly, that the same considerations apply to giving permission to withdraw money in court as to refusing permission to take it out. He inclined, with reference to Curtis J's decision in *Marsh v Frenchay Healthcare NHS Trust* ((2001) Times, 13 March), to a more flexible approach to take account of the overriding objective. But he also considered that Goddard LJ's phrase "a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing j



a or reducing his payment" ... was to be adopted as consistent with the overriding objective. I agree.'

[47] The question is whether we should interfere with the exercise of the judge's discretion. So far as the points taken before the judge are concerned in my view the judge's decision cannot be attacked. The distress or stress on witnesses by the change of heart of the claimant or her advisers would not amount to a change of circumstances. So far as costs incurred since the original rejection of the offer are concerned the order of the judge allowed for the recovery of those costs. There is a cross-appeal against the judge's order in relation to costs, but I can make clear now that in my view his exercise of discretion in making the orders he did on costs cannot be disturbed.

b [48] As regards Mr Havers' points additional to those referred to by the judge, since they were not points taken squarely before the judge, it is hardly right that they should be allowed to be taken for the first time in the Court of Appeal. The points on which he placed his greatest emphasis all revolved round the fact that public funding had been withdrawn for the claimant. He argued that the defendant trust was faced with a quite different prospect once public funding was withdrawn or limited as compared to the situation when the payment in was made. He argued that the defendant trust had re-evaluated the case by reference to the view it was now clear that the Legal Services Commission had taken.

c [49] Apart from the fact that these points were not taken before the judge, I am unattracted by them. It is unnecessary finally to rule whether the arguments should ever succeed and I will simply say this. Logically I can see that the withdrawal of public funding will produce a change of circumstances, but it seems to me that a payment in is intended to reflect an evaluation of the merits of a case, and the question whether a claimant can now afford to fight the case or the view of the Legal Services Commission should not be a circumstance on which a defendant should be entitled to rely as affecting that evaluation. The circumstances relevant to the question of whether a withdrawal should be allowed ought to be limited to matters that go directly to the evaluation, eg some alteration in the condition of the claimant or in the evidence.

#### CONCLUSION

d [50] I would allow the appeal of the defendant NHS trust in the Crouch appeal and dismiss the appeal of the defendant NHS trust in the Murry appeal.

#### MANCE LJ.

e [51] I agree, except that, like Sir Christopher Staughton, I prefer not to express any view on the points mentioned in [48]–[49] above.

#### SIR CHRISTOPHER STAUGHTON.

f [52] I agree with the judgment of Waller LJ on all points, with one exception. That is the issue whether a change in the claimant's funding (or lack of it) can be regarded as a change in circumstance so as to justify withdrawal of a payment in, or the withdrawal of an offer. This is dealt with in [49], in relation to Pema Murry's appeal.

[53] If the change of circumstance is that the claimant's case will not be so well conducted, perhaps by a litigant in person, it may be that it is not a relevant change. In theory, I suppose, the judge will reach the same conclusion however unskilled the advocate. But if the claimant is likely to fare worse because she has

lost her funding, that is not a ground for allowing the defendants to withdraw an offer. a

[54] I have some doubt about the case which Waller LJ puts, where the defendants have regard to the view of the Legal Services Commission in withdrawing the claimant's support. But a third aspect of the case, which was put forward by Mr Havers QC for the Blackburn NHS Trust, has more force. This is, if I understand it correctly, that a defendant may have increased the amount offered or paid into court, because he would not recover his costs from a legally-aided claimant. The situation may have changed if legal aid is withdrawn. b  
All told, I prefer not to express any view as to when a change of funding can be a relevant change of circumstance to justify withdrawal of an offer or payment in. c  
It is not necessary to reach a conclusion in this case, as Waller LJ explains, because the point was not taken in the court below. A point of this nature ought not to be taken for the first time on appeal.

*Appeal allowed in the first appeal. Appeal dismissed in the second appeal.*

Dilys Tausz   Barrister.

# Heath Lambert Ltd v Sociedad de Corretaje de Seguros and another

[2004] EWCA Civ 792

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, CLARKE AND WALL LJJ

27 APRIL, 23 JUNE 2004

*Insurance – Reinsurance – Premium – Payment of premium by broker – Policy providing ‘premium payable on cash basis to London Underwriters within 90 days of attachment’ – Reassured failing to pay premium to broker – Broker bringing claim for premium – When broker’s cause of action accruing – Marine Insurance Act, s 53(1).*

One of the defendant Venezuelan companies asked the claimant broker to place back-to-back reinsurance on the London market in respect of a policy of marine insurance issued by the first defendant insurer and placed by the second defendant broker to a Venezuelan company providing cover for that company’s fleet of vessels. The claimant duly did so. The reinsurance was in the form of a slip policy and was evidenced by a cover note dated 26 January 1996. The conditions included: ‘Warranted premium payable on cash basis to London Underwriters within 90 days of attachment’ (the 90-day clause). On 3 July 1996, an extension was agreed by the reinsurers in respect of one particular vessel. Apart from the details of the extension itself, all terms and conditions remained unaltered. The claimant paid the premiums to the reinsurers, but neither defendant reimbursed the claimant. The claimant commenced proceedings to recover the premiums and issued a claim form on 23 July 2002. It was granted permission to serve the claim form out of the jurisdiction. The defendants applied to set that permission aside on grounds that, inter alia, the claims were out of time. The judge held that all of the claims were time-barred except for the claim for the premium in respect of the extension. He found that the effect of the 90-day clause was that the premium was only due within 90 days of the attachment and not earlier, with the result that the cause of action did not accrue more than six years before the claim was issued. The defendants appealed, contending that the 90-day clause provided solely for a warranty and that the extension premium was payable when the contract was made. It was common ground that s 53(1)<sup>a</sup> of the Marine Insurance Act 1906 applied. That section provided, inter alia, that where a marine policy was effected on behalf of the assured by a broker, the broker was directly responsible to the insurer for the premium, and the insurer was directly responsible to the assured for the amount which might be payable in respect of the losses, or in respect of a returnable premium.

**Held** – Absent any specific agreement between the individual parties, the independent rights and obligations of each of the broker, the assured, and the insurer, in the light of s 53(1) of the 1906 Act, stemmed from the terms of the policy. The nature of a broker’s claim for the premium from the assured

<sup>a</sup> Section 53, so far as material, is set out at [9], below

stemmed from the custom of the market, which had been the underlay of the 1906 Act. The broker's cause of action for payment of the premium was for an indemnity in respect of premium deemed to have been paid and its cause of action accrued when the broker was deemed to have paid the premium. That date was the date on which the premium was due as between the broker and the reinsurer, which depended on the terms of the policy. In the instant case, the 90-day clause provided not only for a warranty but also for the payment of the premium. So far as the time for payment was concerned, the use of 'payable' naturally meant that the obligation to pay the premium was only to pay before the expiry of 90 days from attachment. The effect of s 53(1) was that the obligation was that of the broker and not the assured. It followed that the claimant could not be in breach of its obligation to pay the premium until the 90 days had expired. Moreover, the provision that the premium was payable on a cash basis displaced the fiction that the broker was deemed to have paid the premium when due. The combined effect of the 90-day clause and s 53 was that the premium was payable in cash by the claimant to the reinsurers within 90 days of attachment and that the assured were liable to the claimant on the same basis and that there was no room for a fiction that the claimant had paid the reinsurers in cash when it had not. Accordingly, the claimant's cause of action had not accrued on or before 23 July 1996, and was not time-barred. The appeal would therefore be dismissed (see [14], [16], [20], [25], [26], [30], [32], [37], [39], below).

*JA Chapman & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret, JA Chapman & Co Ltd (in liq) v Chios Breeze Marue Co, JA Chapman & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret AS* [1998] Lloyd's Rep IR 377 considered.

### Notes

For the payment of marine insurance premiums, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 271.

For the Marine Insurance Act 1906, s 53, see 22 *Halsbury's Statutes* (4th edn) (2003 reissue) 38.

### Cases referred to in judgments

*Chapman (JA) & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret, JA Chapman & Co Ltd (in liq) v Chios Breeze Marue Co, JA Chapman & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret AS* [1998] Lloyd's Rep IR 377, CA.

*Power v Butcher* (1829) 10 B&C 329, 109 ER 472, DC.

*Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326.

*Shee v Clarkson* (1810) 12 East 507, 104 ER 199, DC.

*Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 1 QB 205; *affd* [1897] 2 QB 93, CA.

### Appeal

The defendants, Sociedad de Corretaje de Seguros and Banesco Seguros CA, appealed with permission of Jonathan Hirst QC, sitting as a deputy judge of the High Court, from his decision of 14 October 2003 ([2003] EWHC 2269 (Comm)), [2004] 1 Lloyd's Rep 495 on applications by the defendants to set aside the order of Tomlinson J made on 7 October 2002 granting the claimant broker, Heath Lambert Ltd, permission to serve the claim form out of the jurisdiction. The facts and grounds of appeal are set out in the judgment of the court.



- a Gavin Geary (instructed by Prettys, Ipswich) for the first defendant.  
Richard Millett QC (instructed by Le Boeuf, Lamb, Greene & MacRae) for the second defendant.  
Jeffery Onions QC and Daniel Jowell (instructed by Cozen O'Connor) for the claimant.

b *Cur adv vult*

23 June 2004. The following judgment of the court was delivered.

### CLARKE LJ.

c INTRODUCTION

- [1] This is the judgment of the court in an appeal from part of an order made by Mr Jonathan Hirst QC in the Commercial Court sitting as a deputy High Court judge (see [2003] EWHC 2269 (Comm), [2004] 1 Lloyd's Rep 495). The appeal is brought with the permission of the judge. It arises out of an order dated 14 October 2003 on applications by the defendants, which we will call 'SCORT' and 'Banesco' respectively, to set aside the order of Tomlinson J made on 7 October 2002 granting permission to serve the claim form out of the jurisdiction in Venezuela. The applications were made on a number of grounds, including the ground that all the claims were plainly time-barred and could not succeed. The judge held that some of the claims were plainly time-barred and some were not. The appeals are brought in respect of those claims which were held not to be plainly time-barred. The claimant (Heath Lambert Ltd) has not sought to appeal in respect of those issues which it lost.

f THE FACTS

- [2] A Venezuelan company called Instituto Nacional de Canalizaciones (INC) placed insurance for its fleet of vessels with Banesco, which is or was a Venezuelan insurer which essentially operated as a fronting insurer. SCORT, which is or was a firm of Venezuelan insurance brokers, placed that insurance and was also instrumental in obtaining reinsurance for Banesco in the London market. There is an issue between the defendants as to whether, in acting in the latter capacity, SCORT was acting as a producing broker for Banesco or in some other capacity. Thus it is in dispute between the defendants as to which is liable for any premium due under the reinsurance. It is, however, common ground that one or other is liable and that for the purposes of the issues in this appeal it does not matter which. It is also common ground that, although there are two appeals before the court, they raise the same questions and either both succeed or both fail.

- [3] One or other of SCORT or Banesco successively asked Heath Lambert to place back-to-back reinsurance for Banesco in the London market. Heath Lambert did so and duly placed the reinsurance with a number of Lloyd's syndicates, some London market companies and a few companies outside London. The reinsurance was in the form of a slip policy, although no one has produced the slip. It is, however, common ground for the purposes of this appeal that the agreement is evidenced by a cover note dated 26 January 1996 issued by Blackwell Green Ltd, which is now Heath Lambert.

[4] The cover note describes the cover as 'Marine Facultative Reinsurance' and the form as an 'MAR (Slip Policy)'. It describes the reassured as Banesco and gives the names of the various assured and of the various vessels covered. There are ten such vessels, although the appeal relates only the tenth vessel, the dredger ICOA. The conditions include the following:

'All clauses, terms and conditions as original and to follow settlement of same ...

Brokers Cancellation Notice Clause as attached ...

Subject to Venezuelan Law and/or Venezuelan Jurisdiction if required

...

Warranted premium payable on cash basis to London Underwriters within 90 days of attachment.'

The brokers cancellation clause included the following:

'Notwithstanding anything contained in this Policy to the contrary, Blackwell Green Limited, in addition to their lien on the policy, shall be entitled to cancel this Policy in the event of any premium not having been paid to them when due and the Underwriters hereby agree to cancel this Policy on presentation at the request of Blackwell Green Limited and to return any premium payable thereon in excess of a pro rata premium up to the date of the cancellation.'

[5] The only provision in the underlying insurance, which is governed by the law of Venezuela, to which it is necessary to refer is art 3. It provides:

'ARTICLE 3—Premium and Forms of Payment.

The "Insured" is under obligation to pay to "The Company" the premiums stipulated in the Policy Schedule at the actual moment the Policy is contracted, against presentation of a printed Premium Receipt by "The Company", signed by an authorised representative.'

[6] It is not in dispute that Heath Lambert paid the premiums (or all but one tranche of them) to the reinsurers or that neither SCORT nor Banesco has reimbursed Heath Lambert in respect of any of them. The claim form was issued on 23 July 2002 claiming total premium of \$US687,366.44, which was reduced in the particulars of claim to \$US526,090.40. Details of how the claim was made up are set out in sub-paras [7](i)–(vii) of the judge's judgment ([2004] 1 Lloyd's Rep 495). All the claims were held to be plainly time-barred except the claim for premium in respect of the extension agreed by reinsurers on 3 July 1996 for the period from 2 July until 31 December 1996.

[7] The extension slip (which has been produced) was scratched by the leading underwriter. It is not (as we understand it) in dispute that the leading underwriter had authority to bind the following market. The slip includes the following:

a 'Dredge "ICOA"—Port Risk

Noted and agreed following original, cover is extended on Port Risk basis on same terms and conditions from 2nd July 1996 to 31st December 1996 at slip rates ...

All other terms and conditions remain unaltered.'

- b Heath Lambert issued a debit note on 15 July 1996 addressed to SCORT showing a net sum due of US\$261,532.81, which it can be seen is almost half of the total claim.

THE JUDGE'S DECISION

- c [8] Before the judge there were three issues. The first issue was whether SCORT or Banesco was liable for the premium. The judge took the view that the case against SCORT was much stronger than that against Banesco but concluded that there is a reasonable prospect that SCORT is not liable and that it is not possible to say at this stage which defendant is liable. He accordingly declined to accede to the application of either defendant on this point.
- d Neither defendant has sought to challenge this part of the judge's judgment and, as already stated, it is common ground for the purposes of this appeal that one or other is in principle liable for the premium.

- [9] The second issue was whether Heath Lambert paid the premium to underwriters as a volunteer so that there was nothing in respect of which its principal (SCORT or Banesco) was liable to indemnify it. The judge discussed Mr Millett QC's submission to that effect in [16]–[23] of his judgment. He rejected it and there is no appeal against that part of his decision. In the course of that discussion the judge held that s 53(1) of the Marine Insurance Act 1906 applied to a case of this kind. Section 53(1) provides:

- f 'Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of the losses, or in respect of returnable premium.'

- g [10] The third issue before the judge involved a consideration of two questions, first when Heath Lambert's cause of action to recover the premiums arose and second whether SCORT or Banesco acknowledged its liability so as to create a fresh accrual of the cause of action under s 26 of the Limitation Act 1980. As to the second question, the judge held that neither defendant acknowledged its liability and his conclusion to that effect is not the subject of this appeal.

- h [11] As to the first question, (as already stated) he held that all the claims were plainly time-barred except the claim for premium in respect of the extension agreed by reinsurers on 3 July 1996 for the period from 2 July until 31 December 1996. He held that the effect of the clause which provided 'Warranted premium payable on cash basis to London Underwriters within 90 days of attachment' was that the premium was only due within 90 days of attachment and not earlier, with the result that the cause of action did not accrue more than six years before the claim form was issued on 23 July 2002.

## DISCUSSION

[12] The defendants say that the judge was wrong so to hold and that he should have held that the premium was due when the contract extending the reinsurance was made on 3 July 1996, so that Heath Lambert's cause of action accrued more than six years before the claim form was issued. The sole question in this appeal is whether the judge was correct on this point.

[13] In answering that question, it is important to note that it is not (as we understand it) suggested that the case falls outside s 53(1) of the 1906 Act. This is a case in which the policy was effected on behalf of the re-assured by a broker, namely Heath Lambert, so that the effect of s 53(1) is that, 'unless otherwise agreed', Heath Lambert was directly responsible to the reinsurers for the premium and the reinsurers would have been liable to the re-assured for any losses under the policy. It is also common ground (as it was in *JA Chapman & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret*, *JA Chapman & Co Ltd (in liq) v Chios Breeze Marue Co*, *JA Chapman & Co Ltd (in liq) v Kadirga Denizcilik Ve Ticaret AS* [1998] Lloyd's Rep IR 377 at 385) that 'unless otherwise agreed' it is the general rule in these circumstances that the broker (Heath Lambert) has a cause of action in its own right against the re-assured in respect of unpaid premiums.

[14] Since it is not suggested that it was 'otherwise agreed', it follows that it is common ground that SCORT or Banesco was in principle liable to Heath Lambert for the premium. The question is when its cause of action for the premium accrued. It seems to us that the answer to that question should in principle depend upon the terms of the relevant policy. As Sir Brian Neill put it in the *JA Chapman* case (at 386), in the light of s 53(1) of the 1906 Act, each of the broker, the assured and the insurer has independent rights and obligations. As we see it, absent any specific agreement between the individual parties, those rights and obligations stem from the terms of the policy.

[15] Here there is no evidence of any separate agreement as to the payment of premium between any two of the parties outside the policy. Moreover the terms of the brokers cancellation clause quoted above show that Heath Lambert was a party to the terms of the policy, at least for some purposes. Thus the reinsurers' right against Heath Lambert to the premium stems from the policy, as does Heath Lambert's right to recover premium from SCORT or Banesco and Banesco's right to recover any relevant losses under the policy from the reinsurers. In our opinion all depends upon the true construction of the policy.

[16] We are not sure that this is in dispute between the parties, although we were somewhat concerned during the argument as to the true nature of a broker's claim for the premium from the assured. This stems from the custom of the market which underlay the 1906 Act and which has been discussed both in the textbooks and in a number of cases.

[17] In *Arnould's Law of Marine Insurance and Average* (16th edn, 1981) vol 1, at para 170, the editors say that the position is briefly but comprehensively described by Bayley J in *Power v Butcher* (1829) 10 B&C 329 at 339-340, 109 ER 472 at 476 as follows:

'... according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are



a      considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely an agent; he is a principal to receive the money from the assured, and to pay it to the underwriters.'

b      As Rix J observed in *Prentis Donegan & Partners Ltd v Leeds & Leeds Co Inc* [1998] 2 Lloyd's Rep 326 at 334, in the same case Parke J said:

c      'By the course of dealing, the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured.' (See *Power v Butcher* (1829) 10 B&C 329 at 347, 109 ER 472 at 479.)

d      [18] In para 171 the editors of *Arnould* quote this passage from the judgment of Collins J in *Universo Insurance Co of Milan v Merchants Marine Insurance Co* [1897] 1 QB 205 at 209:

e      'It is a well-recognised practice in marine insurance for the broker to treat himself as responsible to the underwriter for the premium; by a fiction he is deemed to have paid the underwriter and to have borrowed from him the money with which he pays. If that is a correct explanation of the origin of the custom, it is as applicable to this form of policy as to a Lloyd's policy.

f      No doubt there is here a contract to pay by the assured but by custom the broker is treated as personally liable, the same fiction being applicable, namely, that the broker has paid the premium, and has so absolved the assured from his liability, having first borrowed the money from the underwriter to make the payment.'

g      The policy contained an express promise by the assured to pay the premiums to the insurer but it was nevertheless held by Collins J that the broker and not the assured was liable for the premium so that the insurer was not entitled to recover the premiums from the assured. His decision was upheld by this court: see [1897] 2 QB 93. As Lord Esher MR (at 96) put it in another passage quoted

h      by Rix J:

j      'It has never been supposed hitherto that that course of dealing is in contradiction of the terms of the policy ... but a mode of carrying them out. The policy says that the assured is to pay the premium, but the mode in which the payment made is according to the custom.'

[19] Those decisions were followed by Rix J in the *Prentis Donegan* case, where he upheld a submission that an automatic termination clause cannot operate under English law to forfeit the policy because the assured's obligations in respect of premium will always have been timeously discharged. As we

understand it, that is because of the fiction that the broker is treated as having paid the premium even when it has not in fact done so. The position is summarised in this way in para 172 of *Arnould*:

'It further follows from what has been above stated that, as a general rule, the assured is liable to the broker for premiums as for money paid, whether they have been in fact paid over by the broker to the underwriter or not. This is because, in accordance with the system which we have just explained, the premiums are, as between the broker and the underwriter, considered as paid. The broker, being thus deemed to have paid the underwriter, can at once recover the amount from the assured as money paid to his use. Similarly, in case the assured becomes entitled to claim a return of premiums, inasmuch as these are deemed to have been paid by the broker to the underwriter on account of the assured, they can at once be recovered from the underwriter by the assured as money had and received "without any reference as to whether or not the year during which the broker generally has credit has run out, so as to make them payable in cash by the broker to the underwriter."'

[20] On that footing the broker's cause of action for payment of the premium is not for an indemnity in respect of premium actually paid, in which case its cause of action would presumably accrue on payment, but for an indemnity in respect of premium deemed to have been paid. It follows that its cause of action accrues when the broker is deemed to have paid the premium. The only date on which the broker can be deemed to have paid the premium for this purpose is the date on which the premium was due as between the broker and reinsurer, which depends upon the terms of the policy.

[21] We would only add this. Some doubt as to the appropriateness of the fictions identified in the cases was expressed in the *JA Chapman* case, where Sir Brian Neill, with whom Chadwick and Waller LJ agreed, referred to the decisions on the custom which was in operation before the 1906 Act including the *Universo Insurance* case and to the textbooks, and said:

'The authorities and the text books throw valuable light on the genesis of the custom and its rationale. One therefore sees the background against which these policies must be construed, though I agree with the judge that since the enactment of the 1906 Act one is concerned primarily with a scheme regulated by statute.' (See the *JA Chapman* case [1998] Lloyd's Rep IR 377 at 385.)

[22] In considering the status of the broker in the ordinary case he said (at 385) that he had been assisted by a passage in Professor Merkin's chapter 'The duties of Marine Insurance Brokers' in *The Modern Law of Marine Insurance* (1998) p 275, by Professor Thomas, where, having referred to the rule that the broker must pay the insurer whether or not the assured has himself paid the broker, Professor Merkin continued (at pp 282-283):

'Perhaps the most important consequence of the rule is that if the broker becomes insolvent before the premium has been paid, the insurer cannot look to the assured for payment but must prove in the broker's liquidation.

a The rule is rooted in market practice, and has been reconciled by legal principle only by the adoption of the fiction that the premium is deemed to have been received by the insurer and loaned back to the broker. A more realistic explanation is that the broker is acting as a principal in his own right or under some form of dual agency, and not merely as an agent for the assured.

b Sir Brian Neill added that the concept of the broker acting as a dual agent (or to use the words of Lord Ellenborough CJ in *Shee v Clarkson* (1810) 12 East 507 at 511, 104 ER 199 at 200 'common agent'), or as an independent intermediary, provides a useful starting point for considering the words 'unless otherwise agreed'.

c [23] We respectfully agree. It seems to us that it is in this regard care should be taken before having regard to the fiction to which the cases refer. Thus for example, could it be said on the facts of a case like this that the broker is deemed to have paid the premium on account of the assured and that it follows that the premium is deemed to have been paid to the underwriter so that there was no breach of warranty? No one suggested that such an argument could be successfully advanced on the basis of the policy in this case. Mr Millett and Mr Geary submitted that on the true construction of the policy the premium was payable when the contract was made and Mr Onions QC submitted that it was payable within 90 days of attachment. No one suggested that the warranty did not have effect as a warranty because of the fiction.

e [24] We turn finally to the true construction of the policy, as extended by the slip dated 3 July. It is common ground that in the absence of an express term in the policy the premium is payable when the contract was made. It follows that, in the absence of agreement to the contrary, but for the clause the premium would have been payable when the contract was made on 3 July 1996.

f The defendants submitted that there is either no such express term in the policy or that the combined effect of the condition 'all clauses, terms and conditions as original' and art 3 of the underlying insurance was that the parties agreed that the premium was payable when the relevant contract was made. As we understand it, Mr Onions accepted that by one or other such route that would be the position but for the clause upon which he relied, namely: 'Warranted premium payable on cash basis to London Underwriters within 90 days of attachment.'

g [25] In our opinion all depends upon the true construction of that clause. The issue between the parties is whether it provides solely for a warranty or whether it also provides for payment of the premium. The judge held that it was the latter. In our judgment he was right so to construe the clause. There are two strong indications in the language of the clause which support the judge's construction. The first is the use of the word 'payable' and not 'paid'. The word 'payable' naturally refers to the moment when the duty to pay arises. Thus the premium was not payable when the contract was made but 'on cash basis to London Underwriters within 90 days of attachment'.

j [26] We do not see how the premium can be both payable when the contract was made and 'within 90 days of attachment'. So far as the time for payment is concerned, the use of the word 'payable' naturally means that the obligation to pay the premium was only to pay before the expiry of 90 days from attachment. Whose obligation was it? As already indicated, the effect of

s 53(1) of the 1906 Act, unless otherwise agreed (which is not suggested here), is that that obligation is the obligation of the broker and not the assured. It follows that Heath Lambert could not be in breach of its obligation to pay the premium until the 90 days expired. a

[27] The judge contrasted this clause with that in the *JA Chapman* case, where the warranty was that each instalment of premium would be 'paid to underwriters within 75 days of due date' and the due dates were separately set out. We agree with the judge that a warranty as to when premium will in fact be paid is different from a warranty as to when premium is payable. For the reasons given above, a warranty as to when premium will be paid suggests that the premium was payable earlier, whereas a warranty as to when it is payable indicates when the obligation to pay arises. b

[28] The second indication is the use of the words 'in cash'. In the absence of a clause requiring payment in cash, the obligation of the broker to pay the premium to the underwriter would be discharged in the ordinary way, which (as we understand it is common ground) in most cases would be in account between them. This clause makes it clear that the premium is payable in cash, not in any other way. In our view the natural meaning of the clause is that the broker was agreeing to pay the premium in cash within the 90 days. Purported payment otherwise than in cash would not satisfy the clause. c

[29] As Mr Millett recognised in argument, the defendants' case has to be that there was an obligation to pay the premium when the contract was made which would be satisfied by a payment by the broker to the underwriter otherwise than in cash but that, if the premium was not further paid in cash within 90 days of attachment, there would be a breach of warranty which, in the absence of waiver or affirmation (or the like), would discharge the underwriters from liability under the policy. That seems to us to make no commercial sense and to be inconsistent with the natural meaning of the clause. We can see no reason why the parties should agree that the premium should be paid, as it were, twice in this way. d

[30] We accept Mr Onions' submission on behalf of Heath Lambert that the natural meaning of the clause in its context is to give 90 days' credit to the broker in respect of the payment of premium. No premium is due immediately but is payable within 90 days of inception and in cash failing which there is a breach of warranty. Mr Geary submitted that the clause is not concerned with the payment of premium by the broker to the underwriter, or at least not with the deemed payment of premium at the outset under the fiction described above, but with the repayment in cash of the deemed loan by the underwriter to the broker. He submitted that that cash obligation lay only on the broker and not on the assured, whereas the assured warranted to the underwriters that if the broker's cash obligation was not discharged as stipulated underwriters would come off risk. e

[31] That is an ingenious argument but we are unable to accept it. The time when premium is payable under the policy depends upon its true construction. Here, for the reasons we have given, we think that on the true construction of the clause premium was not payable when the contract was made but later. The broker cannot be deemed to have paid the premium until it was due. We accept Mr Onions' submission that there is no indication in the clause that the credit was granted to the broker alone and not also to the assured for the f



a repayment of the premium. As Mr Onions put it, how would premium remain payable if it was deemed to have been paid?

b [32] We further accept Mr Onions' submission that the provision that premium is payable on a cash basis displaces the fiction that the broker is deemed to have paid the premium when due. It seems to us that the combined effect of the clause and s 53 of the 1906 Act is that premium is payable in cash by the broker to the underwriters within 90 days of attachment and that the assured are liable to the broker on the same basis and that there is no room for a fiction that the broker paid the underwriters in cash when it did not.

c [33] It was submitted on behalf of the defendants that the judge's construction of the clause is uncommercial. However, we do not agree. On his construction the underwriter provided the broker with credit and took the risk of his insolvency in the 90 days, but that is the effect of any provision of credit. There was nothing in the contract to prevent the broker from seeking payment from SCORT or Banesco immediately in order to put itself in funds to pay the premium in cash before the expiry of the 90 days. Indeed debit notes were sent out within that period. It was suggested that the debit notes somehow supported the defendants' case on the basis that Heath Lambert would otherwise be seeking payment of the premium before it was due. However, the sending out of debit notes is equally consistent with Heath Lambert seeking payment within the 90 days in order to ensure that the underwriters were paid in time in order both to discharge its own obligations to the underwriters and to avoid a breach of warranty. It was in the defendants' interest to ensure that there was payment in time in order to put Heath Lambert in funds to pay the underwriters and avoid a breach of warranty and also to avoid the risk of Heath Lambert exercising its rights under the broker's cancellation clause.

f [34] If the assured were to become insolvent the broker would be in difficulty, but we see nothing odd about that. The assured was Heath Lambert's client and it was for Heath Lambert to decide what risks to take. If the terms of the policy involved some risk to the broker, it was a risk it chose to take.

g [35] We should stress that in reaching these conclusions we are not seeking to resolve all the questions which can arise in a case of this kind. All depends upon the terms of the agreements between the three parties, namely the assured, the broker and the underwriters. Thus there may be agreements between the assured and the broker and/or between the broker and the underwriters and/or between the assured and the underwriters which may affect the position. Here, as already stated, no one suggests that there are any such agreements save as expressed in the policy.

h [36] As we see it, the policy works in this way in the light of s 53(1) of the 1906 Act. Heath Lambert owed a duty to the underwriters to pay the premium in cash within 90 days of attachment of the risk. Failure to pay would put the assured in breach of warranty. There is scope for argument as to when the premium became due from the assured to Heath Lambert. It appears to us that, if Heath Lambert had in fact paid the premium to the underwriters in cash within the 90 days, it would have been entitled to be indemnified by Banesco or SCORT. Having paid the premium (as Parke J put it) for the assured, Banesco or SCORT would become liable to indemnify Heath Lambert, at any rate on receiving notice of payment. If the premium was not paid to Heath

Lambert in those circumstances, it could activate the brokers cancellation clause.

[37] In the present case Heath Lambert did not pay the premium before the expiry of the 90 days. The judge held that the effect of the clause was that it was the obligation of Banesco or SCORT to put Heath Lambert in funds in time to pay the premium in cash to the underwriters within the 90 days but that in these days of electronic bank transfers that would be a very short time before the premium was due to underwriters. We see no reason to disagree with that conclusion. The critical point for present purposes is that Heath Lambert's cause of action did not accrue on or before 23 July 1996, which was only some 20 days or so after the extension was agreed, so that it did not accrue more than six years before the claim form was issued on 23 July 2002. It follows that Heath Lambert's claim for premium in respect of the extension was not time-barred.

[38] Finally we should add that we do not think that the combined effect of the term 'all clauses, terms and conditions as original' and art 3 of the underlying insurance leads to any different conclusion because the parties to the reinsurance made a specific agreement as to the payment of premium.

#### CONCLUSION

[39] For these reasons we have reached the conclusion that the judge's construction of the reinsurance contract was correct. The premium in respect of the extension from July to December 1996 was not payable more than six years before the action was commenced on 23 July 2002 because it was payable within 90 days of 2 July 1996 so that no writ could have been issued by the underwriters against Heath Lambert or by Heath Lambert against Banesco or SCORT before 23 July 1996. It follows that the judge was right to hold that these claims were plainly not time barred and it further follows that the appeals must be dismissed.

*Appeal dismissed. Permission to appeal refused.*

Kate O'Hanlon Barrister.

# Sheldrake v Director of Public Prosecutions

## Attorney General's Reference (No 4 of 2002)

[2004] UKHL 43

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD PHILLIPS OF WORTH MATRAVERS,  
LORD RODGER OF EARLSFERRY AND LORD CARSWELL

28–30 JUNE, 14 OCTOBER 2004

*Criminal evidence – Burden of proof – Statutory provisions imposing burden of proof on defendant – Statutory provision requiring defendant to prove defence of proscribed organisation not being proscribed on last or only occasion of membership or professing of membership and of not taking part in activities of proscribed organisation at any time while it was proscribed – Whether provision affecting definition of offence – Whether provision compatible with presumption of innocence under human rights convention – Whether provision justified and proportionate – Whether provision to be read down – Human Rights Act 1998, s 3(1), Sch 1, Pt I, art 6(2) – Terrorism Act 2000, s 11(1), (2).*

*Criminal evidence – Burden of proof – Statutory provisions imposing burden of proof on defendant – Statutory provision requiring defendant to prove ‘no likelihood of his driving whilst proportion of alcohol in his body remained likely to exceed prescribed limit’ – Whether provision compatible with presumption of innocence under human rights convention – Whether provision justified and proportionate – Whether provision to be read down – Human Rights Act 1998, s 3(1), Sch 1, Pt I, art 6(2) – Road Traffic Act 1988, s 5(1)(b), (2).*

(1) Having regard to the presumption of innocence in art 6(2)<sup>a</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the provisions of s 3(1)<sup>b</sup> of the 1998 Act requiring that so far as it was possible to do so, primary legislation must be read and given effect to in a way which is compatible with convention rights, the burden of proof provision in s 5(2)<sup>c</sup> of the Road Traffic Act 1988 imposes a legal burden on an accused charged with an offence of consuming so much alcohol that the prescribed limit was exceeded contrary to s 5(1)(b) of the 1988 Act. Section 5(2) of the 1988 Act provides that it is a defence for a person charged with an offence under s 5(1)(b) to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit. The task of the court is never to decide whether a reverse burden should be imposed on a

a Article 6, so far as material, is set out at [8], below

b Section 3, so far as material, provides: ‘(1) So far as it is possible to do so, primary legislation ... must be read and given effect to in a way which is compatible with the Convention rights ...’

c Section 5, so far as material, is set out at [35], below

defendant but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It can be assumed that s 5(2) infringes the presumption of innocence, but the provision is plainly directed to a legitimate object, which is the prevention of death, injury and damage caused by unfit drivers. The provision meets the tests of acceptability: the burden placed on a defendant is not beyond reasonable limits or arbitrary. The likelihood of driving is not an ingredient of the offence in s 5(1)(b) despite the defence provided in s 5(2). In the circumstances it is not objectionable to criminalise a defendant's conduct without requiring a prosecution to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, which is a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove beyond reasonable doubt, that he would. That imposition of a legal burden does not go beyond what was necessary. Where a driver tries and fails to establish a defence under s 5(2) the resulting conviction will not be unfair (see [30], [31], [40]–[44], [55]–[57], [79], below); *R v Lambert* [2001] 3 All ER 577, *R v Johnstone* [2003] 3 All ER 884, *Salabiaku v France* (1988) 13 EHRR 379, A-G's Ref (No 1 of 2004) [2004] 1 WLR 2111 considered; *R v Carass* [2002] 1 WLR 1714 disapproved.

(2) The ingredients of an offence contrary to s 11(1)<sup>d</sup> of the 2000 Act under which a person commits an offence if he belongs or professes to belong to a proscribed organisation are set out fully in s 11(1). Subsection (2) under which it is a defence for a person charged with an offence under sub-s (1) to prove that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and that he has not taken part in the activities of the organisation at any time while it was proscribed adds no ingredient to sub-s(1). Recognition of the risk that sub-s (1) might cover conduct which is not blameworthy or such as properly to attract criminal sanctions might well have led Parliament to provide the defence enacted in sub-s (2) but its effect is not to make participation in the activities of the organisation while proscribed an ingredient of the offence (see [47]–[49], [55]–[57], [79], below); *R v Lambert* [2001] 3 All ER 577 considered.

(3) (Lord Rodger of Earlsferry and Lord Carswell dissenting) Section 11(2) of the 2000 Act should be read and given effect as imposing on the defendant an evidential burden only. There can be no doubt that Parliament intended s 11(2) to impose a legal burden on the defendant. There is also no doubt that sub-ss (1) and (2) are directed to the legitimate end of deterring people from becoming members and taking part in the activities of proscribed terrorist organisations. However, the imposition of a legal burden on the defendant is not a proportionate and justifiable legislative response. A person who is innocent of any blameworthy or properly criminal conduct might fall within s 11(1). There would be a clear breach of the presumption of innocence contained in art 6 of the convention and a real risk of unfair conviction if such persons could only exonerate themselves by establishing the defence provided on the balance of probabilities. While a defendant may reasonably be expected to show that the organisation was not proscribed on the last or only occasion on which he became a member or professed to be a member, so as to satisfy sub-s (2)(a), it may well

<sup>d</sup> Section 11, so far as material, is set out at [47], below



- a be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed, so as to satisfy sub-s (2)(b). Thus, although s 11(2) preserves the rights of the defence, those rights would be very hard to exercise effectively. Reading down s 11(2) of the 2000 Act under s 3(1) of the 1998 Act to impose an evidential instead of a legal burden falls well within the applicable interpretative principles (see [49]–[51], [53], [55], [56], below).

- b Decision of Court of Appeal [2004] 1 All ER 1 reversed in part.  
Decision of Divisional Court [2003] 2 All ER 497 reversed.

## Notes

- c For legal and evidential burden of proof, for legal burden on accused, for the onus of proof of statutory exception, and for the presumption of innocence, see, respectively, 11(2) *Halsbury's Laws* (4th edn reissue) paras 1062, 1064, 29(2) *Halsbury's Laws* (4th edn reissue) para 731 and 8(2) *Halsbury's Laws* (4th edn reissue) para 142.

- d For the Road Traffic Act 1988, s 5, see 38 *Halsbury's Statutes* (4th edn) (2001 reissue) 753.

For the Human Rights Act 1998, s 3, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 679, 706.

For the Terrorism Act 2000, s 11, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2072.

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- f *B (a minor) v DPP* [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.

*Barbera v Spain* (1989) 11 EHRR 360, [1988] ECHR 10588/83, ECt HR.

*Bates v UK* [1996] EHRLR 312, E Com HR.

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- g *Bernard v France* (2000) 30 EHRR 808, [1998] ECHR 22885/93, ECt HR.

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- h *H v UK* App No 15023/89 (4 April 1990, unreported), E Com HR.

*Heaney v Ireland* (2001) 33 EHRR 264, [2000] ECHR 34720/97, ECt HR.

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- j *M'Naghten's Case* (1843) 10 Cl & Fin 200, 8 ER 718, [1843–60] All ER Rep 229, HL.

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*R v Edwards* [1974] 2 All ER 1085, [1975] QB 27, [1974] 3 WLR 285, CA.

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## Appeal

The Director of Public Prosecutions appealed with leave of the House of Lords Appeal Committee given on 21 May 2003 from the decision of the Divisional Court (Clarke LJ, Henriques and Jack JJ) on 4 February 2003 ([2003] EWHC 273 (Admin), [2003] 2 All ER 497) allowing an appeal by way of case stated by Peter Sheldrake from his conviction by the justices in North East Essex on 26 June 2001 of an offence of being in charge of a motor vehicle after consuming so much alcohol that the proportion of alcohol in his breath exceeded the prescribed limit contrary to s 5(1)(b) of the Road Traffic Act 1988. The facts are set out in the opinion of Lord Bingham of Cornhill.



**Reference**

Pursuant to s 36 of the Criminal Justice Act 1972 the Attorney General referred to the Court of Appeal for its opinion points of law arising on the acquittal of A on 22 May 2002 in the Crown Court, on an indictment containing counts of offences contrary to s 11(1) of the Terrorism Act 2000 of being a member and professing to be a member of a proscribed organisation. The Court of Appeal (Latham LJ, Hunt and Hedley JJ) gave its opinion on 21 March 2003 ([2003] EWCA Crim 762, [2004] 1 All ER 1) and on the application of the acquitted person referred the points of law, set out at [45], below) to the House of Lords. The facts are set out in the opinion of Lord Bingham of Cornhill.

David Perry and Jonathan Ashley-Norman (instructed by the Crown Prosecution Service) for the DPP.

James Turner QC, James Hodivala and Allan Compton (instructed by Budd Martin Burret, Chelmsford) for Mr Sheldrake.

Tim Owen QC, Anne Richardson and Danny Friedman (instructed by Michael Purdon Solicitor, Newcastle-upon-Tyne) for the acquitted person.

David Perry and Gareth Patterson (instructed by the Crown Prosecution Service) for the Attorney General.

Their Lordships took time for consideration.

14 October 2004. The following opinions were delivered.

**LORD BINGHAM OF CORNHILL.**

[1] My Lords, ss 5(2) of the Road Traffic Act 1988 and 11(2) of the Terrorism Act 2000, conventionally interpreted, impose a legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those matters on the balance of probabilities. If he fails to discharge that burden he will be convicted. In this appeal by the Director of Public Prosecutions and this reference by the Attorney General these reverse burdens ('reverse' because the burden is placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor) are challenged as incompatible with the presumption of innocence guaranteed by art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Thus the first question for consideration in each case is whether the provision in question does, unjustifiably, infringe the presumption of innocence. If it does the further question arises whether the provision can and should be read down in accordance with the courts' interpretative obligation under s 3 of the 1998 Act so as to impose an evidential and not a legal burden on the defendant. An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.

[2] Before turning to the facts of these two cases it is necessary to place them in their legal context. To this end I shall briefly review the pre-convention law of England and Wales, the Strasbourg jurisprudence as it has so far developed and

some of the leading cases decided in the United Kingdom since the convention was incorporated into our domestic law by the 1998 Act.

#### THE PRE-CONVENTION LAW OF ENGLAND AND WALES

[3] The governing principle of English criminal law, memorably affirmed by Viscount Sankey LC in *Woolmington v DPP* [1935] AC 462 at 481, [1935] All ER Rep 1 at 8, is that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. This principle has been regarded as supremely important, but not as absolute. Viscount Sankey LC ([1935] AC 462 at 475, [1935] All ER Rep 1 at 4) acknowledged the authority of *M'Naghten's Case* (1843) 10 Cl & Fin 200, [1843–60] All ER Rep 229 which had 'definitely and exceptionally' placed an onus on the accused to establish a defence of insanity. He further acknowledged ([1935] AC 462 at 481, [1935] All ER Rep 1 at 8) that his statement of principle was 'subject also to any statutory exception'.

[4] One form of statutory exception arose where a defendant sought to rely, in answer to a criminal charge on indictment, on any statutory exception, exemption, proviso, excuse or qualification. It was clearly established that the burden of proving such ground of exoneration, on a balance of probabilities, lay on him: *R v Edwards* [1974] 2 All ER 1085, [1975] QB 27, *R v Hunt* [1987] 1 All ER 1, [1987] AC 352. When courts of summary jurisdiction in recognisably modern form were established in 1848, this rule of practice was extended to them and remains the law: see s 14 of the Summary Jurisdiction Act 1848; s 39(2) of the Summary Jurisdiction Act 1879; s 81 of the Magistrates' Courts Act 1952; and (now) s 101 of the Magistrates' Courts Act 1980. Thus, on a charge of selling intoxicating liquor without a justices' licence, it is not for the prosecutor to prove that the defendant had no licence but for the defendant to prove that he had: *R v Edwards*, *R v Hunt*.

[5] It is not only in cases such as these, and cases of insanity, that a burden may be placed upon the defendant to prove (on a balance of probabilities) a special statutory defence. Thus in *Mancini v DPP* [1941] 3 All ER 272 at 279, [1942] AC 1 at 11, Viscount Simon LC referred, as an exception to the rule in *Woolmington v DPP*, to 'offences where onus of proof is specially dealt with by statute'. In *Jayasena v R* [1970] 1 All ER 219 at 221, [1970] AC 618 at 623, Lord Devlin also recognised 'a statutory defence' as an exception to the *Woolmington* rule, and Lord Templeman in *R v Hunt* [1987] 1 All ER 1 at 3, [1987] AC 352 at 364, referred to 'statutory defences which must be proved by the accused'. Far from condemning the placing of a burden on the accused to prove (on the balance of probabilities) a ground of exoneration, judges of high authority have, in cases judged by them to be appropriate, advocated such a course. Lord Pearce did so in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356 at 390, [1969] 2 AC 256 at 307 and again in *Sweet v Parsley* [1969] 1 All ER 347 at 357, [1970] AC 132 at 157. In the latter case Lord Reid also said:

'Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method ...' (See [1969] 1 All ER 347 at 351, [1970] AC 132 at 150.)

A further example may be given. When, in 1987, it was proposed to criminalise the possession of a bladed or sharply pointed article, other than a small pocket

a knife, 'without good reason or lawful authority', Lord Denning MR suggested that the burden of proving good reason or lawful authority by way of defence should be expressly placed on the defendant (Hansard, 489 HL Official Report (5th series) cols 923–924). The suggestion was accepted (Hansard, 490 HL Official Report (5th series) cols 474, 475), and s 139(4) of the Criminal Justice Act 1988, as enacted, provides:

b 'It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.'

In practice, Parliament has been very ready to impose legal burdens on, or provide for presumptions rebuttable by, the defendant: see Ashworth and Blake  
c 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306 at 309. But the language of the statute may not, in some cases, make it plain whether a ground of exoneration must be established by the defendant or negated by the prosecutor. In *Nimmo v Alexander Cowan & Sons Ltd* [1967] 3 All ER 187, [1968] AC 107 the House was divided on the question. In such a case,  
d as Lord Griffiths said in *R v Hunt* [1987] 1 All ER 1 at 11, [1987] AC 352 at 374:

'... the court should look to other considerations to determine the intention of Parliament, such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance, for  
e surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute.'

f [6] One further point may conveniently be noted at this stage. In *Sweet v Parsley* [1969] 1 All ER 347 at 349, 350, [1970] AC 132 at 148–149, Lord Reid stated that—

'there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a  
g presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea ... it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.'

h Thus, in interpreting an offence-creating statutory provision, the starting point for the court is, as Lord Nicholls of Birkenhead put it in *B (a minor) v DPP* [2000] 1 All ER 833 at 836, [2000] 2 AC 428 at 460:

'... the established common law presumption that a mental element, traditionally labelled mens rea, is an essential ingredient unless Parliament  
j has indicated a contrary intention either expressly or by necessary implication.'

Effect was given to the presumption in that case, as it was in *R v K* [2001] UKHL 41, [2001] 3 All ER 897, [2002] 1 AC 462. It is a strong presumption, not easily displaced. The more serious the crime, and the more severe the potential

consequences of conviction, the less readily will it be displaced. But it is of course the ordinary duty of the courts to give effect to what Parliament has by clear words or necessary implication enacted, and it is not hard to find instances in which Parliament has clearly intended to attach criminal consequences to proof of defined facts, irrespective of an individual's state of mind or moral blameworthiness. Many such instances are found in legislation regulating the conduct of economic and social life: see *Smith and Hogan on Criminal Law* (10th edn, 2002) Ch 7, 'Crimes of strict liability'. Offences against such regulations are often regarded as not truly criminal, since the penalty inflicted is not dire and little or no stigma attaches to conviction. Not all offences of strict liability, however, fall within this sterile regulatory area. An old instance which may be thought not to do so is found in s 12 of the Licensing Act 1872, which (as amended) remains in force:

'Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding level 1 on the standard scale.

Every person who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding level 1 on the standard scale or in the discretion of the court to imprisonment for any term not exceeding one month.'

[7] Until the coming into force of the 1998 Act, the issue now before the House could scarcely have arisen. The two statutory provisions which it is necessary to consider are not obscure or ambiguous. They afford the defendant (Mr Sheldrake) and the acquitted person a ground of exoneration, but in each case the provision, interpreted in accordance with the canons of construction ordinarily applied in the courts, would (as already noted) be understood to impose on the defendant a legal burden to establish that ground of exoneration on the balance of probabilities. Until October 2000 the courts would have been bound to interpret the provisions conventionally. Even if minded to do so, they could not have struck down or amended the provisions as repugnant to any statutory or common law rule. Domestic law would have required effect to be given to them according to their accepted meaning. Thus the crucial question is whether the convention and the Strasbourg jurisprudence interpreting it have modified in any relevant respect our domestic regime and, if so, to what extent.

#### THE CONVENTION AND THE STRASBOURG JURISPRUDENCE

[8] Article 6 of the convention provides, so far as relevant:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

[9] The right to a fair trial has long been recognised in England and Wales, although the conditions necessary to achieve fairness have evolved, in some ways quite radically, over the years, and continue to evolve. The presumption of innocence has also been recognised since at latest the early nineteenth century,



a although (as shown by the preceding account of our domestic law) the presumption has not been uniformly treated by Parliament as absolute and unqualified. There can be no doubt that the underlying rationale of the presumption in domestic law and in the convention is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the  
b accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be. To ascertain the scope of the presumption under the convention, domestic courts must have regard to the Strasbourg case law. It has there been repeatedly recognised that the presumption of innocence is one of the elements of the fair criminal trial required by art 6(1): see, for example, *Bernard v France*  
c (2000) 30 EHRR 808 at 824 (para 37).

[10] The applicant in *X v UK* (1972) 42 CD 135 had been convicted of knowingly living on the earnings of prostitution contrary to s 30(1) of the Sexual Offences Act 1956. He complained of sub-s (2) of that section which provided that—

d 'a man who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution unless he proves the contrary.'

e The Commission rejected as manifestly ill-founded the applicant's challenge to this provision as incompatible with art 6(2). It created a rebuttable presumption which the defendant could disprove, and was not a presumption of guilt. A provision could, if widely or unreasonably worded, have the same effect as a  
f presumption of guilt, and it was not sufficient to examine only the form in which it was drafted. The substance and effect must also be examined. In the present instance, the presumption was restrictively worded, and was neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of 'living on immoral earnings' would in most cases make its task impossible.

g [11] The leading Strasbourg authority on the presumption of innocence is *Salabiaku v France* (1988) 13 EHRR 379. The applicant, a Zaïre national living in Paris, went to the airport to collect, as he said, a parcel of foodstuffs sent from Africa. He could not find this, but was shown a locked trunk, which he was advised to leave alone. He however took possession of it, went through the  
h green customs channel and was detained. The trunk was opened and found to contain drugs. He was charged with the criminal offence of illegally importing narcotics and with the customs offence, also criminal, of smuggling prohibited goods. At trial the applicant was convicted of both offences: on the first he was sentenced to a term of imprisonment and was prohibited from residing in France; on the second he was fined. On his appeal, his conviction of the first offence was  
j set aside: the facts were not sufficiently proved, and he was given the benefit of the doubt. His conviction of the second offence was upheld since—

'any person in possession (*détention*) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of *force majeure* exculpating

him; such *force majeure* may arise only as a result of an event beyond human control which could be neither foreseen nor averted ...' (At 382 (para 14).)

This was an application of art 392(1) of the French Customs Code, as elaborated by judicial decisions, and was held by the Court of Cassation, on further appeal, to be proper. It appeared that the severity of an apparently irrebuttable presumption had been to some extent moderated by court decisions upholding the trial court's unfettered power of assessing evidence and giving a broad meaning to *force majeure*. The trial court could also take account of extenuating circumstances when imposing penalties. In the result the Strasbourg court rejected the applicant's complaint that art 392(1) infringed the presumption of innocence, relying on the features just noted and the courts' freedom to give an accused the benefit of the doubt even where the offence was one of strict liability. It was noted that the French courts had been careful to avoid resorting automatically to the presumption laid down in art 392(1), and had exercised their power of assessment on the basis of the evidence adduced by the parties before them. Thus the French courts had not applied art 392(1) in a way which conflicted with the presumption of innocence.

[12] The European Court of Human Rights' decision in *Salabiaku v France* is important less perhaps for what it decided than for the indications it gives of the correct approach in principle. First of all, it is recognised that member states may, generally speaking, attach criminal consequences to defined facts (at 387):

'27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.'

It also sanctions, but in a qualified way, the application of factual and legal presumptions (at 388):

'28. ... Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable

a limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr. Salabiaku.'

Thus the question in any case must be whether, on the facts, the reasonable limits to which a presumption must be subject have been exceeded.

b [13] Article 392(1) of the French Customs Code, was again the subject of challenge, as were other provisions of the Code, in *Hoang v France* (1993) 16 EHRR 53. Opinion in the Commission was divided, a majority upholding the applicant's conviction of a customs offence on grounds similar to those relied on in *Salabiaku v France*. The European Court unanimously agreed, ruling (at 79–80 (para 36)) that the Paris Court of Appeal had based its finding of guilt on the evidence: it had refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and had not applied them in a manner incompatible with art 6(1) and (2) of the convention. One of the articles of the French Customs Code mentioned in *Hoang v France* was art 373, which provided:

d 'In any proceedings concerning a seizure of goods, the burden of proving that no offence has been committed shall be on the person whose goods have been seized.'

In argument before the Commission the government (at 68–69 (para 50)) dismissed this article as irrelevant, since the applicant's goods had not been seized, and the European Court did no more than mention it. If, however, it had been relevant and had been interpreted and applied entirely literally by the French courts, its compatibility with art 6(2) would surely have been questionable.

e [14] In *H v UK* App No 15023/89 (4 April 1990, unreported) there was found by the Commission to be no infringement of art 6(2) in requiring a defendant to establish a defence of insanity. That requirement was not unreasonable or arbitrary. The application was manifestly ill-founded.

f [15] The provision challenged in *AG v Malta* App No 16641/90 (10 December 1991, unreported) imposed criminal liability on a director of a body which had committed a criminal offence 'unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence'. The Commission found the application to be manifestly ill-founded. It referred to the *Salabiaku v France* judgment, noted that the applicant was provided under the legislation with the possibility of exculpating himself, found that the Maltese courts enjoyed a genuine freedom of assessment and concluded that the provision had not been applied to the applicant in a manner incompatible with the presumption of innocence. A similar decision was reached by the European Court more recently in *Brown v UK* (2002) 35 EHRR CD 197: art 6(2) of the convention was not violated by a provision which enabled a newspaper proprietor or publisher to escape strict liability under s 4(5) of the Sexual Offences (Amendment) Act 1976 only if he proved, on the balance of probabilities, that he was in no way at fault in connection with the offending publication.

j [16] In *Bates v UK* [1996] EHRLR 312 the Commission held inadmissible a challenge to the rebuttable presumption as to the breed of a dog enacted in s 5(5) of the Dangerous Dogs Act 1991. It was noted that the applicant had been entitled but, although represented, had failed, to call evidence to prove at trial

that his dog was not of the breed proscribed by the Act, and that the court had relied on an admission by him that the dog was of the breed proscribed. The section was held to fall within reasonable limits.

[17] An emergency anti-terrorist enactment was held in *Heaney v Ireland* (2001) 33 EHRR 264 to violate the art 6(1) right of the applicants to remain silent and not incriminate themselves, and also to violate the presumption of innocence guaranteed by art 6(2) because (at 283 (para 59)) of the close link, in this context, between it and the rights guaranteed by art 6(1). The European Court rejected (para 58) the Irish government's contention that the enactment in question was justified by its security and public order concerns since the enactment extinguished the very essence of the applicants' rights to silence and against self-incrimination.

[18] A violation of art 6(2) was again found in *Telfner v Austria* (2002) 34 EHRR 207. The victim of a motor accident was able to identify the offending car, but not its driver, even to the extent of saying whether the driver was male or female. The car was owned by the applicant's mother, but he denied that he had been driving at the time and there was no evidence that he had been driving beyond police observations (not, it seems, the subject of oral evidence at the trial) that the car was mainly driven by the applicant. His conviction at trial was upheld on appeal. It was, the European Court held (at 211 (para 15)), for it to ascertain that the proceedings as a whole were fair, which in a criminal trial included observance of the presumption of innocence. A court should not start with the preconceived idea that the accused had committed the offence charged. The burden of proof was on the prosecution and any doubt should benefit the accused. The presumption of innocence is infringed where the burden of proof is shifted from the prosecution to the defence. The case was not one in which adverse inferences could properly be drawn from the silence of the accused (at 212 (paras 17–18)). This decision is in accord with that given in *Barbera v Spain* (1989) 11 EHRR 360 some years earlier, in which the European Court observed (at 392 (para 91)) that the presumption of innocence would be violated if, without the accused having previously been proved guilty according to law, a judicial decision concerning him reflected an opinion that he was guilty. The burden of proof is on the prosecution and any doubt should benefit the accused (at 387 (para 77)).

[19] In *Porras v Netherlands* App No 49226/99 (18 January 2000, unreported) the applicant was convicted of intentionally importing cocaine and complained that the burden of proof had been reversed by imposing on him an obligation, which he found impossible to discharge, to prove that he was not and could not have been aware that persons unknown to him had hidden a significant quantity of the drug in his luggage. The European Court rejected this complaint, holding that no irrebuttable presumption of guilt had been applied. Although accepting a normal assumption that a person who packs his own luggage and takes it with him knows of the contents, the Dutch court had had regard to the possibility that this might not be so, had considered all the circumstances, had weighed all the evidence and had not therefore relied automatically on any presumption. On the somewhat involved procedural facts of *Selvanayagam v UK* App No 57981/00 (12 December 2002, unreported) the European Court found that any presumption of law which had operated against the applicant had been within reasonable limits, had taken account of the importance of what was at stake and had maintained the rights of the defence.



a [20] The decision of the European Court in *Janosevic v Sweden* (2004) 38 EHRR 473 rejected a complaint that the imposition of tax surcharges was incompatible with art 6(2) because (at 505 (para 99)) 'an almost insurmountable burden of proof was imposed on the taxpayer. The opportunity was taken to re-state established principles. There was no need for the Swedish authorities to prove intent or negligence, but states might, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it resulted from criminal intent or from negligence (at 506 (para 100)). There was, on the facts, an effective presumption against the taxpayer (para 100), and as decided in *Salabiaku v France* (para 101)—

c 'in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.'

d The European Court acknowledged (at 506–507 (para 102)) that it was difficult for the taxpayer to rebut the presumption in question, but he was not without means of defence (para 102), and the court had regard to the financial interests of the state in tax matters and its dependence on the provision of correct and complete information by taxpayers (at 507 (para 103)) in concluding (para 104) that the presumption was confined within reasonable limits.

e [21] From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

THE LEADING UNITED KINGDOM CASES SINCE THE HUMAN RIGHTS ACT 1998

j [22] In *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326 the applicants challenged the compatibility of s 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 with art 6(2) of the convention. The relevant provisions read:

'(1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with ... acts of terrorism ...

(3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose ...'

The Divisional Court concluded that the section did violate art 6(2) since if the defendant failed to discharge the legal burden placed upon him by sub-s (3) he could be convicted of a crime punishable by ten years' imprisonment on grounds of reasonable suspicion, and even if there were a reasonable doubt whether he did possess the articles for purposes of terrorism. The House did not find it necessary to resolve this question. Lord Steyn, in an opinion with which Lord Slynn of Hadley ([1999] 4 All ER 801 at 827, [2000] 2 AC 326 at 362) and Lord Cooke of Thorndon ([1999] 4 All ER 801 at 836, [2000] 2 AC 326 at 372) agreed, pointed out ([1999] 4 All ER 801 at 835, [2000] 2 AC 326 at 370) that s 16A might be upheld if it were read as imposing an evidential and not a legal burden on the defendant. Lord Cooke ([1999] 4 All ER 801 at 837, [2000] 2 AC 326 at 373) saw great force in the view that on the natural and ordinary interpretation of the provision there was repugnancy, but also pointed to the possibility of reading down sub-s (3). Lord Hope of Craighead ([1999] 4 All ER 801 at 850, [2000] 2 AC 326 at 387) considered that the compatibility of the provision was still open to argument. Lord Hobhouse of Woodborough ([1999] 4 All ER 801 at 858, [2000] 2 AC 326 at 397) considered that there might be a justification for the terms in which the legislation was drafted even though on its face it appeared to be contrary to the convention. Parliament paid attention to these observations: when s 16A was re-enacted as s 57 of the Terrorism Act 2000 it was provided (with reference to the defence now in sub-s (2) and some other subsections) in s 118(2):

'If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.'

[23] The decision of the Privy Council in *Brown v Stott* (*Procurator Fiscal, Dunfermline*) [2001] 2 All ER 97, [2003] 1 AC 681 does not call for detailed examination. It concerned the implied convention right not to incriminate oneself, which the European Court described in *Saunders v UK* (1997) 2 BHRC 358 at 373–374 (para 68), as 'closely linked to the presumption of innocence contained in art 6(2) of the convention'. For present purposes the decision is noteworthy for its reiteration of important but uncontroversial principles: that a defendant has a right to a trial which, viewed overall is fair ([2001] 2 All ER 97 at 115, 119, 128–129, 136, 139, [2003] 1 AC 681 at 704, 708, 719, 727, 730); that the constituent rights listed or implied in art 6, although important, are not absolute ([2001] 2 All ER 97 at 115, 119, 129, 137, 139, [2003] 1 AC 681 at 704, 708, 719, 728, 730); that substantial respect should be paid by the courts to the considered decisions of democratic assemblies and governments ([2001] 2 All ER 97 at 114, 121, [2003] 1 AC 681 at 703, 710–711); that the convention requires a fair balance to be struck between the rights of the individual and the wider interests of the community ([2001] 2 All ER 97 at 115, 118–119, 128–130, 139, [2003] 1 AC 681 at 704, 707–708, 718–720, 730); and that the justifiability of a legislative measure must be judged with close regard to the particular social problem or mischief which the measure has been enacted to address ([2001] 2 All ER 97 at 116–117, 120–121, 131–132, 137, 140–141, [2003] 1 AC 681 at 705–706, 709–710, 722, 728, 731–732).

a [24] In *R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, the challenge was to a recent statutory provision which, it was held, strictly interpreted, could have the effect of excluding relevant evidence and thus of compromising a defendant's right to a fair trial. Much of the argument was devoted to the scope and application of the interpretative obligation imposed on the courts by s 3 of the 1998 Act. The ratio of the decision was summarised in [46] of Lord Steyn's opinion, which was expressly accepted by Lord Slynn (at [15]), Lord Hope (at [110]), Lord Clyde (at [140]) and Lord Hutton (at [163]), but it is relevant to cite also [44] of his opinion in which the courts' interpretative obligation under s 3 is more fully explained:

c [44] On the other hand, the interpretative obligation under s 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature (see *R v DPP, ex p Kebeline* [1999] 4 All ER 801 at 831, 837, [2000] 2 AC 326 at 366, 373 per my judgment and that of Lord Cooke of Thorndon respectively). The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the convention into account in resolving any ambiguity in a legislative provision (see *Rights Brought Home: The Human Rights Bill* (Cm 3782 (1997)) para 2.7). The draftsman of the 1998 Act had before him the slightly weaker model in s 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 of the 1998 Act places a duty on the court to strive to find a possible interpretation compatible with convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: s 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: s 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it; compare, for example, arts 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, TS 58 (1980); Cmnd 7964). Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that "in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility" (see 585 HL Official Report (5th series) col 840) and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention" (see 306 HC Official Report (6th series) col 778). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of s 3 of the 1998 Act against the executive ("*Pepper v Hart*; A Re-examination" (2001) 21 OJLS 59). In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on convention rights is stated in terms, such an impossibility will arise (*R v Secretary of State for the Home*

*Dept, ex p Simms* [1999] 3 All ER 400 at 413, [2000] 2 AC 115 at 132 per Lord Hoffmann). There is, however, no limitation of such a nature in the present case. a

[45] In my view s 3 of the 1998 Act requires the court to subordinate the niceties of the language of s 41(3)(c) of the 1999 Act, and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and commonsense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under s 3 of the 1998 Act to read s 41 of the 1999 Act, and in particular s 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under art 6 of the convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the 1998 Act. That is the approach which I would adopt. b  
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#### VIII. THE TASK OF TRIAL JUDGES

[46] It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under s 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under s 3 of the 1998 Act, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under art 6 of the convention. If this test is satisfied the evidence should not be excluded. f  
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This opinion must now be read in the light of the later decision of the House in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113. h

[25] The appellant in *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, was convicted of possessing a class A controlled drug (cocaine) with intent to supply contrary to s 5 of the Misuse of Drugs Act 1971. His defence at trial in 1999 was that he did not know that the duffle bag in his possession contained drugs. The trial judge, correctly applying s 28(2) of the 1971 Act as previously interpreted, directed the jury that the burden lay on him to make good this defence on the balance of probabilities. He was convicted, and on appeal contended that knowledge of the contents of a container was an ingredient of the offence which the prosecution had to prove and that imposition of a legal burden on a defendant to prove lack of knowledge violated the presumption of innocence. The Criminal Division of the Court of Appeal rejected these j



a arguments ([2001] 1 All ER 1014, [2002] QB 1112), but gave its ruling as if the 1998 Act had been in force at the time of the trial. In the House, a majority held that the Act did not operate retrospectively, and the appeal failed on that ground. The appellant's arguments of principle were, however, considered in some detail. A majority of the committee held that knowledge of the contents of the duffle bag was not an ingredient of the offence which the prosecution had to prove: Lord Slynn ([2001] 3 All ER 577 at [16]); Lord Hope (at [61]); Lord Clyde (at [126]); Lord Hutton (at [181]). A majority also held that imposition of a legal burden on a defendant to prove lack of knowledge undermined the presumption of innocence to an impermissible extent; that s 28(2) could be read down under s 3 of the 1998 Act so as to impose only an evidential burden; and that it should be read down in that way: Lord Slynn (at [17]); Lord Steyn (at [41], [42]); Lord Hope (at [84], [91], [94]); Lord Clyde (at [156], [157]). It is the opinions of the majority on this point which are relevant for present purposes. The dissenting opinion of Lord Hutton on this issue is not, of course, authoritative.

[26] The opinions of the majority on this second point are, inevitably, of some complexity. They must be read with reference to the particular case with which the House was dealing. The importance of the presumption of innocence was recognised: see, for example, [34] and [131]. It was emphasised that attention should be paid to the substance, not the form, of an enactment (at [35], [150]) and to the particular facts (at [34], [152]). In considering justifiability, the need for a balance between the interests of the individual and those of society was recognised (at [17], [88]). Where some infringement of the presumption of innocence is justified, it should not be greater than necessary to achieve its legitimate object (at [37]). Decisive in the majority's conclusion on the facts of the case was recognition that, on a charge carrying a maximum of life imprisonment and in circumstances where Parliament, by enacting s 28(2), had recognised the importance of knowledge, a defendant could be convicted even though the jury thought it as likely as not that he was ignorant of the contents of a container in his possession: see, for example, at [38], [89], [154], [156]. Such an outcome was plainly regarded as seriously unfair, since a conviction might rest on conduct which was not in any way blameworthy.

[27] The defendant in *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736, was convicted of possessing some 500 bootleg recordings in breach of s 92(1)(c) of the Trade Marks Act 1994. Subsection (1) of that section provides:

h 'A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).'

The section goes on to provide in sub-s (5):

'It is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the

manner in which it was used, or was to be used, was not an infringement of the registered trade mark.’

The defendant’s appeal was allowed by the Court of Appeal on other grounds ([2002] EWCA Crim 194, [2002] All ER (D) 34 (Feb)) with which the House in large measure agreed. The Court of Appeal however read sub-s (5) as imposing no more than an evidential burden on the defendant, and on this point (not determinative of the appeal) the House disagreed. In his leading opinion, with which the other members of the committee agreed, Lord Nicholls of Birkenhead ([2003] 3 All ER 884 at [46]) interpreted s 92(5) as imposing, on a conventional interpretation, a legal burden on the defendant. As such he accepted (at [47]) that it prima facie derogated from the presumption of innocence. Therefore (at [48]), taking account of *Salabiaku v France* (1988) 13 EHRR 379 and the balance to be struck between the public interest and the interests of the individual, it was for the state to justify the derogation and to show that the balance struck was reasonable. Identifying the requirements of a reasonable balance was not, he accepted, easy:

‘... all that can be said is that for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence.’ (See [2003] 3 All ER 884 at [49].)

He continued:

[50] The relevant factors to be taken into account when considering whether such a reason exists have been considered in several recent authorities, in particular the decisions of the House in *R v DPP, ex p Kebeline*, *R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326 and *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577. And there is now a lengthening list of decisions of the Court of Appeal and other courts in respect of particular statutory provisions. A sound starting point is to remember that if an accused is required to prove a fact on the balance of probability to avoid conviction, this permits a conviction in spite of the fact-finding tribunal having a reasonable doubt as to the guilt of the accused (see Dickson CJC in *R v Whyte* (1988) 51 DLR (4th) 481 at 493). This consequence of a reverse burden of proof should colour one’s approach when evaluating the reasons why it is said that, in the absence of a persuasive burden on the accused, the public interest will be prejudiced to an extent which justifies placing a persuasive burden on the accused. The more serious the punishment which may flow from conviction, the more compelling must be the reasons. The extent and nature of the factual matters required to be proved by the accused, and their importance relative to the matters required to be proved by the prosecution, have to be taken into account. So also does the extent to which the burden on the accused relates to facts which, if they exist, are readily provable by him as matters within his own knowledge or to which he has ready access.

[51] In evaluating these factors the court’s role is one of review. Parliament, not the court, is charged with the primary responsibility for deciding, as a matter of policy, what should be the constituent elements of a criminal offence. I echo the words of Lord Woolf in *A-G of Hong Kong v Lee Kwong-kut*, *A-G of Hong Kong v Lo Chak-man* [1993] 3 All ER 939 at 955, [1993]

- a AC 951 at 975: "In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime." The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the
- b fundamental right of an individual to be presumed innocent until proved guilty.'

He concluded (at [53]) that there were compelling reasons why s 92(5) should place a legal burden on the defendant. These reasons included (at [52]) the urgent international pressure, in the interest of consumers and traders alike, to restrain

c fraudulent trading in counterfeit goods, the framing of offences against s 92 as offences of 'near absolute liability' and the dependence of the sub-s (5) defence on facts within the defendant's own knowledge. The considerations (at [52], [53]) which particularly weighed with him as compelling reasons were however (that:

- d 'Those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and keep records and of the risks they take if they do not.'

And that—

- e 'it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators, are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place.'

f Thus Lord Nicholls substantially agreed (at [54]) with the Court of Appeal decision in *R v S* [2003] 1 Cr App R 602, which made it unnecessary to consider the courts' interpretative obligation under s 3 of the 1998 Act, about which he (at [46]) had earlier voiced some reservations.

- g [28] The interpretative obligation of the courts under s 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidan v Mendoza* [2004] 3 All ER 411. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger of Earlsferry in that case (with which Baroness Hale of Richmond agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under s 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a convention-compliant
- h interpretation under s 3 is the primary remedial measure and a declaration of incompatibility under s 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a convention-compliant interpretation is not possible, such limit being illustrated
- j by *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837 and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593, [2003] 2 AC 467. In explaining why a convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with

the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (see *Ghaidan v Mendoza* [2004] 3 All ER 411 at [33], [49], [110]–[113], [116]). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: ‘So far as it is possible to do so ...’ While the House declined to try to formulate precise rules (at [50]), it was thought that cases in which s 3 could not be used would in practice be fairly easy to identify. a  
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[29] I intend no disrespect to the Court of Appeal by failing to discuss a number of cases in which that court has considered, in relation to various statutes, the presumption of innocence. But I cannot overlook the decision of an enlarged Court of Appeal (Lord Woolf CJ, Judge LJ, Gage, Elias and Stanley Burnton JJ) in *A-G’s Ref (No 1 of 2004)* [2004] EWCA Crim 1025, [2004] 1 WLR 2111 and four appeals heard at the same time. In its judgment (at [38]) the court considered much of the authority to which I have referred (although not *Ghaidan v Mendoza*, which had not been decided) and detected a ‘significant difference in emphasis’ between the approach of Lord Steyn in *R v Lambert* [2001] 3 All ER 577 and that of Lord Nicholls in *R v Johnstone* [2003] 3 All ER 884. Making plain its preference for the latter, the court prefaced its guidance to the courts of England and Wales by ruling ([2004] 1 WLR 2111 at [52](a)): c  
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‘Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in *Johnstone* ... and this guidance. *Johnstone* is at present the latest word on the subject.’ e

Relying on this judgment, Mr Perry, for the Director of Public Prosecutions and the Attorney General, submitted in his printed case and (more tentatively) in argument that there was clearly a difference of emphasis between the approach of Lord Steyn in *R v Lambert* and that of Lord Nicholls in *R v Johnstone*, and that the latter was to be preferred. Mr Turner QC, for Mr Sheldrake, made a submission to the opposite effect, that the reasoning of the House in *R v Johnstone* should not be followed. f

[30] Both *R v Lambert* and *R v Johnstone* are recent decisions of the House, binding on all lower courts for what they decide. Nothing said in *R v Johnstone* suggests an intention to depart from or modify the earlier decision, which should not be treated as superseded or implicitly overruled. Differences of emphasis (and Lord Steyn was not a lone voice in *R v Lambert*) are explicable by the difference in the subject matter of the two cases. Section 5 of the 1971 Act and s 92 of the 1994 Act were directed to serious social and economic problems. But the justifiability and fairness of the respective exoneration provisions had to be judged in the particular context of each case. I have already identified the potential consequence to a s 5 defendant who failed, perhaps narrowly, to make good his s 28 defence. He might be, but fail to prove that he was, entirely ignorant of what he was carrying. By contrast, the offences under s 92 are committed only if the act in question is done by a person ‘with a view to gain for himself or another, or with intent to cause loss to another’. Thus these are offences committed (if committed) by dealers, traders, market operators, who could reasonably be expected (as Lord Nicholls pointed out) to exercise some care about the provenance of goods in which they deal. The penalty imposed for breaches of s 92 may be severe (see, for example, *R v Gleeson* [2001] EWCA Crim g  
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a 2023, [2002] 1 Cr App R (S) 485, but that is because the potential profits of fraudulent trading are often great.

[31] The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence. It may none the less be questioned whether (as the Court of Appeal ruled in *A-G's Ref (No 1 of 2004)* [2004] 1 WLR 2111 at [52](d)) 'The assumption should be that Parliament would not have made an exception without good reason'. Such an approach may lead the court to give too much weight to the enactment under review and too little to the presumption of innocence and the obligation imposed on it by s 3 of the 1998 Act.

c [32] The House was not addressed on the cases decided in *A-G's Ref (No 1 of 2004)*. In the absence of argument, I would incline to agree with the Court of Appeal's conclusion in each case and would in particular agree that *R v Carass* [2001] EWCA Crim 2845, [2002] 1 WLR 1714 was wrongly decided. I would not endorse the guidance given by the Court of Appeal in [52] of its judgment save to the extent, that it is in accordance with the opinions of the House in these cases d which must, unless and until revised or supplemented, be regarded as the primary domestic authority on reverse burdens.

[33] On a number of occasions the House has gained valuable insights from the reasoning of Commonwealth judges deciding issues under different human rights instruments: see, for example, Lord Steyn in *R v Lambert* [2001] 3 All ER 577 e at [34], [35] and [40], and Lord Nicholls in *R v Johnstone* [2003] 3 All ER 884 at [49]. I am accordingly grateful to counsel for exploring in detail, and addressing the House on, the treatment of reverse burdens in other jurisdictions. In the result, I do not think I should be justified in lengthening this opinion by a review of the cases relied on. Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. But, even f more important, the United Kingdom courts must take their lead from Strasbourg. In the United Kingdom cases I have discussed our domestic courts have been trying, loyally and (as I think) successfully, to give full and fair effect to the Strasbourg jurisprudence.

g *DIRECTOR OF PUBLIC PROSECUTIONS v SHELDRAKE*

[34] On 26 June 2001 Mr Sheldrake was convicted by justices sitting at Colchester of being in charge of a motor car in a public place on 9 February 2001 after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to s 5(1)(b) of the Road Traffic Act 1988. He was h well over the limit: he was arrested at 8.40 pm, and on an average rate of elimination of alcohol would not have been below the limit until 11.40 am the next day.

[35] Section 5 of the 1988 Act, so far as material, provides:

j '(1) If a person—(a) drives or attempts to drive a motor vehicle on a road or other public place, or (b) is in charge of a motor vehicle on a road or other public place, after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his

driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.’ a

[36] Mr Sheldrake gave evidence of his efforts to arrange alternative transport home, but the justices were unconvinced. On his behalf it was argued that s 5(2) infringed the presumption of innocence guaranteed by art 6(2) of the convention if it were interpreted so as to impose a legal burden upon him. He argued that once the prosecutor had proved that he was in charge of a motor car in a public place while over the prescribed limit, it was presumed that he would have driven the car while over the limit unless he proved otherwise. If he failed to discharge the legal burden he would be convicted on the basis that he would have driven the car whilst over the limit. The risk of driving was an essential element of the offence, and the prosecution should be required to prove the presence of that risk beyond all reasonable doubt. Section 5(2) should be interpreted as imposing upon him an evidential burden only. The justices were of opinion that he had not proved, on a balance of probabilities, that there was no likelihood of his driving whilst in excess of the prescribed limit. They concluded, for reasons which they gave, that s 5(2) did not interfere with the presumption of innocence but that, if it did, it pursued a legitimate aim and was proportionate. The justices appear to have been very expertly advised. At the request of Mr Sheldrake the justices stated a case for the opinion of the High Court which by a majority (Clarke LJ and Jack J, Henriques J dissenting) allowed the appeal and quashed Mr Sheldrake’s conviction because the justices had not applied the correct test to the facts found: see [2003] EWHC 273 (Admin), [2003] 2 All ER 497, [2004] QB 487. b c d e

[37] The area of disagreement in the High Court was narrow. All three members held that the likelihood of the defendant driving whilst over the limit was the gravamen of the offence under s 5(1)(b). All three members considered that s 5(2), read with s 5(1)(b), violated the presumption of innocence because it enabled a defendant to be convicted even though the court was not sure that there was a likelihood of his driving. All three members held that s 5(2) pursued a legitimate aim, since the likelihood of a defendant driving usually involved consideration of his present or future intention to drive, a matter which was particularly within his knowledge and difficult for the prosecution to counter unless there was at least some burden on the defendant to put forward his case. The majority concluded (contrary to the view of Henriques J) that it was not necessary to accomplish the objective of the 1988 Act to impose a legal burden on the defendant to show that there was no likelihood of his driving whilst over the limit, and therefore it was disproportionate to do so. All members were agreed that, if it were necessary and appropriate, s 5(2) could be read down so as to impose an evidential burden only. f g

[38] The lineal ancestor of s 5(1)(b) is s 12 of the Licensing Act 1872, quoted in [6], above. To establish an offence against that provision it was plainly unnecessary to prove any likelihood that the defendant would drive the carriage (or, for that matter, discharge the firearm). The offence was based on the obvious risk of mishap if a person were drunk in the situations specified. Section 15(1) of the Road Traffic Act 1930 made it an offence to drive or attempt to drive or to be in charge of a motor vehicle on a road or other public place when under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle. The maximum penalty did not vary according to whether the offence was driving, attempting to drive or being in charge. No special defence was provided. But a person liable to be charged under this section was h j

- a not to be liable under s 12 of the 1872 Act. Section 9 of the Road Traffic Act 1956 recast this offence in relation to a person in charge of a car on a road or other public place but not driving it while unfit. It was also provided that a person should be deemed for purposes of the section not to have been in charge of the car if he proved that at the material time the circumstances were such that there was no likelihood of his driving the car so long as he remained unfit. These provisions were re-enacted in s 6 of the Road Traffic Act 1960 and were elaborated in the Road Traffic Act 1962. The Road Safety Act 1967 introduced the now familiar breathalyser regime. Section 1(1) was directed to those driving or attempting to drive while over the limit, s 1(2) to those in charge of a motor vehicle while over the limit. On a second conviction, or if convicted on indictment, the former were liable to more severe penalties than the latter. To the latter, a ground of exoneration was made available to the effect now found in s 5(2) of the 1988 Act. There were thus parallel regulatory provisions in force applicable to those in charge of vehicles on roads or public places, one based on unfitness to drive (s 6 of the 1960 Act, derived from s 9 of the 1956 Act and s 15 of the 1930 Act) and one based on exceeding the prescribed limit (s 1 of the 1967 Act). This dichotomy was preserved in ss 5 and 6 of the Road Traffic Act 1972 and endures in ss 4 and 5 of the 1988 Act.

[39] In *DPP v Watkins* [1989] 1 All ER 1126 at 1131, [1989] QB 821 at 829, Taylor LJ said, with reference to s 5 of the 1972 Act (the equivalent of s 4 of the 1988 Act):

- e 'In regard to that section two broad propositions are clear. First, the offence of being "in charge" is the lowest in the scale of three charges relating to driving and drink. The two higher in the scale are driving and attempting to drive. Therefore a defendant can be "in charge" although neither driving nor attempting to drive. Clearly, however, the mischief aimed at is to prevent driving when unfit through drink. The offence of being "in charge" must therefore be intended to convict those who are not driving and have not yet done more than a preparatory act towards driving, but who in all the circumstances have already formed or may yet form the intention to drive the vehicle, and may try to drive it whilst still unfit.'

- g In his submissions on behalf of Mr Sheldrake, Mr Turner relied on this passage, the ratio of which (he suggested) applied equally to s 5 of the 1988 Act, with which this appeal is concerned. Since the mischief aimed at by s 5(1)(b) is to prevent driving when unfit through drink, the likelihood of a person driving is (as the High Court held) the gravamen of the offence. The effect of s 5(2) is accordingly to impose on the defendant a burden to disprove an important ingredient of the offence which, if not disproved, will be presumed against him. Thus the presumption of innocence is seriously infringed.

- j [40] This analysis is in my opinion too simple and only partly correct. There is an obvious risk that a person may cause death, injury or damage if he drives or attempts to drive a car when excessive consumption of alcohol has made him unfit (I use that adjective compendiously) to do so. That is why such conduct has been made a criminal offence. There is also an obvious risk that if a person is in control of a car when unfit he may drive it, with the consequent risk of causing death, injury or damage already noted. That is why it has been made a criminal offence to be in charge of a car in that condition. Taylor LJ was right that 'the mischief aimed at is to prevent driving when unfit through drink'. But the

ingredients of the offence make no reference to doing a preparatory act towards driving or forming an intention to drive. The 1872 and 1930 Acts criminalised the conduct of those who were in charge of carriages and cars respectively when drunk or unfit, but made no reference to the likelihood of driving. There could, as I understood counsel to accept, be no ground of complaint if the offence of being unfit when in charge of a motor vehicle, as laid down in 1930, had remained unaltered. As has been shown, Parliament has modified that provision in favour of the defendant. If he can show that there was no likelihood of his driving while unfit, he is deemed not to have been in charge for purposes of s 4 of the 1988 Act and has a defence under s 5(2). There appears to be no very good reason (other than history) for the adoption of these different legislative techniques, but the outcome is effectively the same. The defendant can exonerate himself if he can show that the risk which led to the creation of the offence did not in his case exist. If he fails to establish this ground of exoneration, a possibility (but not a probability) would remain that he would not have been likely to drive. But he would fall squarely within the class of those whose conduct Parliament has, since 1930, legislated to criminalise. In *DPP v Watkins* [1989] 1 All ER 1126 at 1131, 1133, 1134, [1989] QB 821 at 829, 832, 833 it was recognised, in my view rightly, that the offence does not require proof that a defendant is likely to drive. This is not in my view an oppressive outcome, since a person in charge of a car when unfit to drive it may properly be expected to divest himself of the power to do so (as by giving the keys to someone else) or put it out of his power to do so (as by going well away). It may be, as was submitted in argument and suggested by Taylor LJ in [1989] 1 All ER 1126 at 1131–1132, [1989] QB 821 at 830, that the words ‘in charge’ have been too broadly interpreted and applied, but that is not a question which falls for decision in this appeal.

[41] It may not be very profitable to debate whether s 5(2) infringes the presumption of innocence. It may be assumed that it does. Plainly the provision is directed to a legitimate object: the prevention of death, injury and damage caused by unfit drivers. Does the provision meet the tests of acceptability identified in the Strasbourg jurisprudence? In my view, it plainly does. I do not regard the burden placed on the defendant as beyond reasonable limits or in any way arbitrary. It is not objectionable to criminalise a defendant’s conduct in these circumstances without requiring a prosecutor to prove criminal intent. The defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would. I do not think that imposition of a legal burden went beyond what was necessary. If a driver tries and fails to establish a defence under s 5(2), I would not regard the resulting conviction as unfair, as the House held that it might or would be in *R v Lambert*. I find no reason to conclude that the conviction of Mr Sheldrake was tainted by any hint of unfairness.

[42] In seeking to uphold the majority decision of the High Court, Mr Turner relied on the Eleventh Report of the Criminal Law Revision Committee (*Evidence (General)* (Cmnd 4991 (1972)) para 140) to urge that all burdens on the defence, including that in s 5(2), should be evidential only. Whatever the merits of this sweeping proposal, its adoption is not mandated by Strasbourg authority as it



a now stands. Lord Griffiths' observation in *R v Hunt* [1987] 1 All ER 1 at 12, [1987] AC 352 at 376 remains apposite:

'My Lords, such a fundamental change is, in my view, a matter for Parliament and not a decision of your Lordships' House.'

b [43] As an alternative fall-back submission Mr Turner argued that a presumption could be justified only if the facts presumed flow inexorably from the facts proved or if there was a rational connection between the fact proved and the fact presumed. Here, the likelihood of Mr Sheldrake driving did not, he said, flow inexorably from his being drunk and in charge of the car in a public place nor was there a rational connection between the latter fact and the likelihood of his driving. I am not sure that these propositions find much support in the c Strasbourg jurisprudence, although sometimes the fact presumed would flow all but inexorably from the fact proved (as perhaps in the case of knowingly living on immoral earnings: see [10], above) and the closer the connection between the fact proved and the fact presumed the more reasonable the presumption would usually be. Conversely, the more far-fetched a presumption is, the more suspect d it is likely to be. But it cannot be necessary that the facts presumed flow inexorably from the facts proved, since in such an event there would scarcely be a need for any presumption, and rarely, if ever, would a statutory presumption lack a rational connection with a fact proved. I do not however think that Mr Sheldrake's conviction, properly analysed, rested on a presumption that he was likely to drive. It rested on his being in charge of a car while unfit in a public e place. If it rested on a presumption that he was likely to drive, that did indeed flow directly from proof of his unfitness while in charge and his inability to show, despite a full opportunity to do so, that there was no likelihood of his driving.

[44] I would allow the Director's appeal, reinstate the justices' decision and answer the certified question by saying that the burden of proof provision in f s 5(2) of the 1988 Act imposes a legal burden on an accused who is charged with an offence contrary to s 5(1)(b) of that Act.

ATTORNEY GENERAL'S REFERENCE NO 4 OF 2002

[45] This reference by the Attorney General under s 36 of the Criminal Justice Act 1972 was prompted by the acquittal of A (as I shall call the defendant) in the g Crown Court on 22 May 2002. He had been indicted (so far as relevant to the reference) on two counts, both charging offences against s 11(1) of the Terrorism Act 2000: being a member (count 1) of a proscribed organisation, namely Hamas-Izz al-Din al-Qassem Brigades (Hamas IDQ); and (count 2) professing to be a member of that organisation. It was common ground at trial that s 11(2) h imposed on the defendant an evidential burden only. But despite this, at the conclusion of the evidence and following legal argument, the trial judge ruled that there was no case to answer on these counts and a verdict of not guilty was entered on each. The questions referred by the Attorney General for the opinion of the Court of Appeal were twofold:

j '(1) What are the ingredients of an offence contrary to s 11(1) of the Terrorism Act 2000?

(2) Does the defence contained in s 11(2) of the 2000 Act impose a legal, rather than an evidential, burden of proof on an accused, and if so, is such a legal burden compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the

Human Rights Act 1998) and, in particular, arts 6(2) and 10 of the convention?' a

In its judgment given on 21 March 2003 ([2003] EWCA Crim 762, [2004] 1 All ER 1, [2003] 3 WLR 1153; Latham LJ, Hunt and Hedley JJ) the Court of Appeal answered (1) that the ingredients of the offence were set out fully in s 11(1), and (2) that the defence in s 11(2) imposed a legal rather than an evidential burden and was compatible with art 6(2) of the convention and would not, save perhaps in circumstances difficult to envisage in the abstract, infringe a person's rights under art 10. On application made by counsel for A, the Court of Appeal referred the Attorney General's questions to the House under s 36(3) of the 1972 Act. b

[46] The 2000 Act is a far-reaching measure enacted to counter the all-too-familiar scourge of international terrorism. Part II (ss 3–13) provides a regime for the proscription (and de-proscription) of terrorist organisations. Part III (ss 14–31) is entitled 'Terrorist Property'. These two Parts of the Act provide for a wide range of criminal offences relating to proscribed organisations and terrorist property: inviting support for a proscribed organisation (s 12(1)); knowingly arranging meetings to support or further the activities of a proscribed organisation, or to be addressed by a member of such an organisation (s 12(2)); addressing a meeting to encourage support for such an organisation (s 12(3)); wearing or carrying insignia suggesting membership or support of such an organisation (s 13(1)); soliciting or receiving or providing money or other property for purposes of terrorism (s 15(1), (2) and (3)); using or possessing money or other property for the purposes of terrorism (s 16(1) and (2)); making an arrangement for money or other property to be made available for purposes of terrorism (s 17); making an arrangement which facilitates the retention or control of terrorist property by concealment, removal from the jurisdiction, transfer to nominees or in any other way (s 18(1)). Further offences relating to terrorism are enacted by ss 39(2), 54(1), (2) and (3), 56(1), 57(1), 58(1) and 59. These offences supplement existing criminal offences such as causing an explosion (s 2 of the Explosive Substances Act 1883) or conspiracy to cause an explosion (s 3 of the 1883 Act) or conspiracy to commit a crime abroad (s 1A of the Criminal Law Act 1977, inserted by s 5(1) of the Criminal Justice (Terrorism and Conspiracy) Act 1998). Where the prosecutor has evidence implicating the defendant in the commission of any of these offences, all of which (save that under s 13 of the 2000 Act) expose a defendant tried on indictment to very severe maximum penalties, it would be standard practice to charge the defendant with whichever offence was supported by the available evidence. c  
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[47] The indictment preferred against A did not charge him with any of the foregoing offences but with belonging to and professing to belong to a proscribed organisation. Section 11(1) of the 2000 Act, so far as relevant, provides: g  
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'11. *Membership*.—(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

(2) It is a defence for a person charged with an offence under subsection (1) to prove—(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed. j

(3) A person guilty of an offence under this section shall be liable—(a) on conviction on indictment, to imprisonment for a term not exceeding ten

- a years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

(4) In subsection (2) "proscribed" means proscribed for the purposes of any of the following—(a) this Act ...

- b Section 11(1), considered on its own, is a provision of extraordinary breadth. It would cover a person who joined an organisation when it was not a terrorist organisation or when, if it was, he did not know that it was. It would cover a person who joined an organisation when it was not proscribed or, if it was, he did not know that it was. It would cover a person who joined such an organisation as an immature juvenile. It would cover someone who joined such an organisation abroad in a country where it was not proscribed and came to this country ignorant that it was proscribed here (as illustrated by *R v Hundal* [2004] EWCA Crim 389, [2004] All ER (D) 35 (Feb)). It would cover a person who wished to dissociate himself from an organisation he had earlier joined, perhaps in good faith, but had no means of doing so, or no means of doing so which did not expose him to the risk of serious injury or assassination. If s 11(1) is read on its own, some of those liable to be convicted and punished for belonging to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions. Mr Owen QC, for A, pointed out that no international convention directed to countering terrorism requires the criminalisation of nominal membership of a proscribed organisation; only a minority of states seek to penalise nominal membership; and Lord Lloyd of Berwick in the report of his *Inquiry Into Legislation Against Terrorism* (Cm 3420, October 1996, para 6.11) did not recommend that course.

- [48] 'Profess' is a strange expression to find in a criminal statute, and it is not defined. Of various meanings given to it by the *Oxford English Dictionary* it is far from clear, in my opinion, whether it should be understood to denote an open affirmation of belonging to an organisation or an acknowledgment of such belonging, and whether (in either case) such affirmation or acknowledgment, to fall within s 11(1), would have to be true. This was a material consideration in the case of A, who arrived in this country in April 2001, some three weeks after Hamas IDQ had been duly proscribed under the 2000 Act. There was evidence that he had said, more than once, 'I am Hamas', which may well have been a reference to Hamas IDQ, the proscribed organisation, rather than to a charitable organisation, not proscribed, known simply as Hamas. But those to whom he said this were far from sure whether he spoke seriously or in jest, and the trial judge concluded that on the evidence 'a jury could reasonably conclude that [A] was perhaps some latter day Walter Mitty or Billy Liar'. The scope of 'profess' is in my view so uncertain that some of those liable to be convicted and punished for professing to belong to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.

- j [49] Recognition of the risk that sub-s (1) might cover conduct which was not blameworthy or such as properly to attract criminal sanctions may very well have led Parliament to provide the defence enacted in sub-s (2). The effect of this subsection is not, in my opinion, to make participation in the activities of the organisation while proscribed an ingredient of the offence. A majority of the House in *R v Lambert* [2001] 3 All ER 577 found that knowledge of the contents of

the container was not an ingredient of the s 5 offence, despite the defence of ignorance in s 28. I have concluded above (at [40]) that the likelihood of driving is not an ingredient of the s 5(1)(b) offence, despite the defence provided in s 5(2) of the 1988 Act. By parity of reasoning, s 11(2) adds no ingredient to s 11(1), and I would reject Mr Owen's contrary submission. I would accordingly answer the first of the Attorney General's questions in the same way as the Court of Appeal.

[50] There can be no doubt that Parliament intended s 11(2) to impose a legal burden on the defendant, since s 118 of the 2000 Act lists a number of sections which are to be understood as imposing an evidential burden only, and s 11(2) is not among those listed. There is also, in my opinion, no doubt that sub-ss (1) and (2) are directed to a legitimate end: deterring people from becoming members and taking part in the activities of proscribed terrorist organisations. The crucial question is therefore whether, as the Court of Appeal held, imposition of a legal burden on a defendant in this particular situation is a proportionate and justifiable legislative response to an undoubted problem. To answer this question the various tests identified in the Strasbourg jurisprudence as interpreted in the United Kingdom authorities fall to be applied.

[51] A number of considerations lead me to a conclusion different from that reached by the Court of Appeal. They are these.

(1) As shown in [47] and [48], above, a person who is innocent of any blameworthy or properly criminal conduct may fall within s 11(1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under s 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission.

(2) While a defendant might reasonably be expected to show that the organisation was not proscribed on the last or only occasion on which he became a member or professed to be a member, so as to satisfy sub-s (2)(a), it might well be all but impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed, so as to satisfy sub-s (2)(b). Terrorist organisations do not generate minutes, records or documents on which he could rely. Other members would for obvious reasons be unlikely to come forward and testify on his behalf. If the defendant's involvement (like that of *R v Hundal*: see [47], above) had been abroad, any evidence might also be abroad and hard to adduce. While the defendant himself could assert that he had been inactive, his evidence might well be discounted as unreliable. A's own case is a good example. He arrived as a stowaway. He described himself on different occasions as Palestinian and also as Jordanian. An immigration adjudicator concluded that he was Moroccan. The judge, as already noted, thought he might well be a fantasist. He was not a person whose uncorroborated testimony would carry weight. Thus although s 11(2) preserves the rights of the defence, those rights would be very hard to exercise effectively.

(3) If s 11(2) were held to impose a legal burden, the court would retain a power to assess the evidence, on which it would have to exercise a judgment. But the subsection would provide no flexibility and there would be no room for the exercise of discretion. If the defendant failed to prove the matters specified in sub-s (2), the court would have no choice but to convict him.



a (4) The potential consequence for a defendant of failing to establish a sub-s (2) defence is severe: imprisonment for up to ten years.

(5) While security considerations must always carry weight, they do not absolve member states from their duty to ensure that basic standards of fairness are observed.

b (6) Little significance can be attached to the requirement in s 117 of the Act that the Director of Public Prosecutions give his consent to a prosecution (a matter mentioned by the Court of Appeal in [2004] 1 All ER 1 at [42] for the reasons given by the Court of Appeal in [91] of its judgment in *A-G's Ref (No 1 of 2004)* [2004] 1 WLR 2111.

c [52] I would accept that, in a case where the prosecutor is unable to charge the defendant with any offence related to terrorism other than under s 11, and where the defendant has raised an evidential issue under sub-s (2), the prosecutor may well be unable to disprove the facts specified in sub-s (2)(a) and (b). But if so, that will be because he cannot point to any conduct of the defendant which has contributed to the furtherance of terrorism. It is not offensive that a defendant should be acquitted in such circumstances.

d [53] It was argued for the Attorney General that s 11(2) could not be read down under s 3 of the 1998 Act so as to impose an evidential rather than a legal burden if (contrary to his submissions) the subsection were held to infringe, impermissibly, the presumption of innocence. He submitted that if the presumption of innocence were found to be infringed, a declaration of incompatibility should be made. I cannot accept this submission, which e Mr Owen contradicted. In my opinion, reading down s 11(2) so as to impose an evidential instead of a legal burden falls well within the interpretative principles discussed above. The subsection should be treated as if s 118(2) applied to it. Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting s 3 of the 1998 Act. I would answer f the first part of the Attorney General's second question by ruling that s 11(2) of the 2000 Act should be read and given effect as imposing on the defendant an evidential burden only.

g [54] In penalising the profession of membership of a proscribed organisation, s 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by art 10 of the convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of 'profess'. Thirdly, it must be necessary in a h democratic society and proportionate. The necessity of attacking terrorist organisations is in my view clear. I would incline to hold sub-s (1) to be proportionate, for art 10 purposes, whether sub-s (2) imposes a legal or an evidential burden. But I agree with Mr Owen that the question does not fall to be considered in the present context, and I would (as he asks) decline to answer j this part of the Attorney General's second question.

#### LORD STEYN.

[55] My Lords, I have read the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it. I would also make the order which he proposes.

**LORD PHILLIPS OF WORTH MATRAVERS.**

[56] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it and with the order that he proposes. a

**LORD RODGER OF EARLSFERRY.**

[57] My Lords, these appeals relate to reverse burden of proof provisions in two statutes. The provisions are said to be incompatible with the defendants' convention right under art 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) to be presumed innocent until proved guilty according to law. I have had the privilege of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with his general exposition of the applicable case law of the European Court of Human Rights relating to art 6(2) and with his proposal that the appeal by the Crown in the case of Sheldrake should be allowed for the reasons he gives. I also agree with the answer that he proposes should be given to the first question in the Attorney General's reference, but I have the misfortune to differ from him on the second question. I confine my observations to that matter. Like Lord Bingham, I shall refer to the acquitted person as A. b  
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[58] In [30], above, Lord Bingham emphasises that, when considering the art 6(2) convention right, British courts must take their lead from the decisions of the European Court in Strasbourg and that caution should be exercised when considering authorities decided under provisions of Commonwealth constitutions which are not modelled on the convention. I respectfully agree with that observation, which mirrors what Lord Steyn and Lord Hope of Craighead said in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 118, 133, [2003] 1 AC 681 at 708, 724. For the purposes of art 6(2) there may indeed be particular need for caution in drawing on Commonwealth authorities which, despite the apparent similarities, may turn out to be *faux amis*. It is noticeable that in *Bates v UK* [1996] EHRLR 312, the European Commission on Human Rights were presented with a number of Commonwealth authorities on the presumption of innocence, but found it unnecessary to look at them because they preferred to be guided by the established jurisprudence of the European Court. Therefore, if art 6(2), as interpreted by the European Court, lays down what appears to be a different test, our courts must apply that test since the convention rights in our domestic law are intended to march with the rights under the convention. e  
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[59] The European Court has frequently pointed out that the guarantee in art 6(2) is a specific aspect of the right to a fair trial set forth in art 6(1): eg *Barbera v Spain* (1989) 11 EHRR 360 at 384 (para 67) and *Janosevic v Sweden* (2004) 38 EHRR 473 at 505 (para 96), with citations. It follows that, where an accused has a fair trial in terms of art 6(1), the presumption of innocence is not violated. The European Court's broad description of the requirements of art 6(2) in *Barbera v Spain* (1989) 11 EHRR 360 at 387 (para 77), is consistent with that approach: h

'Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, j

- a so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.'

So far as the Attorney General's reference is concerned, it is not suggested that there was in fact any breach of art 6(1) or (2) at the trial, since, by agreement, the proceedings were conducted on the basis that s 11(2) of the Terrorism Act 2000 was to be read as imposing on A an evidential, as opposed to a persuasive, burden.

- b The contention for A is, however, that art 6(2) would have been infringed if s 11(2) had been interpreted as requiring him to prove the matters in question on a balance of probabilities—failing which, he would have been convicted of the offence in terms of s 11(1).

[60] Section 11(1) and (2) of the Terrorism Act 2000 provide:

- c '(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.  
(2) It is a defence for a person charged with an offence under subsection (1) to prove—(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.'
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In considering the arguments advanced by counsel, it is worth remembering that these provisions represent no innovation in the law. Being a member of, or professing to belong to, a proscribed organisation was first made an offence under primary legislation in s 19 of the Northern Ireland (Emergency Provisions) Act 1973 and a measure to the same effect has been part of the law of Great Britain since the Prevention of Terrorism (Temporary Provisions) Act 1974. Section 1(1) and (6) of that Act provided *inter alia*:

- f '(1) Subject to subsection (6) below, if any person—(a) belongs or professes to belong to a proscribed organisation ... he shall be liable—(i) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400, or both, and (ii) on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both ...  
(6) A person belonging to a proscribed organisation shall not be guilty of an offence under this section by reason of belonging to the organisation if he shows that he became a member when it was not a proscribed organisation and that he has not since then taken part in any of its activities at any time while it was a proscribed organisation.
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- h In this subsection the reference to a person becoming a member of an organisation shall be taken to be a reference to the only or last occasion on which he became a member.'

The provisions in the two Acts are drafted differently. In the 2000 Act s 11(2) makes it a defence for the defendant to prove the matters in question, whereas in the 1974 Act s 1(6) says that a person belonging to a proscribed organisation shall not be guilty of an offence if he shows the matters in question. I doubt whether the draftsman intended any change in the operation of the provision but, in any event, the current provision is clearly to be regarded as a defence.

j [61] As under s 1(1) of the 1974 Act, a person commits an offence under s 11(1) of the 2000 Act if he does one of two things: if he belongs to a proscribed organisation or if he professes to belong to a proscribed organisation. Both limbs merit consideration for present purposes.

[62] The first alternative is that the defendant is a member of the proscribed organisation. The legislature has made it a crime for people simply to belong to such a murderous terrorist organisation. Criminalising membership serves a legitimate purpose by making it difficult for members of the organisation to demonstrate publicly in a manner that affronts law-abiding members of the public. Moreover, not only do people by their mere membership give credence to the claims of the organisation but, in addition, members are a potential network of people who may be called on to act for the organisation at some time in the future, even if they have not yet done so. It follows that it is no defence for most members of the organisation to show that they have never taken an active part in the activities of the organisation. The crime is being a member, not being an active member.

[63] The second alternative in s 11(1) is designed to catch not only members of the proscribed organisation but people who, though not members, profess to belong to it. As the terms of sub-s (2)(a) ('began to profess') indicate, professing to be a member of an organisation is regarded as something which is not complete when the declaration is made, but continues thereafter. So once a person has begun to profess to belong to an organisation, other things being equal, he is regarded as continuing to do so after the organisation is proscribed—just as a person who joins is treated as continuing to be a member thereafter. That is the basis upon which such persons are convicted, in conformity with art 7 of the convention. I take it to be clear, however, that a person can be convicted of professing to belong to a proscribed organisation, even if he is not a member or the prosecution cannot prove that he is. So, for example, if the present proceedings had run their course, the jury could competently have acquitted A of being a member of Hamas IDQ (count 1), while convicting him of professing to belong to that organisation (count 2). It is not hard either to see why the legislature would wish to prevent people from falsely claiming to belong to a proscribed organisation. By making such claims, especially as part of a public demonstration, people are liable to contribute to an exaggerated impression of the strength of the organisation in question. In this way they will tend to raise the morale of the actual members of the organisation, while lowering that of the law-abiding members of the community and of the forces of law and order.

[64] Claims to belong to an organisation will not have this effect, however, unless they are made to other people and in such a manner as to be capable of belief. So, if it were obvious that someone was only making a joke and was not meaning to be taken seriously when he said that he belonged to a proscribed organisation, this would not amount to 'professing' to belong to the organisation for purposes of s 11(1). In para 22 of his ruling that there was no case to answer, the trial judge in the present proceedings noted that A's 'audience was never sure whether he was serious or making a joke when he said what he did'. Had the case gone to the jury, in my view it would have been proper for the judge to direct them that, if they had a reasonable doubt whether A was serious or was only making a joke when he said what he did, then he should be acquitted.

[65] It follows that, in order to achieve a conviction under s 11(1), the Crown must lead evidence that satisfies the magistrate or jury beyond a reasonable doubt either that the defendant is a member of the proscribed organisation or that he professes—in the sense of claiming to other people and in a manner that is capable of belief—that he belongs to the organisation. If the Crown leads the



- a necessary evidence to prove these matters, then the defendant is liable to be convicted of the offence. It is important to notice that the burden of proving these facts lies entirely on the Crown. Moreover, as in most criminal trials, the Crown enjoys no presumption of fact or law to help it to prove them. The issue is tried as in any other ordinary criminal trial: the Crown leads the evidence to prove the relevant facts; it is open to the defence to cross-examine the Crown witnesses, to make a submission of no case to answer, to lead any contrary evidence and to make submissions on the evidence to the magistrate or jury. There is a right of appeal. Nothing in such proceedings could possibly be regarded as infringing the defendant's convention rights under art 6(1) or (2).
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- [66] If the prosecution establishes that the defendant is a member of a proscribed organisation or professes to belong to it, then in one sense it proves a simple objective fact. And, with one exception, s 11(1) makes that fact an offence, irrespective of how or why it came about. There is nothing in the convention to prevent states enacting and prosecuting offences of this kind, as the European Court emphasised in *Salabiaku v France* (1988) 13 EHRR 379 at 387 (para 27):
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- d 'As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.'
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- In the present case, for the reasons given by Lord Bingham, the criminalisation of professing to belong to a proscribed organisation does not violate any art 10 convention right of the defendant. Similarly, the nature of the offence created by s 11(1) does not engage any right of the defendant under art 6, since that article is concerned with the fair trial of offences and not with the substance of the offences themselves. I am accordingly satisfied that, given the murderous aims of the proscribed organisations, it is open to the legislature, without in any way infringing a defendant's rights under the convention, to make it a punishable offence for someone simply to be a member of, or to profess to belong to, such an organisation in the United Kingdom.
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- [67] As Lord Bingham points out, s 11(1) is apt to catch people who joined the organisation before it was proscribed—at a stage, perhaps, when it was not even a terrorist organisation. It could catch someone who joined the organisation without knowing that it was proscribed, or when he was an immature youth. And it would cover someone who joined the organisation abroad, where it was legal, and came to this country without being aware that it was illegal here. All these are factors which may be relevant in at least three ways. First, and very importantly, under s 117(1) and (2) they will be relevant to the decision of the Director of Public Prosecutions—for these purposes a senior Crown Prosecutor—or of the Attorney General to consent to the instituting of proceedings. Secondly, they will be relevant to any decision whether such proceedings should be summary or on indictment. Lastly, in the event of a conviction, they will fall to be considered by the court in mitigation of penalty. But, with one alleged exception, in my respectful opinion these are not matters
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which raise any issue whatever as to the compatibility of s 11 with art 6(2) of the convention. a

[68] The alleged exception is the case, envisaged by s 11(2), where the defendant joined the organisation or began to profess to belong to it before it was proscribed. In this kind of case, from the Northern Irish legislation of 1973 onwards, Parliament has always made provision for the defendant to have a defence if he establishes two points: that he joined or began to profess to belong b to the organisation when it was not proscribed and that he has not taken part in any of its activities while it has been proscribed. The form of this defence is designed precisely to meet the objection that terrorist organisations are not likely to have mechanisms by which people can safely give up their membership or dissociate themselves from the organisation. So it applies after the Crown has established that, at the relevant time, the defendant remains a member of the c organisation or professes to belong to it and where, accordingly, in any other case he would fall to be convicted under s 11(1). Exceptionally, in this particular situation the defendant is to be acquitted if he proves that he has not taken an active part in any of the activities of the organisation while it was proscribed. Plainly, if s 3 of the 1998 Act is left on one side, the wording of s 11(2) places the d burden of proving the defence on the defendant.

[69] By enacting s 11(2) Parliament has singled out for favourable treatment those defendants who became members or began to profess to belong to the organisation before it was proscribed. As I pointed out in [65], above, there could have been no question of an infringement of the defendant's art 6 rights if this e defence had not been included in s 11. On that hypothesis, whatever the circumstances of his initial involvement in the organisation, he could have had a fair trial in terms of art 6 and could have been convicted of an offence under s 11(1) if the Crown had proved that he was a member or professed to belong to the organisation after it was proscribed. All that has happened is that, without f changing the definitional elements of the offence, Parliament has given these particular defendants the additional benefit of a defence if they can prove the two elements in sub-s (2). The introduction of the defence does not involve the introduction into the proceedings of any presumption in favour of the Crown: the magistrate or jury decides the matter by considering and weighing the evidence led, unconstrained by any presumption of any kind. Parliament g requires, however, that, before a defendant who has otherwise been proved to be guilty of the offence under s 11(1) is excused, the magistrate or jury must actually be satisfied that he did indeed join, or begin to profess to belong to, the organisation before it was proscribed and that he did not thereafter take any part in its activities. Parliament can lay down these preconditions for the defendant's h acquittal in such a case without infringing art 6(2) as interpreted by the European Court in *Salabiaku v France* and the other authorities. And, when Parliament does so, it must inevitably be for the defendant to satisfy the magistrate or jury that the preconditions have been met. Who else could do it? If the defendant fails to establish either of the preconditions, the defence is to fail and the defendant is to be duly convicted—because, *ex hypothesi*, the Crown will already have proved j all that is necessary to secure a conviction under s 11(1).

[70] In this respect the defendant under s 11(1) is in precisely the same position as a defendant, such as Mr Sheldrake, who is proved to have been in charge of a vehicle when over the prescribed alcohol limit in terms of s 5(1) of the Road Traffic Act 1988 and who fails to prove, for the purposes of s 5(2), that there was

- a no likelihood of his driving while in that condition. He is convicted of the offence under s 5(1) because, again *ex hypothesi*, the Crown has proved all the constitutive elements of the offence. As the House holds, there is no violation of the defendant's right under art 6(2). Moreover, the fact that the court has no 'discretion' in either case to acquit the defendant raises no issue in terms of art 6(2): guilt or innocence can never depend on the exercise of discretion by the tribunal which assesses the evidence and pronounces the verdict.
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- [71] The defence in s 11(2) can be seen as relaxing the rigour of the offence in s 11(1) for defendants in these particular circumstances. If s 11(1) itself contains nothing to infringe art 6(1) or (2), then nothing in s 11(2), which serves only to improve the defendant's situation, can precipitate a violation of art 6(1) or (2). If that were not so, Parliament could remove the violation by deleting the defence—and yet this would be to the defendant's obvious disadvantage.
- c Counsel for A contends, however, that art 6(2) is infringed because s 11(2) imposes a persuasive burden on the defendant to prove the necessary elements of the defence. The idea of evidential and persuasive burdens is very much a product of the adversarial system of criminal procedure favoured in English-speaking countries. The distinction has no direct counterpart in civil law systems and is, of course, not mentioned, one way or the other, in any guarantee in art 6 of the convention. It is clear, however—not least from the decision of the European Court in *Salabiaku v France*—that, if the law provides for a defence and the defendant is free to deploy his case in support of that defence before the trial court, then the mere fact that the onus is on him to establish the facts giving rise to the defence does not constitute a violation of art 6(2) or make his trial unfair for the purposes of art 6(1).
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- [72] In *Salabiaku v France* the defendant went to Roissy Airport to collect a parcel of food from an Air Zaïre flight. He could not find it, but an airline official directed him to a padlocked trunk which had not been collected from an earlier Air Zaïre flight. The official, acting on the advice of police officers who were watching the trunk, suggested that M Salabiaku should leave it where it was since it might contain prohibited goods. Despite this warning, the defendant took possession of the trunk and passed through customs with it. He was detained and, when the trunk was opened, 10kg of herbal and seed cannabis were found concealed in a false bottom underneath the food. The defendant was charged inter alia with the customs offence of smuggling prohibited goods, contrary to arts 414 and 417 of the Customs Code. Article 392(1) of that Code provided that 'the person in possession of contraband goods shall be deemed liable for the offence'. The defendant was convicted of the smuggling offences and, when his appeal against conviction was rejected, he applied to the European Commission, alleging that the way that art 92(1) had been applied to him infringed his rights under arts 6(1) and (2). The European Court found that there had been no violation of either paragraph of art 6.
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- [73] As I pointed out in [66], above, the European Court started from the position that under the convention there was no objection to a state penalising an objective state of fact, such as being in possession of prohibited goods. So, if M Salabiaku had been charged with an offence of being in possession of prohibited goods, viz the cannabis, it is clear that there would have been no conceivable violation of art 6. What raised the art 6(2) question was that the defendant was not charged with possession of the cannabis but, rather, under art 392(1), as the person in possession of the cannabis, he was deemed to be liable
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for smuggling it into France. This provision gave rise to a presumption of law by virtue of which the French courts had found the defendant guilty of smuggling the prohibited goods, contrary to arts 414 and 417 of the Customs Code. a

[74] What the European Court had to consider was whether these proceedings violated art 6(2). In holding that they did not, the court observed, (1988) 13 EHRR 379 at 388 (para 28), that art 6(2) does not regard presumptions of fact or law with indifference: b

‘It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.’

The European Court noted that the presumption in art 392(1) did not mean that the defendant is left entirely without any means of defence. The competent court trying the offence may accord him the benefit of extenuating circumstances, and it must acquit him if he succeeds in establishing a case of force majeure. The court went on (at 388–389 (para 29)) to refer with approval to a judgment of the Paris Court of Appeal, holding that the specific character of customs offences does not deprive the offender of every possibility of defence since ‘the person in possession may exculpate himself by establishing a case of *force majeure*’ (*‘le détenteur peut s’exonérer par la preuve de la force majeure’*). c  
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[75] As this analysis shows, what gave rise to the issue in relation to art 6(2) in *Salabiaku v France* was the presumption of guilt of smuggling prohibited goods which art 392(1) drew from proof of the objective state of fact, viz that the defendant was in possession of the goods. Even then, the court held that there was no violation of art 6(2) since, first, the presumption did not apply in the circumstances where the defendant proved that his possession was due to force majeure and, further, the defendant was free to deploy that defence and the court was equally free to consider it on its merits. e  
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[76] The present case involves no presumption of any kind. So the entire basis upon which the question of art 6(2) arose in *Salabiaku v France* is missing. In particular, since no presumption is involved, no question arises as to whether a presumption has been kept within reasonable limits. Moreover, as para 29 of the decision of the European Court plainly shows, the mere fact that the onus is on the defendant to establish a defence in this situation does not in itself give rise to any breach of art 6(2). What matters is that the tribunal assesses the facts with an open mind, without any preconception of the defendant’s guilt. In addition, in a case like the present, the rights of the defence are fully respected. The defendant is free to give evidence himself, and to lead the evidence of other witnesses, in support of the defence. Of course, this will involve him in having to prove a negative, viz that he has not taken part in any activities of the organisation since it was proscribed. The point is rightly made that, given the nature of proscribed organisations, the defendant may well have difficulty in finding witnesses to support his evidence that he has taken no part in the activities of the organisation. But, by the same token, the Crown is likely to have difficulty in finding witnesses to contradict anything that he says. More particularly, if the defendant has actually taken no part in the activities of the organisation, then the Crown is unlikely to have any evidence—and will, at any rate, have no sound evidence—on which it can properly invite the jury to reject the defendant’s account. If such evidence is led, the defendant’s counsel will be able to g  
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- a cross-examine the witnesses and to make submissions about the quality of their evidence.

[77] The present case illustrates the point. As the trial judge recorded, 'the Crown cannot point to one overt act that has been designed to further the cause of Hamas IDQ'. Counsel for the Crown was reduced to arguing that A was in the United Kingdom as a 'sleeper'—a suggestion that the judge rightly regarded as fanciful, speculative and not supported by the evidence at all, not least because A had been announcing to the world at large that he was Hamas. The evidence available to the Crown would have remained exactly the same if the case had been conducted on the footing that the burden of proving the defence lay on A. Therefore, given that there was in fact no evidence available to the Crown of any single overt act by A designed to further the cause of Hamas IDQ, in accordance with proper professional practice, prosecuting counsel could not have challenged the credibility of the defence evidence that he had not taken part in the activities of the organisation since 29 March 2001. In the absence of any such challenge by the Crown or of any Crown evidence to the contrary, it is likely that A's evidence on this point would have been accepted. There is accordingly no reason to believe that in this, or any similar, case where there is no evidence to show that the defendant took part in the activities of the organisation, he would fail to establish the defence simply because the onus of proof lay on him. In any event, simply placing the onus of proving this defence on the defendant involves no violation of his art 6(2) convention rights. Therefore if the trial had been conducted on the footing that A had to establish the defence, there would have been no violation of his convention rights under either art 6(1) or 6(2).

[78] For these reasons, as well as those in the speech to be delivered by my noble and learned friend, Lord Carswell, I would hold, first, that s 11(2) of the 2000 Act imposes a legal, rather than an evidential, burden of proof on an accused and, secondly, that the legal burden is compatible with arts 6 and 10 of the convention. I would answer the Attorney General's second question accordingly.

#### LORD CARSWELL.

[79] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. I agree with his reasons and conclusions and wish to add only a few observations of my own.

[80] The issue common to these appeals is whether it is unfair to the accused to have to undertake the burden of proving the defence provided for in the governing legislation and, if so, whether the relevant provisions should be 'read down' as an evidential rather than a legal or persuasive burden. My noble and learned friend, Lord Bingham of Cornhill, has reviewed in detail in his opinion the applicable provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the decisions of the European Court of Human Rights (the European Court), together with the domestic decisions which affect the issues before us, and I do not wish to add anything to the discussion of the law set out in his opinion and that of Lord Rodger. I shall consider in this opinion the application of the law to the two appeals before us, observing only that the objective of art 6 of the convention is to require a fair trial and that the presumption of innocence contained in art 6(2) is one aspect of that requirement, rather than constituting a free-standing obligation. For that reason, as accepted

by the European Court in *Salabiaku v France* (1988) 13 EHRR 379, inroads into the obligation of the prosecution to prove beyond reasonable doubt all the matters in issue in a criminal trial may be permissible in certain circumstances. The reversal of the ordinary burden of proof resting upon the prosecution may accordingly be justified in some cases and will not offend against the principle requiring a fair trial. Where the question arises, it has to be determined, first, whether it is fair and reasonable in the achievement of a proper statutory objective for the state to deprive the defendant of the protection normally guaranteed by the presumption of innocence whereby the burden of proof is placed upon the prosecution to prove beyond reasonable doubt all the matters in issue. Secondly, one must determine whether the exception is proportionate, that is to say, whether it goes no further than is reasonably necessary to achieve that objective.

[81] Mr Sheldrake was on 26 June 2001 convicted by a magistrates' court of an offence, contrary to s 5(1)(b) of the Road Traffic Act 1988, of being in charge of a vehicle in a public place after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit. He relied upon the defence available under s 5(2), which provides:

'It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle while the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.'

He had been arrested at 8.40 pm on 9 February 2001, and it was established that at the average rate of elimination of alcohol that proportion would not have fallen below the limit until approximately 11.40 am the following day. Mr Sheldrake gave evidence that he had made efforts to arrange transport home by other means, but the justices held that he had not established on the balance of probabilities that there was no likelihood of his driving his vehicle.

[82] The issue which formed the subject of the appeal before the House was whether the imposition on a defendant of a legal or persuasive burden of proof of the matters specified in s 5(2) constituted an interference with the presumption of innocence provided for by art 6(2) of the convention which was unfair and contrary to the requirements of art 6. His counsel argued, unsuccessfully before the magistrates' court but successfully on appeal to the Queen's Bench Division of the High Court, that the imposition of a persuasive burden constituted a breach of art 6 and accordingly s 5(2) of the 1988 Act should be read in such a way as to impose only an evidential burden. If this were done, then once the issue was raised the prosecution would be required to prove beyond reasonable doubt that some likelihood (interpreted by the Divisional Court as a 'real risk') existed of the defendant's driving the vehicle. The majority of the Divisional Court accepted the argument advanced on behalf of Mr Sheldrake and held that the magistrates had been wrong to regard s 5(2) as imposing a persuasive burden (see [2003] EWHC 273 (Admin), [2003] 2 All ER 497, [2004] QB 487).

[83] The offence of being in charge of a motor vehicle when unfit to drive or over the prescribed limit is, as Taylor LJ observed in *DPP v Watkins* [1989] 1 All ER 1126 at 1131, [1989] QB 821 at 829, the lowest in the scale of three charges relating to driving and drink, coming after driving and attempting to drive. It was argued on behalf of Mr Sheldrake and accepted by the Divisional Court that the

a likelihood of his driving was the gravamen of the offence and, once raised as an issue in the case, was an essential element in the matters to be proved by the prosecution. For the reasons set out by Lord Bingham, I am unable to accept this. I agree with the proposition stated by Taylor LJ in *DPP v Watkins* that proof of being in charge of a vehicle does not necessitate proof of a likelihood of the defendant driving the vehicle. Since that issue does not require to be proved by the prosecution in order to establish a case of being in charge, to hold that the burden of proof on the defendant in propounding the defence under s 5(2) is merely an evidential burden would be to require the prosecution to prove a matter dehors the elements of the offence itself. This in my opinion is a material factor in determining whether it would be fair and reasonable and proportionate to make it a persuasive burden.

c [84] The ultimate risk may be that the defendant may elect to drive the vehicle, but it is not in my view the gravamen of the offence. Being in charge of a vehicle while over the limit is in itself such an anti-social act that Parliament has long since made it an offence. A person who has drunk more than the limit should take steps to put it out of his power to drive. Section 5(2) gives him an escape route, which it is quite easy for him to take in a genuine case, as he is the person best placed to know and establish whether he was likely to drive the vehicle. Conversely, the prosecution might be able readily enough to establish that the defendant was in a position to drive the vehicle if he elected to do so, but it could well be difficult to prove beyond reasonable doubt that there was a likelihood of his driving it.

e [85] An example may be posed to test these propositions. The owner of a car, who has drunk enough alcohol to take him over the limit, decides to wash the car. He takes his keys with him, which he uses to open the doors to get access to all the surfaces to be washed and to clean the inside. It is indisputable that during this process he is in charge of the vehicle. He may have started off with the sole intention of confining himself to cleaning the car, but the possibility exists that he may change his intention and drive it on some errand, perhaps to fill the tank with petrol. The person who knows best whether there was a real risk of that occurring is the defendant himself. I see nothing unreasonable or disproportionate in requiring him to prove on the balance of probabilities that there was no likelihood of his doing so. He should in my opinion have to do so, by adducing evidence which may be duly tested in court.

g [86] For these reasons and for those contained in the opinion of Lord Bingham I would allow the appeal of the Director of Public Prosecutions, reinstate the magistrates' decision and answer the certified question in the terms proposed.

h [87] I turn then to the Attorney General's reference. I have set out my reasons in relation to Mr Sheldrake's case in rather more detail than might otherwise be necessary, given my agreement with those expressed by Lord Bingham, because I think that they give some grounds for comparison when considering the issues in the reference.

j [88] Section 11(1) of the Terrorism Act 2000 is a provision of some breadth, but it has legislative precedents, as Lord Rodger has pointed out in [60], above, and so also has the defence contained in s 11(2). It may be unusual to find the verb 'professes' in a criminal statute, but I do not myself consider that its inclusion is likely to result in the conviction of defendants who would not properly be regarded as blameworthy. If a defendant who had told other persons that he was a member of a proscribed organisation advances the defence that he was merely

joking or was a fantasist or a compulsive liar, then the jury will, quite correctly, be directed to acquit him if they have a reasonable doubt whether this might be the case. It would not be sufficient for the Crown to say that since he had made the statement, he was without more guilty of professing membership; in order to convict such a person, it will be necessary to prove beyond reasonable doubt that his profession was seriously made. I therefore do not share the fear that a 'latter day Walter Mitty or Billy Liar' is unreasonably at risk of conviction of professing to be a member of a proscribed organisation.

[89] A specific defence is provided by s 11(2) of the 2000 Act, whereby a person charged with an offence under sub-s (1) may prove:

'(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and (b) that he has not taken part in the activities of the organisation at any time when it was proscribed.'

The defence will apply in a variety of situations. The organisation concerned may be started in the United Kingdom with terrorist objectives ab initio, and the defendant, knowing its objectives, may have become a member before the Secretary of State became aware of its existence and proscribed it. He may have joined it in another jurisdiction when it was not proscribed in this country, then found subsequently that it became the subject of a proscription order under s 3(3)(a) of the 2000 Act. Alternatively, the organisation may, as has occurred in Northern Ireland, have started out as one with lawful objectives, but have later evolved into one concerned with terrorism.

[90] It was represented that a defendant might find it difficult to adduce sufficiently convincing evidence that he refrained from taking part in the activities of the organisation after it was proscribed, given that he may be dependent solely on his own testimony, which may be less than impressive and could well be regarded as unreliable. I would not myself place a great deal of weight on this consideration. Naturally the defendant will be highly unlikely to obtain any documentary evidence in support of his case, nor is the organisation likely to furnish him with assistance—indeed, some proscribed organisations visit severe consequences upon members who seek to leave their ranks. Nevertheless, such a person is better placed than anyone to testify whether he has taken any part in the organisation's activities. He can give that evidence on oath and it can be tested by the ordinary process of proper cross-examination. Since it is most unlikely that contrary evidence will be available to the prosecution, the jury (or in Northern Ireland the judge sitting without a jury) or magistrates will ordinarily have to decide whether or not to believe the defendant's testimony and determine accordingly whether he has proved his case on the balance of probabilities. It does not seem to me that that places a defendant at an unfair disadvantage.

[91] On the other side of the scale, one must place several considerations.

(a) It is not easy to determine what is to be proved and by whom in respect of the date when the defendant joined the organisation. If he raises the issue, it would hardly be appropriate for the prosecution to have to prove that he became a member before the date on which it was proscribed. The only sensible answer must be that the defendant has to establish this fact, but it would be a strange procedure if the onus then reverted to the prosecution to prove that he had taken part in the activities of the organisation.



a (b) If sub-s (2) were construed as imposing only an evidential burden, the prosecution, once the issue is raised, would have to prove a matter dehors the elements of the offence specified in sub-s (1), that the defendant was not only a member but had taken part in activities of the organisation. As I stated when considering Mr Sheldrake's appeal at [83], above, I would regard that as a material factor in determining whether it is fair and reasonable and proportionate to interpret the provision in sub-s (2) as imposing a persuasive burden upon the defendant.

(c) The prosecution may in many cases face substantial difficulties in proving that the defendant had taken part in activities of the organisation after it was proscribed.

c (d) New organisations not infrequently spring up as offshoots of existing terrorist organisations, but with different names (for a summary of the history of such developments in the case of the Irish Republican Army see *R v Z* [2004] NICA 23 at [28], [29]). They may not all fall within s 3(1)(b) as organisations operating under the same name as one listed in Sch 2 to the 2000 Act, which the court held to apply in respect of the Real IRA. One could see this giving rise to difficulties of proof for the prosecution if the burden on defendants under s 11(2) is held to be evidential only.

[92] For these reasons and for those given by Lord Rodger I consider that it is fair and reasonable and proportionate to regard the burden of proof under s 11(2) as a legal rather than an evidential burden. I would hold accordingly and answer the Attorney General's second question in the terms proposed by Lord Rodger.

e *Appeal allowed.*

*Reference answered accordingly.*

Dilys Tausz Barrister.

# Cadogan and another v Search Guarantees plc

[2004] EWCA Civ 969

COURT OF APPEAL, CIVIL DIVISION

JONATHAN PARKER LJ AND LADDIE J

6, 27 JULY 2004

*Landlord and tenant – Leasehold enfranchisement – Entitlement – Flat forming part of house let to qualifying tenant – Tenant of house having right to enfranchise only when occupying house or part as only or main residence – Company being tenant of house and qualifying tenant of each flat – Whether company required to occupy house or part as only or main residence – Leasehold Reform Act 1967, s 1(1ZB).*

The defendant was the proprietor of the long lease of a house. The claimants owned the freehold reversion. The leasehold property comprised six flats and for the purposes of Chs 1 and 2 of Pt I of the Leasehold Reform, Housing and Urban Development Act 1993, the defendant was the 'qualifying tenant' of each flat. It applied to the claimants to acquire the freehold under s 1<sup>a</sup> of the Leasehold Reform Act 1967. The claimants objected on the basis that the defendant did not satisfy the requirements of s 1(1ZB) of the 1967 Act. That sub-section provided that where a flat forming part of a house was let to a person who was a qualifying tenant of the flat for the purposes of Chs 1 or 2 of Pt I of the 1993 Act, a tenant of the house did not have any right to enfranchise under the 1967 Act unless, at the relevant time, he had been occupying the house, or any part of it, as his only or main residence for a specified period. The claimants commenced proceedings for a declaration that the defendant was not entitled to enfranchise. They succeeded in the county court, having argued (i) that the effect of s 1(1ZB) was that because all of the flats, each of which was a part of the house, were let to a qualifying tenant (the defendant), the tenant of the house (also the defendant) had no right to enfranchise unless it could meet the occupancy requirement; and (ii) that the defendant, being a company, could not satisfy the requirement, as it could not occupy property as its residence for the purposes of the 1967 Act. The defendant appealed, submitting that the purpose of the sub-section was to resolve potential conflicts between different tenants at different levels of superiority and that it dealt with who should have the right to enfranchise where there was a tenant of the house, and also a tenant of a flat forming part of the house, they being different persons.

**Held** – On the true construction of s 1(1ZB) of the 1967 Act the 'tenant of the flat' was someone other than the 'tenant of the house'. That was consistent with the logical purpose of s 1(1ZB) which was to resolve which of two or more persons should have the right to seek enfranchisement. Accordingly, s 1(1ZB) did not apply to the defendant and thus did not prevent it from obtaining

<sup>a</sup> Section 1, so far as material, is set out at [5], below

- a enfranchisement. The defendant's appeal would therefore be allowed (see [8], [12], [15], [16], [25], [26], below).

### Notes

- b For the right to enfranchisement or extended lease, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1253.  
 For the Leasehold Reform Act 1967, s 1, see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 246.

### Cases referred to in judgments

- c *Bagettes Ltd v GP Estates Co Ltd* [1956] 1 All ER 729, [1956] Ch 290, [1956] 2 WLR 773, CA.  
*Crean Davidson Investments Ltd v Earl Cadogan* [1998] 2 EGLR 96.  
*Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995] 4 All ER 831, [1996] AC 329, [1995] 3 WLR 854, HL.  
*Hanlon v Law Society* [1980] 2 All ER 199, [1981] AC 124, [1980] 2 WLR 756, HL.  
 d *Pittalis v Grant* [1989] 2 All ER 622, [1989] QB 605, [1989] 3 WLR 139, CA.

### Appeal

- e Search Guarantees plc, the registered proprietor of a lease of 51-52 Hans Place, London SW1 (the property), appealed with permission of Judge Levy QC from his decision on 9 January 2004 in the Central London County Court granting the declaration sought by the respondent claimants, Earl Cadogan and Cadogan Estates Ltd, in whom the freehold reversion of the property was vested, that the defendant was not entitled to acquire the freehold of the property under the Leasehold Reform Act 1967. The facts are set out in the  
 f judgment of Laddie J.

*Jonathan Gaunt QC* (instructed by *Lawrence Jones*) for the appellant.  
*Anthony Radevsky* (instructed by *Pemberton Greenish*) for the respondents.

- g *Cur adv vult*

27 July 2004. The following judgments were delivered.

### LADDIE J.

- h [1] This is an appeal by Search Guarantees plc from the judgment of Judge Levy QC given on 9 January 2004. Permission to appeal was given by the judge.  
 [2] Since July 1997, the appellant has been the registered proprietor of a lease of 51-52 Hans Place, London SW1 (the premises) granted on 21 March 1985 for a term of 65 years from 25 March 1984. The freehold reversion is vested in the  
 j respondents, Earl Cadogan and Cadogan Estates Ltd. The premises comprise six flats or maisonettes, five of which are presently sublet on short-term tenancies, and a caretaker's flat. By a notice dated 17 December 2002, the appellant applied to the respondents to acquire the freehold pursuant to s 1 of the Leasehold Reform Act 1967 (the 1967 Act). If the landlord intends to object to the enfranchisement, he is required to serve a notice in reply.

[3] Since the respondents did object, on 28 March 2003, they served such a notice which denied that the appellant was entitled to enfranchise under s 1 because, so it was said, it did not satisfy the requirements of s 1(1ZB) of the 1967 Act. The respondents then commenced these proceedings, seeking a declaration that the appellant was not entitled to enfranchise. The judge granted the respondents the declaration they sought at the hearing on 9 January 2004.

[4] Under s 101(3) of the Leasehold Reform, Housing and Urban Development Act 1993 (the 1993 Act), a head lessee can be a 'qualifying tenant' for the purposes of Chs 1 and 2 of Pt 1 of the 1993 Act. This was held to be the case in *Crean Davidson Investments Ltd v Earl Cadogan* [1998] 2 EGLR 96 and is agreed to be so by the parties. Under s 39(4) of the 1993 Act, a person can be the qualifying tenant of each of two or more flats at the same time, whether he is tenant of those flats under one lease or under two or more separate leases. In this case the parties agree that, because the flats in the premises are sublet on short-term tenancies, the tenant under the headlease, the appellant, is the 'qualifying tenant' of each flat. On the facts of this case, by virtue of the headlease, the appellant is also the tenant of the whole house. It is because the appellant is both the tenant of the house and a qualifying tenant of the flats under the 1993 Act that the current dispute has arisen.

[5] Section 1(1ZB) of the 1967 Act provides:

'Where a flat forming part of a house is let to a person who is a qualifying tenant of the flat for the purposes of Chapter 1 or 2 of Part 1 of the [1993 Act], a tenant of the house does not have any right under this Part of the Act unless, at the relevant time, he has been occupying the house, or any part of it, as his only or main residence (whether or not he has been using it for other purposes)—(a) for the last two years; or (b) for periods amounting to two years in the last ten years.'

[6] The respondents' argument, accepted by the judge, is as follows. All of the flats, each of which is for part of the house, is let to a qualifying tenant, namely the appellant. Because that is so, the tenant of the house, who is also the appellant, does not have any right to enfranchise unless it meets the occupancy requirements set by s 1(1ZB). However, it is not in dispute that the appellant cannot meet this requirement because it is a company; s 37(5) of the 1967 Act provides that a company cannot occupy property as its residence for the purposes of this legislation. It follows that the appellant has no right to enfranchise.

[7] The appellant argues that this is not the correct construction of s 1(1ZB). It says that, read purposively, the tenant of the house cannot be the same person as the qualifying tenant. It is inherent in the provision that they are different.

[8] To determine the scope of s 1(1ZB) it is useful to have in mind the legislative history. Until amendment of the 1967 Act, including the introduction of s 1(1ZA) and (1ZB), by s 138(2) of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act), a tenant of a house who wished to enfranchise under that Act or a tenant of a flat who wanted to obtain an extended lease under Ch 2 of the 1993 Act had to demonstrate that he had been occupying the premises as his only or main residence or principal home for



a three years. This requirement had two effects. First, in most cases it resolved  
b conflicts between different people who might be interested in enfranchisement  
of the same premises. Second, it severely restricted the ability of companies to  
seek enfranchisement because they were incapable of meeting the residency  
requirements as explained above. They could only seek enfranchisement  
under the group provisions of Ch 1 of Pt 1 of the 1993 Act. The consequence  
of this was that landlords used the residency requirement to curtail severely  
their exposure to successful applications for enfranchisement. So long as they  
only granted long leaseholds to companies and would only permit assignment  
to companies, they ensured that the tenant could never be treated as resident  
in the premises.

c [9] The amendments introduced under the 2002 Act largely removed the  
residency requirement for enfranchisement and thereby allowed company  
tenants to qualify for enfranchisement.

[10] The 2002 Act introduced s 1(1ZA) and (1ZB). The former is in the  
following terms:

d 'Where a house is for the time being let under two or more tenancies, a  
tenant under any of those tenancies which is superior to that held by any  
tenant on whom this Part of this Act confers a right does not have any right  
under this Part of this Act.'

e [11] The clear intention of this was to resolve conflicts between different  
tenants which would have surfaced because of the removal of the residency  
requirement. The subtenant can enfranchise, those higher up the ladder  
cannot.

f [12] Mr Gaunt QC, who appears for the appellant, argues that the purpose  
of s 1(1ZB) is likewise to resolve potential conflicts between different tenants at  
different levels in the chain. Thus the section is dealing with who shall have the  
right to enfranchise when there is a tenant of the house and also a tenant of a  
flat forming part of the house, those being different people. He argues that the  
legislation is clear and accords with this construction.

g [13] Alternatively he argues that, if there is any ambiguity, it should be  
resolved in favour of his construction. In support of this he relies in particular  
upon the near-contemporaneous Leasehold Reform (Notices) Amendment  
Regulations 2002, SI 2002/1715 (the 2002 regulations) which may be relied  
upon as an aid to construction under the principles set out in *Hanlon v Law  
Society* [1980] 2 All ER 199 at 218, [1981] AC 124 at 193–194. He also relies on a  
ministerial statement made in Parliament by Lord Falconer of Thoroton when  
h introducing what is now s 1(1ZB). He says that these demonstrate that what  
was in contemplation was a resolution of the right of enfranchisement between  
different tenants, just as s 1(1ZA) does. Thus, in so far as material, the notes to  
the 2002 regulations state:

j '9. Section 1(1ZA) of the Act ... provides that head lessees do not have  
rights to enfranchise or a lease extension where there exist inferior tenancies  
which confer on the tenant the right to enfranchise and a lease extension  
under the Act. Under section 1(1ZB) of the Act, where there exists an  
inferior long tenancy (as defined under section 7 of the Leasehold Reform,  
Housing and Urban Development Act 1993) of a flat which confers on the

tenant the right to enfranchise or a new lease under that Act the head lessee only has the right to enfranchise or a lease extension under the Act where he meets the residence requirement ... It is therefore necessary to provide details of any other long tenancies.'

[14] Mr Radevsky, who appears for the respondents, concedes the purpose of s 1(1ZA), the 2002 regulations and the ministerial statement indicate that one mischief addressed by the legislation was the resolution of rights of enfranchisement between different tenants at different levels in the chain. He also concedes that that is likely to be the sort of case in which s 1(1ZB) will most frequently be deployed. However he argues that neither the 2002 regulations nor the minister explored or considered the full scope of the section. So, they are illustrative of the application of the section in a normal case but are not definitive of its full scope. He also argues that it is not legitimate to have regard to these extraneous aids to construction because the section is not ambiguous. Had the legislature intended only to resolve conflicts between tenants at different levels in a chain of tenancies it could have done so with ease. For example it could have referred to subtenants or subletting or it could have referred to head leases and inferior leases as the 2002 regulations do. He also submits that there is nothing surprising in the legislature having retained a residency requirement in the sort of case we are here concerned with. Why should a company, which cannot be a resident for these purposes, be entitled to enfranchise?

[15] I do not accept these arguments. As explained above, one of the purposes of the changes to the 1967 Act effected by the 2002 Act was to change the law so as to allow companies to obtain enfranchisement. To do that the residence requirement was removed from most of the enfranchisement provisions. Since that is so, one has to inquire why, in the special circumstances of s 1(1ZB), the residence requirement is retained. Mr Gaunt's construction is consistent with a logical purpose to the section, namely to resolve which of two or more people should have the right to seek enfranchisement. In this respect it seeks to achieve a similar result to s 1(1ZA). By contrast, it is difficult to see what purpose would be served were Mr Radevsky's construction correct. Indeed, as Mr Gaunt points out, were one to accept Mr Radevsky's construction, it would have the effect that, in a situation like the present one, although the appellant could not obtain enfranchisement of its interest in the house, it could still obtain extension of each of the leases for all the individual flats of which it is the qualifying tenant. This would mean that it would have longer leases for the flats than it would have for the common parts. Mr Gaunt described such an outcome as bizarre. I agree.

[16] In the result I accept Mr Gaunt's argument that the reference in s 1(1ZB) to a situation '[w]here a flat forming part of a house is let to a person who is a qualifying tenant of the flat for the purposes of Chapter 1 or 2 of Part 1 of the [1993 Act]', the tenant of the flat is someone other than the tenant of the house. So construed, the section does not apply to the appellant and, therefore, does not prevent it from obtaining enfranchisement.

[17] This was the only issue raised in the notice in reply and argued before the judge. However, very shortly before the appeal came on for hearing, the respondent served a respondents' notice in which they seek to rely on s 1(1B) of the 1967 Act. This provides:

a        'This Part of this Act shall not have effect to confer any right on the tenant  
of a house under a tenancy to which Part 2 of the Landlord and Tenant Act  
1954 (c. 56) (business tenancies) applies unless, at the relevant time, the  
tenant has been occupying the house, or any part of it, as his only or main  
residence (whether or not he has been using it for other purposes)—(a) for  
b        the last two years; or (b) for periods amounting to two years in the last ten  
years ...'

[18] The respondents argue that the appellant is a tenant to which Pt 2 of the  
1954 Act applies. This is because s 23(1) of that Act defines tenancies to which  
Pt 2 applies as being those where the demised premises include premises  
c        occupied for business purposes. Since, according to the respondents, the  
appellant is a commercial landlord, it does occupy the premises for business  
purposes. For these reasons s 1(1B) applies. The appellant is not entitled to  
enfranchisement because, being a company, it cannot meet the residence  
requirement set by that section.

d        [19] This raises a number of issues. First, Mr Gaunt relies upon the decision  
of this court in *Bagettes Ltd v GP Estates Co Ltd* [1956] 1 All ER 729, [1956] Ch 290  
in support of the proposition that the 1954 Act does not apply to the tenancy of  
a party who sublets flats in a building. Mr Radevsky suggests that that case may  
not apply here or may not be good law in the light of Lord Nicholls of  
Birkenhead's speech in *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995]  
e        4 All ER 831 at 839, [1996] AC 329 at 339–340. Second, Mr Gaunt says that the  
1954 Act does not apply because the relevant lease contains a prohibition on  
business user. Mr Radevsky's response is to say that, on its true construction,  
this clause does not prohibit commercial subletting. Alternatively he argues  
that the landlord must have been taken to have waived this prohibition. Third,  
f        Mr Gaunt argues that, because this issue was not raised earlier, neither party  
has served evidence relating to the question of whether, in fact, the appellant  
carries on a relevant business in the premises. For that reason he says that the  
respondents have failed to demonstrate that s 1(1B) applies. Mr Radevsky's  
response is to say that there is sufficient material before the court to allow it to  
be reasonably confident that a relevant business is being conducted in the  
g        premises and, if it is not, the proper course would be to remit this case to the  
county court for further consideration.

[20] In addition to these points, Mr Gaunt raises a matter of practice. He  
refers to the provisions of para 7(1) of Sch 3 to the 1967 Act which sets the  
background against which this application to admit a new objection should be  
h        considered. It is in the following terms:

j        'Where a tenant of a house gives the landlord notice in accordance  
with Part 1 of this Act of the tenant's desire to have the freehold or an  
extended lease, the landlord shall within two months give the tenant a  
notice in reply in the prescribed form stating whether or not the landlord  
admits the tenant's right to have the freehold or extended lease (subject to  
any question as to the correctness of the particulars given in the tenant's  
notice of the house and premises); and if the landlord does not admit the  
tenant's rights, the notice shall state the ground on which it is not  
admitted.'

[21] Mr Gaunt says that this court should not allow this new point to be raised particularly where, as here, it will inevitably involve an investigation of issues of fact to which neither party has turned its attention. He says that there is no reason why the approach adopted by this court in *Pittalis v Grant* [1989] 2 All ER 622 at 626–627, [1989] QB 605 at 611 should not apply here. This point should have been taken at first instance and it is too late to raise it now.

[22] Mr Radevsky says that this approach is too narrow. Although Sch 3 uses mandatory language in relation to the content of the notice in reply, this does not mean that the landlord is excluded from putting all relevant arguments before the court. On the contrary, he says that these mandatory requirements can be largely ignored. There is no sanction if the additional grounds are added later, save that the tenant may be compensated in costs. He relies in particular on the following passage in *Hague on Leasehold Enfranchisement* (4th edn, 2003) p 130 (para 5-19):

‘... the failure to serve a Notice in Reply, (or an invalid or incomplete one), either within the two-month time limit or at all, has no practical adverse consequences for the landlord ... In particular, it does not prevent the landlord from later challenging the validity of the tenant’s claim ... Overall, it is hard to see exactly what useful purpose the Notice in Reply serves in the form that has been prescribed.’

[23] A number of county court decisions are cited by the authors in support of this passage.

[24] Mr Gaunt does not suggest that the provisions of para 7(1) in Sch 3 are so rigid that a landlord can never rely on a ground which was not set out in his notice in reply. Furthermore this court is not being invited to consider in what circumstances and subject to what limitations, if any, the landlord can raise new objections before a court of first instance. The issue here is whether the respondents should be allowed to raise this ground for the first time on appeal. In my view they should not. Because this point was only raised just before the appeal, the appellant has been deprived of the opportunity to consider and put forward evidence on the issues. It is only in exceptional circumstances that it would be appropriate to refer a matter back for further consideration by the trial judge. Here there is no suggestion that this point could not have been raised earlier nor have we been presented with any compelling reason why this should be allowed to be raised at this stage.

[25] For these reasons, I would allow this appeal.

**JONATHAN PARKER LJ.**

[26] I agree.

*Appeal allowed.*

Kate O’Hanlon Barrister.



a **Pabari v Secretary of State for Work and Pensions and another**

[2004] EWCA Civ 1480

b COURT OF APPEAL, CIVIL DIVISION

BROOKE, DYSON LJ AND HOLMAN J

11 OCTOBER, 10 NOVEMBER 2004

c *Child – Maintenance – Child support – Absent parent – Maintenance assessment – Exempt income – Housing costs – Housing costs necessarily incurred for purpose of purchasing, renting or otherwise securing possession of home – Absent parent remortgaging home and incurring higher housing costs – Meaning of ‘necessarily incurred’ – Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815, Sch 3, para 4(1)(a).*

d A wife and her husband bought a house in their joint names with an endowment mortgage which would mature when the husband reached the age of 50. The marriage later broke down. The husband was the absent parent and he was assessed to child maintenance by the Child Support Agency under the Child Support (Maintenance Assessments and Special Cases) Regulations 1992. That assessment took into account his own ‘housing costs’ which included the mortgage payments. The husband and wife were divorced; the final order for ancillary relief included the requirements that the husband pay the wife a lump sum and transfer his interest in the mortgage endowment policies to her, and that the wife transfer her interest in the house to the husband. The effect of that order was that the husband had to remortgage the house in order to raise the lump sum and be able to transfer the policies. He obtained a larger mortgage for a term ending on approximately the same date as the original mortgage would have ended. His mortgage payments increased. The Child Support Agency reassessed his child maintenance at a lower amount, treating the full amount of his new mortgage payments as housing costs. The wife appealed to a child support appeal tribunal on the ground, inter alia, that as it had not been necessary for the husband to obtain a mortgage for so short a term, the whole amount of the mortgage payments should not be included in the assessment as housing costs as it followed that the payments were not ‘necessarily incurred’ for the purpose of purchasing or securing possession of the house as was required by para 4(1)(a)<sup>a</sup> of Sch 3 to the 1992 Regulations. The tribunal rejected that ground of appeal, and her appeal to a child support commissioner was also dismissed. The wife appealed against the commissioner’s decision on a point of law.

j **Held** – The word ‘necessarily’ in para 4(1)(a) of Sch 3 to the 1992 regulations was linguistically irreducible. Its context determined that it had to be given its proper force, but not a strained force. The wording and purpose of para 4(1)(a) set a high threshold, but it had to be interpreted and applied sensibly, with appropriate regard to the realities of property acquisition and of the mortgage market. In practice the focus was likely to be on the sequence of events that led to the mortgage arrangements and the reason the parent gave for making that decision.

a Paragraph 4, so far as material, is set out at [8], [9], below

In the instant case the commissioner had correctly identified the conceptual line drawn by the law by the test which he had to apply and it had been open to him to conclude that as the husband had merely remortgaged in order to release the endowment policies to the wife and to raise the lump sum, the housing costs had been necessarily incurred even though the husband had not used the occasion as an opportunity to extend the previous term. The appeal would therefore be dismissed (see [37]–[41], [43], [46], [47], [51], [52], [55], [59]–[61], below). a

Dicta of Lord Hoffmann in *Moyna v Secretary of State for Work and Pensions* [2003] 4 All ER 162 at [19], [20], [23]–[25] and of Lord Mustill in *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289 at 294–295, 298 applied. b

## Notes c

For child support, see 5(3) *Halsbury's Laws* (4th edn reissue) paras 825–900.

For the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815, see 4 *Halsbury's Statutory Instruments* (2003 issue).

The 1992 Regulations were revoked with effect from 3 March 2003 by the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, SI 2001/155. d

## Cases referred to in judgments

*Handyside v UK* (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR. e

*Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 4 All ER 162, [2003] 1 WLR 1929; *rvsg* [2002] EWCA Civ 408, [2002] All ER (D) 425 (Mar).

*R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, [2002] 2 WLR 754. f

*South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289, [1993] 1 WLR 23, HL.

## Appeal

Minaxi Pabari appealed with permission of Keene LJ from the decision of a Child Support Commissioner (Edward Jacobs) on 1 September 2003 dismissing her appeal from the decision of the Southampton child support appeal tribunal on 13 December 2002 dismissing her appeal against the assessment of child maintenance payable by the second respondent, her former husband, Nilesh Pabari, on the basis that the full amount of Mr Pabari's periodic mortgage repayments were to be treated as housing costs under paras 1, 4 of Sch 3 to the Child Support (Maintenance Assessments and Special Cases) Regulations 1992. The first respondent to the appeal was the Secretary of State for Work and Pensions. The facts are set out in the judgment of Holman J. g  
h

*Richard Castle* (instructed by *Moore & Blatch*, Southampton) for Mrs Pabari. j

*Marie Demetriou* (instructed by the Solicitor for the Department of Work and Pensions) for the Secretary of State.

*Caroline Willbourne* (instructed through the *Bar Pro Bono Unit*) for Mr Pabari.

a 10 November 2004. The following judgments were delivered.

HOLMAN J (giving the first judgment at the invitation of Brooke LJ).

#### THE STATUTORY FRAMEWORK

b [1] This appeal concerns the approach to 'housing costs' for the purpose of determining exempt income when making a maintenance assessment under the Child Support Act 1991. It is convenient to set out the relevant statutory framework before describing the facts of the case. Considerable changes to the system have been enacted but not yet brought into force, and I refer only to the law, system and terminology currently in force and applicable to this case.

c [2] As part of the overall process of making a maintenance assessment under the 1991 Act, it is necessary to calculate the 'assessable income' of each parent. This is his or her net income minus his 'exempt income, calculated or estimated in accordance with regulations' (Sch 1, para 5). It is also necessary (although not relevant to the present case) to calculate the absent parent's 'protected income' (para 6) since, if his disposable income after deduction of the maintenance would d be less than his protected income, the maintenance assessment is adjusted.

[3] These calculations are performed in accordance with the 1991 Act itself and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815. In what appears to be the jargon of those who work daily with these regulations, I will refer to them as the MASC Regulations 1992.

e [4] By reg 9 of the MASC Regulations 1992, the exempt income of the absent parent shall be the aggregate of various specified amounts. One of these is 'an amount in respect of housing costs determined in accordance with regulations 14 to 18'. Regulation 14 provides:

f 'Schedule 3 shall have effect for the purpose of determining the costs which are eligible to be taken into account as housing costs for the purposes of these regulations.'

[5] Schedule 3 is headed 'Eligible housing costs'. Paragraph 1 provides:

g 'Subject to the following provisions of this Schedule, the following payments in respect of the provision of a home shall be eligible to be taken into account as housing costs for the purposes of these Regulations—(a) payments of, or by way of, rent; (b) mortgage interest payments ... (d) interest payments on loans for repairs and improvements to the home ...'

h [6] In the case of exempt (but not protected) income, para 3 provides:

'(1) The additional provisions made by this paragraph shall have effect only for the purpose of calculating or estimating exempt income.

j (2) Subject to sub-paragraph (6), where the home of an absent parent or, as the case may be, a parent with care, is subject to a mortgage or charge and that parent makes periodical payments to reduce the capital secured by that mortgage or charge of an amount provided for in accordance with the terms thereof, the amount of those payments shall be eligible to be taken into account as the housing costs of that parent ...

(6) For the purposes of sub-paragraphs (2) and (3), housing costs shall not include—(a) any payment of arrears or payments in excess of those which

are required to be made under or in respect of the mortgage, charge or agreement to which either of those sub-paragraphs relate ...'

[7] However, the whole of Sch 3 is subject to the overall limitation of para 4. Paragraph 4 has been the subject of amendment. In the original MASC Regulations, as made in 1992, it provided:

'(1) Subject to the following provisions of this paragraph the housing costs referred to in this Schedule shall be included as housing costs only where—(a) they are incurred in relation to the parent's home ...'

[8] Regulation 15 of the Child Support (Miscellaneous Amendments) (No 2) Regulations 1996, SI 1996/3196 substituted a new head for head (a) of sub-para (1) of para 4. In its substituted form, para 4(1) of the MASC Regulations 1992 now provides:

'Subject to the following provisions of this paragraph the housing costs referred to in this Schedule shall be included as housing costs only where—(a) they are necessarily incurred for the purpose of purchasing, renting or otherwise securing possession of the home for the parent and his family, or for the purpose of carrying out repairs and improvements to that home ...'

[9] The 1996 amendment regulations also added further subparagraphs to para 4, including sub-para (4) which provides:

'Where a loan has been obtained only partly for the purposes specified in sub-paragraph (1)(a), the eligible housing cost shall be limited to that part of the payment attributable to those purposes.'

[10] The issue in this case centres on the application of the words 'necessarily incurred' in para 4(1)(a), as substituted, to the facts of the case. However, before turning to the facts it is convenient also to set out para 2 of Sch 3. This provides:

'For the purposes of paragraph 1(d) "repairs and improvements" means major repairs necessary to maintain the fabric of the home and any of the following measures undertaken with a view to improving its fitness for occupation ...'

There then follows a long list of improvements such as installation of a bath, shower, washbasin or lavatory; damp proofing; provision of electric lighting; and finally '(k) other improvements which the child support officer considers reasonable in the circumstances'.

#### THE FACTS

[11] The appellant before us is Mrs Minaxi Pabari. She was formerly married to Mr Nilesh Pabari. They have two children, Devini who is now aged 12, and Ishani who is now aged 9.

[12] Mr Pabari was born in April 1962. We were told, and it was not challenged, that in 1987, when he was about 25, he bought a house jointly with his brother. They jointly obtained an endowment mortgage with a 25-year term, maturing in about 2012 or 2013 when he himself will be about 50. In about 1992, after Mr and Mrs Pabari had married, they and the brother bought a new house, again with an endowment mortgage maturing on or about the same date as the previous one. Finally, in about 1999 Mr and Mrs Pabari bought and moved to a new house of their own at 12 Pasture Close, Bushey. They obtained an



a endowment mortgage in their joint names and again this matured on or about the same date. Thus, on each occasion that Mr Pabari had mortgaged or remortgaged his home, the endowment policies matured on or about the same date, always when he would be about 50.

b [13] Unfortunately the marriage broke down. Mrs Pabari moved to Southampton. The children live with her, so she is the parent with care and Mr Pabari is the absent parent for the purpose of the child support legislation and scheme. Mr Pabari remained at 12 Pasture Close. There was a divorce. A final order as to ancillary relief was made by consent on 22 March 2001. It provided for a clean break. It included a recital: 'And upon the parties agreeing that the respondent [Mr Pabari] will re-mortgage 12 Pasture Close, Bushey, in order to pay the petitioner [Mrs Pabari] a lump sum.' The operative parts of the order c provided amongst other matters that (i) Mr Pabari must pay to Mrs Pabari a lump sum of £56,000 by 22 May 2001; (ii) simultaneous with that payment, Mr Pabari must transfer to Mrs Pabari various assets including 'all his legal and beneficial interest in' the two endowment policies which secured repayment of the mortgage; and (iii) upon (i) and (ii), above, Mrs Pabari must transfer to Mr Pabari d all her legal and beneficial interest in 12 Pasture Close subject to the mortgage secured thereon.

[14] All the above was duly done. However, and as the order and the recital contemplated, Mr Pabari necessarily had to remortgage 12 Pasture Close, for two reasons. First, he needed to increase the amount borrowed so as to raise the lump sum of £56,000. Secondly, he had to transfer to Mrs Pabari his interest in the e endowment policies that secured repayment of the existing mortgage.

[15] By 2001, endowment mortgages had become unpopular and Mr Pabari obtained a repayment mortgage. No complaint is made of that. But he obtained the mortgage for a term whose redemption date was on or about the same date as the previous mortgages, ie a term of about 12 years until 2013. According to f para 10 of the decision of the commissioner (Mr Edward Jacobs), Mr Pabari told the commissioner that it was—

'his choice [to retain the same redemption date]. He was under no pressure from the lender or anyone else. So, he took out a short repayment mortgage rather than one for 25 years.'

g [16] Prior to these events, the total child maintenance payable by Mr Pabari as the absent parent had been assessed by the Child Support Agency as £143.38 per week. After the remortgaging, the child maintenance payable by Mr Pabari was reassessed at £106.63 per week. The reduction was attributable to the Child Support Agency treating the full amount of Mr Pabari's new periodic mortgage h repayments as 'housing costs' when calculating his exempt income and making the ultimate maintenance assessment.

[17] The endowment mortgage in place immediately prior to implementation of the order for ancillary relief secured a loan of £75,000 and the repayments of interest and endowment premiums totalled about £120 per week. The new, j repayment, mortgage secured a loan of £120,000 and the repayments of interest and capital total about £253 per week. If the repayment mortgage had been for a longer term than 12 years, for instance for a 25-year term, the periodic repayments would be lower and the maintenance assessment higher.

[18] Mrs Pabari makes no complaint that Mr Pabari obtained a repayment mortgage; and no complaint that he increased the borrowing from £75,000 to £120,000 since the order contemplated that he would do so (in fact he only

increased the borrowing by £45,000 although the lump sum was just under £57,000). But she does complain that he obtained a mortgage for a 12-year term. She contends that so short a term was not, and is not, necessary and that the whole of the periodic repayments are not 'necessarily incurred for the purpose of ... securing possession of' Mr Pabari's home. She contends that, in calculating his exempt income, there should be an apportionment under para 4(4) of Sch 3 to the MASC Regulations 1992 and that Mr Pabari should be credited only with the level of repayments he would have to have made under a repayment mortgage with a term of 24 or 25 years. She says that a 25-year term is the 'normal' term and that a term of 24 years would coincide with Mr Pabari reaching the 'normal' retirement age of 65.

#### THE COURSE OF THE PROCEEDINGS

[19] A parent with care is entitled to appeal to a tribunal and Mrs Pabari did so. On 13 December 2002 the tribunal, which consisted of a legally qualified chairman and a financially qualified member, allowed her appeal on another point (which is no longer in issue and not relevant to this appeal) but rejected her appeal in so far as it related to the mortgage. There is a right of appeal on a point of law only to a child support commissioner. Mrs Pabari did appeal. On 1 September 2003 Mr Commissioner Jacobs dismissed the appeal, although his reasoning differed from that of the tribunal.

[20] Mrs Pabari now appeals to this court. Mr Commissioner Jacobs had refused leave to appeal, but Keene LJ later granted permission in view of the conflict between decisions of commissioners to which I refer in [49], below.

[21] The respondents to the appeal are the Secretary of State for Work and Pensions and Mr Pabari himself. We are grateful to Ms Caroline Willbourne, counsel, who kindly appeared on behalf of Mr Pabari pro bono.

#### THE DECISION OF MR COMMISSIONER JACOBS

[22] The commissioner said (at para 6 of his decision) that the key issue raised by the appeal was 'how to interpret and apply the requirement that, in order to be eligible for child support purposes, an absent parent's housing costs must be necessarily incurred' under para 4(1)(a) of Sch 3 to the MASC Regulations 1992. After referring to two decisions of other commissioners, to which I will later briefly refer, Mr Commissioner Jacobs described his own 'analysis of the legislation'. He said (at para 39 of his decision) that para 4(1)(a) set a 'high threshold', given both the wording ('necessarily incurred') and the anti-avoidance purpose of the provision. 'Nevertheless' he said (at para 40)—

'it must be interpreted and applied sensibly, with appropriate regard to the realities of property acquisition and of the mortgage market. In particular, it is not appropriate to interpret para 4(1)(a) to disallow all housing costs that are not absolutely essential.'

[23] The commissioner referred (at para 49 of his decision) to costs being eligible provided they were 'reasonably' incurred for the purposes of para 4(1)(a). That is clearly wrong. But since the whole thrust of the commissioner's reasons was focussed on the word 'necessarily' and he was at pains elsewhere to distinguish 'necessarily' from 'reasonably', I am satisfied that para 49 contains a mere drafting or typing slip. It is not what the commissioner meant to say, or thought; and it does not invalidate his reasoning or decision or afford any ground of appeal.

[24] He said:

‘52. ... The only issue is whether the costs were, in their amount, necessarily incurred. If they were, they are eligible for housing costs. If they were not, they are not eligible. In practice, the focus is likely to be on the sequence of events that led to the mortgage arrangement that is under scrutiny and the reasons the parent gives for making that decision. A parent will need a more persuasive reason to explain some decisions than others. So, a decision to cut the mortgage term by half, thereby substantially increasing the mortgage repayments, will have to be explained. But a decision in the present economic climate to move from an endowment mortgage to a more expensive repayment mortgage is readily explained as reducing the risk that is inherent in endowment policies.’

53. This analysis produces a sensible and workable interpretation of the housing costs provisions that takes account of their anti-avoidance aspects without producing unrealistic outcomes.’

[25] The commissioner then applied his analysis to the facts of the case and said:

‘54. In strict legal terms, following his divorce the absent parent redeemed one mortgage and took out another. However, that is an unrealistic way of looking at the matter. For practical and economic purposes, the absent parent found a new way of financing his existing ownership of his home. This is reflect[ed] in common parlance. It is not unusual to speak of moving a mortgage to another lender rather than of redeeming and taking out a new mortgage. Seen in that way, it is not surprising that he decided to keep to the same redemption date as before.’

55. There is no evidence at all to suggest that the absent parent had in mind any purpose other than retaining his home. If he had not raised the money, he would have had to sell the home in order to honour the court order. The parent with care has referred to the divorce documents, but I have already explained why they do not assist her argument.

56. Nor does the history of the case suggest that the costs were not necessarily incurred. Taking a realistic and practical approach to necessity, leads me to this analysis. The absent parent needed finance in order to remain in his home. He lost the means of financing his purchase of the home, because the endowment policies were transferred into his wife’s sole name. And the economic climate did not favour taking out new endowment policies, regardless for how long a period. So, he had to take out a repayment mortgage for an increased amount. But what about the period of the mortgage? The decision was certainly taken in the context of continuity of occupation of the same home. And there was, as a matter of substance if not of legal form, continuity in the mortgage arrangement, subject only to the adjustments required by the absent parent’s changed circumstances following his divorce. In those circumstances, for the purposes of para 4(1)(a) I consider that the costs were necessarily incurred.’

#### THE ARGUMENTS BEFORE US

[26] On behalf of Mrs Pabari, Mr Castle submitted that Sch 3 contains within it anti-avoidance provisions. One of those is para 3(6), quoted in [6], above, which clearly excludes as housing costs voluntary repayments of capital in excess

of those required under the mortgage deed. Another is para 4(1). He stressed that the new head (a), substituted in 1996, was clearly designed to further tighten anti-avoidance. He submitted that although head (a) employs the word 'are', it nevertheless refers or relates to the time when the mortgage was first incurred or taken out, i.e. the time when a legal liability was first incurred; not the continuing, periodic liability to pay under the mortgage. He submitted that para 4(1)(a), as substituted, relates both to the purpose for which the costs were incurred and also the size or amount of them. And he submitted that if regard has to be had to size or amount, then (in the case of a mortgage) regard must also be had to duration or term. He submitted that a normal term would be one of 25 years or (if earlier) to normal retirement date, and that a shorter term cannot be described as necessary or necessarily incurred. He accepts that the test is not purely objective, since para 4(1)(a) refers to 'the' housing costs and 'the' home of 'the' parent, and he submitted that the test is a subjectivised objective test. He specifically accepted that the first sentence of para 40 of the commissioner's decision, quoted in [22], above, is correct or appropriate, where the commissioner said that para 4(1)(a) 'must be interpreted and applied sensibly, with appropriate regard to the realities of property acquisition and the mortgage market'. But Mr Castle submitted that in his consideration of the facts of the case, Mr Commissioner Jacobs had allowed a test of reasonableness to creep in or pervade his final conclusion. He fastened on the use of the word 'reasonably' in para 49 (with which I have already dealt in [23], above), and the sentence 'Seen in that way, it is not surprising that he decided to keep to the same redemption date as before' at the end of para 54 (quoted in [25], above). Mr Castle submitted that the phrase 'it is not surprising that' is not the language of necessity but more the language of reasonableness.

[27] Mr Castle made a separate and discrete submission that the commissioner did not correctly apply the burden of proof. Mr Castle submitted that there is a burden of proof upon a parent, in this case the absent parent, to prove that the housing costs which he claims should be exempted, are housing costs which are necessarily incurred for a specified purpose. He submitted that passages in the decision indicate that the commissioner did not have in mind, or did not correctly apply, the burden of proof. He referred to the phrase 'it is not surprising that' in para 54; the sentence 'There is no evidence at all to suggest that the absent parent had in mind any purpose other than retaining his home' in para 55; and the sentence 'Nor does the history of the case suggest that the costs were not necessarily incurred' in para 56. He submitted that none of those approaches or comments reflect the burden on the absent parent. I do not accept the submission, and it is convenient to dispose of it now. There is of course a burden of proof on the parent to supply evidence and to satisfy the decision-maker of the primary facts. This the absent parent did, and indeed so far as I am aware there was and is very little dispute about the primary facts on this aspect of the case. Once the facts have been established, it is not in my view helpful or appropriate to speak of a burden of proof. The task of the decision-maker is simply to make a correct legal analysis, and then correctly to apply the law to, and make a judgment about, the facts so established.

[28] On behalf of the Secretary of State, Ms Demetriou submitted that the appellant's case, and Mr Castle's argument, amounted to equating costs 'necessarily incurred' with 'absolutely essentially' or 'barest minimum of essential costs'. She suggested that such a test would require in every case an exhaustive survey of the mortgage market to see if perchance a cheaper mortgage



a could have been obtained elsewhere, and would enable the parent with care to question the choice of lender. Further, it would probably require an endowment mortgage to be taken as the yardstick in any case. Instead, she submitted, the words 'necessarily incurred' must be given a sensible and workable meaning as the commissioner had given to them. In the context of these regulations, 'necessarily' is not a hard-edged word, but implies a band on a spectrum, b somewhere between essential and reasonable.

[29] On behalf of Mr Pabari, Ms Willbourne particularly emphasised the facts and history of the case. Mr Pabari had necessarily had to remortgage so as to transfer the endowment policies and pay the lump sum, and it would strain para 4(1)(a) too far, and beyond its purpose, to say that at that point he should c have doubled the term.

#### DISCUSSION

[30] An appeal lies to this court from a decision of a child support commissioner only 'on a question of law' (see s 25(1) of the 1991 Act). The focus d of the present appeal is upon the application of the words 'are necessarily incurred for the purpose of purchasing ... or otherwise securing possession of the home for the parent' where they appear in para 4(1)(a) of Sch 3 to the MASC Regulations 1992, and in particular on the word 'necessarily'. The word 'necessarily' is an ordinary English word, not a technical legal term. It is accordingly important first to establish the task of, and permissible discretion in, e this court on an appeal of this kind. There is clear guidance from the House of Lords.

[31] *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 4 All ER 162, [2003] 1 WLR 1929 concerned a statutory test of incapacity to cook (the 'cooking test') for entitlement to disability living allowance. The relevant f statutory words and the factual context were very different from the present case; but they fell to be considered within a similar hierarchy of adjudication by an official with appeals to a tribunal and on a point of law to a commissioner and this court. In this court ([2002] EWCA Civ 408, [2002] All ER (D) 425 (Mar)), Kay LJ did not accept that one could have facts on which different tribunals could g properly reach different conclusions about whether the 'cooking test' had been satisfied. In his view, the test was intended to be straightforward and to produce the same answer on the same facts. So he strove to give to the words of the statute a meaning which could be applied by an essentially arithmetical approach. On appeal, the House of Lords reversed the decision. Lord Hoffmann, with h whom the rest of their Lordships agreed, said ([2003] 4 All ER 162 at [19]) that the statutory words of the 'cooking test' involved taking a broad view of the matter and making a judgment; and (at [20]):

'In any case in which a tribunal has to apply a standard with a greater or i lesser degree of imprecision and to take a number of factors into account, there are bound to be cases in which it will be impossible for a reviewing court to say that the tribunal must have erred in law ... I respectfully think that it was unrealistic of Kay LJ to think that he was able to sharpen the test to produce only one right answer.'

[32] Lord Hoffmann pointed out (at [23]) that—

'many words or phrases are linguistically irreducible in the sense that any attempt to elucidate a sentence by replacing them with synonyms will change rather than explain its meaning.'

However (see [24]), there is still a—

'distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey by using that word in a sentence. The latter depends not only upon the conventional meanings of the words used but also upon syntax, context and background.'

The latter is a question of law:

'The meaning of an English word is not a question of law because it does not in itself have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law.' (See [2003] 4 All ER 162 at [24].)

[33] In the context of a hierarchy of tribunals in that case (as there are in this case) Lord Hoffmann said (at [25]):

'There is a good deal of high authority for saying that the question of whether the facts as found or admitted fall one side or the other of some conceptual line drawn by the law is a question of fact ... What this means in practice is that an appellate court with jurisdiction to entertain appeals only on questions of law will not hear an appeal against such a decision unless it falls outside the bounds of reasonable judgment.'

[34] This echoes the observations of Lord Mustill (with whom the rest of their Lordships agreed) in *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289, [1993] 1 WLR 23. The factual context was very different. On the facts of that case, the Monopolies and Mergers Commission could only accept a reference if it related to a 'substantial part' of the United Kingdom. The commission decided that the reference in point did so relate. Within proceedings for judicial review, the judge and the Court of Appeal considered that it did not. In the House of Lords, Lord Mustill said ([1993] 1 All ER 289 at 294–295, [1993] 1 WLR 23 at 29) that (as is indeed obvious) the word 'substantial' 'accommodates a wide range of meanings'. Between the extremes of its meaning—

'there exist many shades of meaning, drawing colour from their context. That the protean nature of the word has been reflected in the decided cases is ... made quite clear by the judgment of [the judge] ...'

Lord Mustill said, however:

'The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision.'

[35] Lord Mustill concluded ([1993] 1 All ER 289 at 298, [1993] 1 WLR 23 at 32) that the appreciation of the commission of 'substantive' (sic as reported, but *quaere* should be 'substantial') was broadly correct. He continued:

a 'Once the criterion for a judgment has been properly understood, the fact  
b that it was formerly part of a range of possible criteria from which it was  
c difficult to choose and on which opinions might legitimately differ becomes  
d a matter of history. The judgment now proceeds unequivocally on the basis  
e of the criterion as ascertained. So far, no room for controversy. But this  
f clear-cut approach cannot be applied to every case, for the criterion so  
g established may itself be so imprecise that different decision makers, each  
h acting rationally, might reach differing conclusions when applying it to the  
i facts of a given case. In such a case the court is entitled to substitute its own  
j opinion for that of the person to whom the decision has been entrusted only  
k if the decision is so aberrant that it cannot be classed as rational ... The  
l present is such a case. Even after eliminating inappropriate senses of  
m "substantial" one is still left with a meaning broad enough to call for the  
n exercise of judgment rather than an exact quantitative measurement.  
o Approaching the matter in this light I am quite satisfied that there is no  
p ground for interference by the court, since the conclusion at which the  
q commission arrived was well within the permissible field of judgment.'

d [36] I now apply these approaches to the present case.

[37] In my view 'necessarily' where it appears in para 4(1)(a) of Sch 3 is a  
linguistically irreducible word. We should be very careful not to replace it with  
a synonym in this case nor to paraphrase para 4, and I eschew any attempt to do  
so.

e [38] It is also a word which accommodates a range of meanings, although it is  
far less protean or wide than the word 'substantial' which Lord Mustill was  
considering.

[39] In my view it is possible and permissible to say where on the spectrum of  
exigency the word 'necessarily' is placed, and to say what it does not mean. It  
f does not mean merely reasonably, or sensibly or justifiably. It is higher on the  
g spectrum than that. Nor does it mean 'reasonably necessarily'. The maker of the  
h regulation has not qualified the word necessarily, so if there is a different shade of  
i meaning, or a different band on the spectrum, between 'reasonably necessarily'  
j and 'necessarily' simpliciter, it is the latter meaning and the latter band which the  
k regulation requires. But nor does the word 'necessarily' convey an absolute  
l meaning, such as absolutely essentially or inescapably. The context is, as  
m Mr Castle accepts, too subjective for that; and I agree with the submission of  
n Ms Demetriou that the regulation cannot sensibly require that minute scrutiny is  
o given not only to all possible mortgage options at the time of commencement,  
p but to continuing possible remortgage options. Further, 'necessarily incurred' in  
q para 4(1)(a) qualifies both the purpose of purchasing, renting or otherwise  
r securing possession of the home; and also 'the purpose of carrying out repairs and  
s improvements to that home'. There is a definition of 'repairs and improvements'  
t in para 2, quoted in [10], above. In relation to repairs it means 'major repairs  
u necessary to maintain the fabric of the home'. In relation to improvements it  
v means any of the measures listed in sub-para (a) to (k) 'undertaken with a view  
w to improving its fitness for occupation'. The measures themselves include at (k)  
x 'other improvements which the child support officer considers reasonable in the  
y circumstances'. So it is clear that although all repairs and improvements must,  
z because of para 4(1)(a), be 'necessarily incurred', consideration of repairs and  
improvements requires the application of a range of judgments by the  
decision-maker. The breadth and elasticity of para 2 (which employs words like

'major', 'maintain[ing] the fabric of the home', 'improving its fitness for occupation' and 'reasonable in the circumstances') would be otiose if 'necessarily incurred' was given too restrictive or absolute a meaning in para 4(1)(a). a

[40] So 'necessarily' must be given its proper force, but not a strained force. I agree with paras 39 and 40 of the decision of Mr Commissioner Jacobs (quoted in [22], above) where he said that para 4(1)(a) set a 'high threshold' but also that 'it must be interpreted and applied sensibly, with appropriate regard to the realities of property acquisition and of the mortgage market'. In my view Mr Castle was right to accept the appropriateness of that comment. b

[41] I also agree with the sense of the observations of Mr Commissioner Jacobs when he said (at para 52) (quoted more fully in [24], above):

'In practice the focus is likely to be on the sequence of events that led to the mortgage arrangement ... and the reasons the parent gives for making that decision. A parent will need a more persuasive reason to explain some decisions than others.'

c

[42] Beyond what I have stated in [37]–[41], above, I do not believe it possible to 'sharpen' the test where it appears in para 4(1)(a) of Sch 3 to the MASC Regulations 1992. d

[43] It follows from what I already have said that I consider that in paras 36–53 of his decision, under the heading 'My analysis of the legislation', Mr Commissioner Jacobs did (in the language of Lord Hoffmann) correctly identify the 'conceptual line drawn by the law' by the test of 'necessarily incurred' which he had to apply. In the language of Lord Mustill, the commissioner properly understood the 'criterion for a judgment' which he had to make. There is, in my view, no error of law in the analysis and approach which the commissioner identified for himself. e

[44] So his task, then, was to decide on which side of the conceptual line, or by application of the criteria as he had correctly understood them, the facts of the case fell. This he did in paras 54–56, under the heading, 'How does this analysis apply to the facts of this case?' f

[45] I agree with Mr Castle that the sentence within para 54 of the decision that 'it is not surprising that he decided to keep to the same redemption date as before' does not reflect the idea of necessity nor the correct test. To say that something is not surprising is far less exigent than to say it was necessary. If the reasoning of the commissioner had been contained in that paragraph alone, then I would have been driven to conclude that despite his previous careful and correct analysis, the commissioner had, at that point, fatally applied the wrong test. But the section of the decision has to be read as a whole. The nub of his reasoning is in para 56, quoted in [25], above. Here, the commissioner repeatedly refers to necessity and the costs being necessarily incurred. g  
h

[46] I acknowledge that another tribunal or commissioner might, without falling into error, have concluded that the decision of Mr Pabari not to extend the overall term of his mortgage, although reasonable, sensible or wise was not necessary. But that involves the exercise of judgment around the margins of the meaning of 'necessarily incurred'. In my view, the final decision whether, on the facts and in all the circumstances of the case, the costs were necessarily incurred involves the exercise of a judgment with which this court can only interfere if the decision of the commissioner fell outside the bounds of reasonable judgment. In my opinion it did not. In my opinion it was open to the commissioner to conclude that as Mr Pabari was merely remortgaging in order to release the j



a endowment policies to his former wife and raise the lump sum, the costs were necessarily incurred even although he did not use the occasion as an opportunity to extend the previous terms.

[47] I would accordingly dismiss this appeal.

#### DECISIONS OF OTHER COMMISSIONERS

b [48] Within his own reasoning and decision, Mr Commissioner Jacobs referred to two previous decisions of other commissioners, namely a decision of Mr Commissioner Williams in CCS/2742/2001 (3 September 2002) and a decision of Mrs Commissioner Brown in Northern Ireland (but applying identical legislation) in CSC4/02-03 (24 June 2003). Our attention was also drawn to a later and recent decision of Mr Commissioner Mesher in CCS/1707/2003  
c (31 March 2004) in which he considered not only those earlier decisions but also the decision of Mr Commissioner Jacobs in the present case.

[49] In CCS/2742/2001, the absent parent had, without pressure upon him to do so, remortgaged so as to reduce the term of the mortgage from 25 to 10 years, claiming that he was anxious that he might not be able to continue working  
d throughout the remaining term of the earlier mortgage. The tribunal held that the resulting increased payments were not necessarily incurred and Mr Commissioner Williams upheld its decision. In CSC4/02-03, the non-resident parent had similarly redeemed an earlier mortgage and remortgaged for a shorter term, thereby increasing the monthly repayments. The tribunal considered that the increased payments were not necessarily  
e incurred. On appeal, Mrs Commissioner Brown considered that para 4(1)(a) related only to the purpose of the mortgage and not to its term or the amount payable. She remitted the case for redetermination. Clearly, the facts of both those cases are distinguishable from the present case in which the expiry date of the terms has remained constant throughout. But the reasoning of the two  
f commissioners conflicts, and Mr Commissioner Jacobs did not agree with that of Mrs Commissioner Brown. In the recent case of CCS/1707/2003, the absent parent changed his mortgage from an endowment to a repayment mortgage and also reduced the term. Mr Commissioner Mesher disagreed with the view of Mrs Commissioner Brown. He said (at para 19 of his decision):

g 'I also agree that para 4(1)(a) is concerned with the purpose of a housing cost, but I do not agree that that requires ignoring questions of the amount of the cost involved.'

h He then suggested a 'two-stage test' or approach to remortgage cases, which may be helpful to analysis in some cases but which is not, in my view, essential. He continued by saying (at paras 19-20) that it is necessary in remortgage cases—

j 'to ask, looking at the new transaction as a whole, including all its terms and conditions, especially as to the interest rate, term of the loan and level of periodical payments required, whether the housing costs that would otherwise be calculated on the new mortgage or loan were necessarily incurred ...

20. The question is not whether the incurring of the particular housing costs is absolutely necessary, but whether it is necessary in a common sense and reasonable way, bearing in mind the interests of all concerned in a child support case and not merely the personal interests of the parent concerned.'

After a case-specific examination of the facts of that case, Mr Commissioner Mesher concluded that the change from an endowment to a repayment mortgage was 'necessarily incurred', but the reduction in the term was not. a

[50] I agree that Mrs Commissioner Brown was wrong in CSC4/02-03 to exclude consideration of the length of the term and the amount of periodic repayment of the mortgage; and I agree with the approach and thrust of what Mr Commissioner Mesher said in the passages quoted above, which is substantially to the same effect as how Mr Commissioner Jacobs directed himself in the present case. But with this caveat. The test of necessity must be considered in a commonsense and reasonable way; but the test remains necessity, and a lower test of sensibleness or reasonableness per se must not be substituted. What all these cases illustrate is that the decision requires careful examination of the facts and circumstances of the individual case, and the overall exercise of a judgment as to whether the costs in question are necessarily incurred. b  
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[51] I would dismiss this appeal.

### DYSON LJ.

[52] I agree that this appeal should be dismissed for the reasons given by Holman J. I add a few words of my own because the word 'necessarily' which lies at the heart of the appeal has given rise to difficulty. The appeal turns on the meaning of this word where it is used to describe housing costs that are 'necessarily incurred for the purpose of purchasing, renting or otherwise securing possession of the home for the parent ...' (see para 4(1)(a) of Sch 3 to the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815). d  
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[53] 'Necessary' is a somewhat protean word whose meaning depends on the context in which it is used. In some contexts, it means 'indispensable' or 'essential'. Thus, for example, s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a contract for the sale of an interest in land 'can only be made in writing'. To say that it is 'necessary' for such a contract to be in writing is to use the word in its strongest sense. It is indispensable that such a contract be in writing. There is no contract *unless* it is in writing. f

[54] In *R v Shayler* [2002] UKHL 11 at [23], [2002] 2 All ER 477 at [23], [2003] 1 AC 247 Lord Bingham of Cornhill said of the word 'necessary' where it appears in the phrase 'necessary in a democratic society' in art 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998): g

'It is plain from the language of art 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with art 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" (see *Handyside v UK* (1976) 1 EHRR 737 at 754 (para 48)).' h  
j

[55] In some contexts, the word 'necessary' has a weaker meaning. But it will usually bear the connotation of some degree of compulsion or exigency. The context will determine where on the spectrum of compulsion or exigency the word 'necessary' is placed (I adopt the words of Holman J at [39], above).

a [56] It could be argued in the present context (costs incurred in securing possession by means of a mortgage) that, to the extent that costs are incurred in excess of the *minimum necessary* to secure possession of the house, they are not necessarily incurred; or putting it another way, that costs are 'necessarily incurred' only if they are unavoidably or indispensably incurred. But Mr Castle does not so contend, and he is right not to do so. Such an approach is unrealistic and would in any event be difficult to apply in practice. It would mean that it had to be established that the parent had incurred the lowest possible mortgage costs. But, in the real world, many considerations are taken into account by a would-be mortgagor when choosing a mortgage. The level of the interest rate is obviously an important consideration. But mortgage A may offer a rate of interest of 6% which is fixed for five years, and mortgage B may offer a variable interest rate of 5%. Which of these two offers the cheaper costs? Is the position affected if mortgage A includes a penalty for early redemption, whereas mortgage B does not do so? And what if the level of redemption penalty differs as between the two mortgages? There are many different types of mortgages available. It may be quite impossible to say whether the costs incurred in relation to any particular mortgage are the cheapest possible mortgage costs. This is the practical reason why, in the present context, it cannot have been intended that the necessity test requires the making of detailed comparisons of mortgage costs of this kind.

[57] But, in my view, this is not the only reason why the necessity test is not limited to an objective assessment of the question whether the costs incurred are the cheapest possible costs. It may be very important to a mortgagor to have the security of a fixed-rate mortgage and/or to know that he can redeem his mortgage without penalty. It may be of importance to him that the mortgagee is a front rank building society, rather than a relatively unknown secondary bank. From his point of view, it may be *necessary* to obtain a mortgage from a well-known building society and on terms that enable him, so far as possible, to plan his affairs with some certainty. In my judgment, it would be most surprising if these entirely normal considerations were required to be left out of account when determining whether the mortgage costs were necessarily incurred.

[58] I do not consider that, in the context of para 4(1) of Sch 3 to the MASC Regulations 1992, the phrase 'necessarily incurred' requires such considerations to be ignored. In my judgment, in deciding whether costs are necessarily incurred, account can also be taken of the absent parent's circumstances. That is not to introduce a test of reasonableness. But it recognises that it may not be possible to say whether a person has necessarily incurred costs without having regard to his or her circumstances. These will, of course, include whether the person could have secured the possession of his house by incurring lower costs, ie whether lower costs were actually available to him or her as an option. But they may also include whether, having regard to those circumstances, he or she considered it to be possible to incur lower costs. To give another example: the absent parent may have a rational fear that he will be made redundant within the next ten years, and that he will then find it very difficult to find employment. He may be a somewhat cautious person, and want to pay off his mortgage as soon as possible, so as to allay his concern that he may be saddled with a mortgage after he has stopped earning. From his point of view, it is *necessary* to pay off the mortgage as soon as possible. In my judgment, this is a consideration to which a tribunal may have regard when deciding the question.

[59] As regards the facts of the present case, I agree that it was open to the commissioner to hold that the mortgage costs incurred by Mr Pabari were

necessarily incurred. The critical question was whether it was necessary for Mr Pabari in 2001 to obtain a mortgage for a term of about 12 years, so as to coincide with the redemption date of the earlier mortgages. No doubt, it would have been possible for him to obtain a 25-year mortgage, in the sense that there were lenders who would have been willing to grant him a mortgage for a 25-year term. But it is to be inferred that it was a matter of importance to Mr Pabari that his liability for mortgage repayments should come to an end by 2013. That is why 2013 was the redemption date for each of the mortgages that he obtained. From his point of view, having regard to his age and all his circumstances, it was necessary to be free of mortgage obligations in 2013. In my judgment, that was a factor which the commissioner was entitled to take into account in deciding that the costs were necessarily incurred on the facts of this case.

[60] For these reasons as well as those given by Holman J, I would dismiss this appeal.

**BROOKE LJ.**

[61] I agree with both judgments.

*Appeal dismissed.*

Kate O'Hanlon Barrister.



# Re Supporting Link Ltd

[2004] EWHC 523 (Ch)

CHANCERY DIVISION

SIR ANDREW MORRITT V-C

2-5, 8, 19 MARCH 2004

*Company – Compulsory winding up – Petition by Secretary of State – Secretary of State taking view that it is expedient in the public interest that company be wound up – Whether court should accept undertakings from company as alternative to winding it up on public interest grounds – Insolvency Act 1986, s 124A.*

The Secretary of State presented a petition to wind up the respondent company on public interest grounds under s 124A<sup>a</sup> of the Insolvency Act 1986. He relied on a number of grounds in support of his contention that it was just and equitable to wind up the company, including alleged misrepresentations. The company contended that it had ceased to carry on business in the manner complained of. It suggested, however, that any doubt on that score could be resolved by the court accepting undertakings offered by one of its principal directors, and that the petition should be dismissed on that basis.

**Held** – Unless the Secretary of State was content that a petition to wind up a company on public interest grounds should be disposed of on undertakings, the court should be very slow indeed to accept them in preference to making a winding-up order. If the court were satisfied that the offending business had ceased and it was prepared to trust the existing management, then it might be appropriate to dismiss the petition altogether. But if the court was not so satisfied or did not trust the existing management, it was hard to envisage a case in which it would be appropriate to dismiss the petition on undertakings as to the future conduct of the company's business. In the instant case, a number of the grounds relied on by the Secretary of State had been made out. The business of the company had been founded and continued on the basis of deception. It was just and equitable that the company should be wound up. The acceptance of undertakings from the company or the principal director, instead of making that order, would be an abdication, not an exercise, of the court's jurisdiction. Accordingly, the usual compulsory order would be made (see [49], [58], [66]–[68], below).

## Notes

For winding up on public interest grounds and for the meaning of 'just and equitable', see 7(3) *Halsbury's Laws* (4th edn) (2004 reissue) paras 444, 449.

For the Insolvency Act 1986, s 124A, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 980.

<sup>a</sup> Section 124A, so far as material, provides: '(1) Where it appears to the Secretary of State ... that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so ...'

**Cases referred to in judgment**

*Bamford Publishers Ltd, Re* (1977) Times, 4 June. a

*Blackspur Group plc, Re, Secretary of State for Trade and Industry v Davies* [1998] 1 BCLC 676, [1998] 1 WLR 422, CA.

*Colins (Derek) Associates Ltd, Re* [2002] All ER (D) 474 (Jul).

*Easy-Dial Ltd, Re* [2003] EWHC 3508 (Ch).

*Equity and Provident Ltd, Re* [2002] EWHC 186 (Ch), [2002] 2 BCLC 78. b

*Jacob (Walter L) & Co Ltd, Re* [1989] BCLC 345, CA; *rvsg* (1987) 3 BCC 532.

*Kanmar Trustees Ltd, Re* (22 April 2003, unreported) Ch D.

*Secretary of State for Trade and Industry v KTA Ltd* [2003] EWHC 3512 (Ch); *affd* [2004] EWCA Civ 1066, [2004] 36 LS Gaz R 33, [2004] All ER (D) 598 (Jul).

*Senator Hanseatische mbH, Re* [1996] 4 All ER 933, [1997] 1 WLR 515, CA. c

*Vehicle Options Ltd, Re* [2002] EWHC 3235 (Ch).

**Cases referred to in skeleton arguments**

*ForceSun Ltd, Re, Re Tidesdale Ltd* [2002] EWHC 443 (Ch), [2002] 2 BCLC 302.

*Company (No 5669 of 1998), Re a* [2000] 1 BCLC 427. d

**Winding up petition**

The Secretary of State for Trade and Industry presented a petition pursuant to s 124A of the Insolvency Act 1986 for the respondent company, Supporting Link Ltd, to be wound up on public interest grounds. The facts are set out in the judgment. e

*Robert Hildyard QC and Sarah Harman* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Anthony Ellera QC* (instructed by *Paul Ross & Co*, Manchester) for the company. f

*Cur adv vult*

19 March 2004. The following judgment was delivered. g

**SIR ANDREW MORRITT V-C.**

[1] On 17 March 2003, pursuant to the powers conferred on him by s 447 of the Companies Act 1985, the Secretary of State for Trade and Industry authorised two of his officers, David Eric Usher and Claire Mary Bernadette Entwistle, to require Supporting Link Alliance Ltd (the company) to produce to them forthwith any documents they might specify. From the information and documents obtained by them it appeared to the Secretary of State to be expedient in the public interest that the company should be wound up. Accordingly a petition was presented to the court for that purpose on 25 November 2003. An application for the appointment of a provisional liquidator was disposed of on the basis of undertakings given to the court by the company and its principal director Mr Anthony Simister on 15 December 2003. I am now asked to accept the same or similar undertakings and, on that basis, to dismiss the petition. h  
j

a [2] Mr Simister and his co-director Ms Selby incorporated the company in September 2000 to carry on business as a general commercial company. They were then only 20. Mr Simister had had previous experience working in a warehouse and as a sales representative. Ms Selby did not give evidence and I do not know what, if any, previous experience she had had. The company carried on business in and from offices in Manchester. It employed b 'tele-salespersons' who, by means of unsolicited telephone calls, sold advertising space in publications to be subsequently produced and distributed by the company. I shall refer to the way in which the company carried on its business in greater detail later. For present purposes it is sufficient to record that the 'sales pitch' included representations that the company made regular c donations to children's charities and that the publication would be distributed in the 'regional' or 'surrounding' area of the advertiser's business.

[3] The first publication was a wallplanner. This is a calendar running from Monday 1 April 2002 to Monday 31 March 2003. The document measures approximately 23 x 16.5 inches. A central rectangle measuring approximately 16 x 7 inches contains the calendar printed over two right hands connected in d a handshake and surrounded by the company's name, Supporting Link Alliance Ltd. Most of the rest of the document is taken up with advertisements for a variety of businesses. There were about 30 variations to cover the different regions in which the advertisers carried on business.

e [4] The second publication was entitled 'The Annual Business Guide'. It is a booklet in A5 size. Below the title is added the description 'for employers of small to medium size businesses'. At the foot of the front cover is the year '2003'. The cover, front and back, is on stiff card and was printed separately from the remaining pages. Inside the front cover is an advertisement for f Harrods and a list of those, including contributors, responsible for the publication. In small print at the foot of the page is a copyright notice followed by a disclaimer of liability in respect both of advertising and editorial content. The outside back cover bears the logos of 20 charities under the heading: 'Here are just a few of the many charities that have benefited from the production of The Annual Business Guide 2003.' The contents list on p 3 describes them as 'Supporting Link's Nominated Charities'. The inside back g cover bears what are described as help and advice line numbers provided by the Inland Revenue; in addition it indicates that it is p 35. Accordingly pp 3-34 had to be provided to complete the publication. Those pages contain editorial content dealing with such matters as the Budget 2002, inheritance tax, national minimum wage, employment law, health and safety in the workplace, safety h signs and regulations, charitable giving through the payroll and tax relief on computer purchases. There were 13 regional editions. The editorial content was the same for all but the advertisers differed. The number of advertisements varied from 200 to 250 advertisements each. Five thousand copies of each variation were printed at a unit cost of about 11.5p plus value j added tax.

[5] The third publication was an Annual Business Guide for 2004. This was published after the presentation of the petition. It follows closely the format used for the guide for 2003 but the outside back cover bears commercial advertisements as opposed to the logos of charities, the editorial content is different and the advertisements are not the same though some customers did

repeat advertisements. It has been distributed. The guide for both 2003 and 2004 is printed on good quality stiffish paper. Each guide weighs about 100g. a

[6] The business of the company was successful. The abbreviated financial statements for the period from 12 September 2000 to 31 December 2001 prepared by a firm of chartered accountants record the following: turnover: £240,255; expenses: £205,360; operating profit: £34,895; dividend: £2,150; net current assets: £21,197; fixed assets: £5,111; retained profit: £26,307. The b expenses include £63,000 in respect of directors' remuneration and £1,700 as donations to charity. Those for the year ended 31 December 2003 record: turnover: £482,026; expenses: £483,258; operating loss: (£1,232); fixed assets: £7,236; net current assets: £17,978; P/L account: £25,223. Included in c expenses are £403,601 for wages and salaries, there being no separate figure for directors' remuneration, and £5,550 as donations to charity.

[7] In the light of these and other figures obtained by Mr Usher, the Secretary of State accepts that the company is and always has been solvent. It is not suggested that the company has failed to keep proper books of account. Accordingly, there has been no examination of the accounts to ascertain the d extent to which the figures for 2002 might have been inflated by the inclusion of income for the wallplanner but not all the corresponding expenses, whilst those for 2003 might have been depressed by the inclusion of expenses in relation to the wallplanner without the associated income.

[8] But the company was attracting a certain amount of adverse comment. In and after November 2002 the trading standards service of the Department of Enterprise Trade and Investment of Northern Ireland (the DETI) received e a number of complaints from members of the public in relation to the wallplanner for Northern Ireland and the guide for 2003. The complaints were investigated but the chief trading standards officer for Northern Ireland concluded that a prosecution under the Trade Descriptions Act 1968 was unlikely to succeed. Mr Simister was so informed by letter dated 21 February f 2003.

[9] In January 2003 the company received complaints from solicitors acting for one of its competitors Barrington House Publishing Co Ltd (Barrington House) alleging passing off, fraud and breach of the law relating to charities. In the following month the company obtained copies of mailshots from g Barrington House and another of its competitors, McKenzie Campbell Publishing Ltd (McKenzie Campbell), addressed to their customers. The letters warned addressees that a number of unscrupulous businesses were defrauding some of their customers; five companies were named including the company.

[10] On 13 March 2003 the company changed its name by omitting the h word 'Alliance'. As I have indicated Mr Usher and Ms Entwistle were appointed four days later and commenced their investigations. They attended the offices of the company on 18 March. Mr Simister provided information and documents then and subsequently when he attended the offices of the Department of Trade and Industry (the DTI) in Manchester on 20 March. On j 18 June 2003 Mr Simister, accompanied by his solicitor Mr Paul Ross, saw Mr Usher at the DTI's offices. Mr Simister provided further information to Mr Usher at a meeting in the DTI's offices on 3 July and supplied more documents on 10 and 16 July. There was a telephone call from Mr Simister to Mr Usher on 23 July. This completed what might be described as the first



a phase of the investigation.

[11] At an early stage of the investigation by Mr Usher and Ms Entwistle, namely on 8 May 2003, the Trading Standards Service of Northern Ireland published a news release entitled: 'Publishing scam rips off charities and business.' The news release stated that 'one of those involved in this scam [is] Supporting Link Alliance Ltd'. There followed a statement from Mr McMurdo, b a trading standards officer, describing the nature of the scam. Mr Simister thought that Mr Usher was responsible for the news release and rang him on 20 May to complain of the breach of confidentiality. Mr Usher pointed out that though the initials were similar the DETI was a different department to the DTI in England. In consequence, but not until after the decision to present a petition for the winding up of the company had been taken, Mr Usher obtained from c Northern Ireland details of the complaints they had investigated and from trading standards officers in England similar complaints made to them of which he had previously been unaware.

[12] The petition, presented on 25 November 2003, sets out formal matters in paras 1–9. In paras 10–18 it describes the manner in which the business of d the company was carried on. In those paragraphs it is alleged that: (a) at no time was a potential advertiser required to authorise the purchase of the advertising space in writing; (b) it is unlikely that the regional editions of the publications provided any benefit to advertisers in a particular area; (c) the annual guides contained comprehensive disclaimers; (d) Mr Simister changed his account to Mr Usher as to how the annual guides were distributed; (e) the company did not in any of its publications specify how much it would pay to charity, how it would be calculated nor how it would be paid; (f) the company had used the logos of several charities without their consent; (g) the company had failed to comply with reg 25 of the Telecommunications (Data Protection and Privacy) Regulations 1999, SI 1999/2093; (h) complaints had been f received by trading standards officers from persons who claimed not to have placed orders with the company as to the aggressive manner in which the company pursued those who did not pay; (i) other legitimate traders and the DETI of Northern Ireland had accused the company of being unscrupulous.

[13] The grounds on which, in paras 20–26 of the petition, it is alleged that g it is just and equitable that the company should be wound up are: (1) failure to comply with s 3(1)(a)–(c) of the Unsolicited Goods and Services Act 1971; (2) the annual guides are distributed over so wide and disparate an area as to be contrary to the representations made by the company to potential advertisers at the time of the sale of the advertising space; (3) the distribution of the annual guides is not consistent with that promised to potential h advertisers at the time of sale; (4) the company has not complied with the provisions of reg 7 of the Charitable Institutions (Fund-Raising) Regulations 1994, SI 1994/3024; (5) the company has used the logos of charities for the purpose of promoting its own business without their consent; (6) in the light of the disclaimer the contents of the annual guides are of dubious benefit to j the business community; (7) Mr Simister hampered Mr Usher in the conduct of his inquiries by evasive and contradictory replies to questions.

[14] The petition is supported by a formal affidavit of Mr Robertshaw and a lengthy one from Mr Usher giving details of what he found from the information and documents supplied to him by the company. Mr Simister swore four affidavits between 13 December 2003 and 2 February 2004 raising

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a very large number of issues. In addition Mr Anthony Hughes, the deputy sales manager of the company, swore a short affidavit on behalf of the company dealing with the distribution of the annual guide for 2003. In the light of this evidence Ms Entwistle returned to the company's offices on 17 February 2004 for the purpose of examining a number of further documents. This and other information is contained in a second affidavit sworn by Mr Usher on 24 February 2004. Ms Entwistle did not swear any affidavit of her own. This is unsatisfactory because Mr Usher had no personal knowledge of what Ms Entwistle found or was told on her return and Ms Entwistle was not cross-examined.

[15] In his fourth affidavit Mr Simister dealt at some length with his communications with the Trading Standards Service in Northern Ireland, in particular with Mr McMurdo, and the complaints to which the latter referred. On 24 February 2004 an affidavit in reply to that evidence was sworn by Mr Livingstone, the chief trading standards officer. He related what Mr McMurdo had told him concerning the latter's communications with Mr Simister and some of the complainants. There was no affidavit from Mr McMurdo. This too is unsatisfactory because the person with personal knowledge, Mr McMurdo, was not cross-examined on them.

[16] In addition there was no evidence from any complainant. It is clear from the documents that some of them had been prompted to complain by Barrington House or McKenzie Campbell. In addition Mr Simister has alleged that those competitors put forward spurious complaints purporting to be from members of the public so as, if possible, to bring down the company. There has been no evidence from Barrington House or McKenzie Campbell. In these circumstances I propose to consider the allegations in the petition, at least in the first instance, without reference to any of the complaints or the matters relative to them related to Mr Usher and Mr Livingstone by Ms Entwistle and Mr McMurdo respectively.

[17] Mr Usher, Mr Livingstone, Mr Simister and Mr Hughes were cross-examined on their respective affidavits. Mr Usher produced his contemporary notes of the interviews and conversations he had had with Mr Simister. I accept Mr Usher and Mr Livingstone as truthful and helpful witnesses in relation to all matters of which they had personal knowledge. I cannot say the same for Mr Simister and Mr Hughes. Mr Simister was cross-examined for over a day. I allow for the fact that the experience of being cross-examined in court was new, unwelcome and, initially, confusing. Even so I found each of Mr Simister and Mr Hughes unreliable. Mr Simister was both evasive and voluble. In some instances, to which I shall refer in due course, his evidence was plainly untrue. Mr Hughes was present in court throughout Mr Simister's cross-examination. When cross-examined on the same topic his answers were clear, assured and largely consistent with the evidence of Mr Simister. But once counsel turned to topics on which Mr Simister had not been cross-examined, such as Mr Hughes's description of carrying two bags each containing 500 copies of the annual guide in order to distribute them, his evidence became incredible. I have no hesitation in preferring the evidence of Mr Usher and Mr Livingstone to that of Mr Simister and Mr Hughes. Further I approach the evidence of both Mr Simister and Mr Hughes, unless corroborated by a contemporary document, with considerable reserve.

a [18] I turn then to the first ground relied on by the Secretary of State which I have summarised in [13](1), above. Section 3(1) of the 1971 Act provides:

b 'A person ("the purchaser") shall not be liable to make any payment, and shall be entitled to recover any payment made by him, by way of charge for including or arranging for the inclusion in a directory of an entry relating to that person or his trade or business, unless—(a) there has been signed by the purchaser or on his behalf an order complying with this section, (b) there has been signed by the purchaser or on his behalf a note complying with this section of his agreement to the charge and before the note was signed, a copy of it was supplied, for retention by him, to him or a person acting on his behalf, or (c) there has been transmitted by the purchaser or a person acting on his behalf an electronic communication which includes a statement that the purchaser agrees to the charge and the relevant condition is satisfied in relation to that communication.'

d By sub-s (2) if a person demands payment without knowing or having reasonable cause to believe that the provisions of sub-s (1) have been complied with he commits an offence.

e [19] The application of those provisions depends on each of the annual guides being a 'directory' within the meaning of that word as used in that Act. I have been referred to the *Oxford English Dictionary*, Compact and New Shorter Editions. I take the ordinary meaning from the *New Shorter Oxford English Dictionary* (4th edn, 1993) vol 1, p 680 as being—

f '[a] book containing an alphabetical or classified list of the people in some category, e.g. telephone subscribers or clergy, with information about them.'

g I have also been referred to passages in Hansard for 4 December 1970 when what became the 1971 Act had its second reading. They do not suggest that the word 'directory' was intended to have any meaning other than its normal meaning. Accordingly, as so often, reference to Hansard takes the matter no further.

h [20] In my judgment the word 'directory' must be given its normal meaning. So defined it is clear that the annual guides produced by the company were not directories. The editorial content is not a list of people or things at all. The advertisements are just that. They contain details of the advertisers, including addresses and telephone numbers, but they are not listed by reference to any category or in any order, alphabetical or otherwise. If these annual guides are directories then so are most newspapers and magazines. For these reasons I dismiss this ground as wrong in law. It follows that the factual issue summarised in [12](a), above is irrelevant.

j [21] Regulation 7 of the 1994 regulations provides:

'(1) This regulation applies to any person who carries on for gain a business other than a fund-raising business but, in the course of that business, engages in any promotional venture in the course of which it is represented that charitable contributions are to be applied for charitable,

benevolent or philanthropic purposes of any description (rather than for the benefit of one or more particular charitable institutions).

(2) Where any person to whom this regulation applies makes a representation to the effect that charitable contributions are to be applied for such charitable, benevolent or philanthropic purposes as are mentioned in paragraph (1) above he shall, unless he has a reasonable excuse, ensure that the representation is accompanied by a statement clearly indicating—(a) the fact that the charitable contributions referred to in the representation are to be applied for those purposes and not for the benefit of any particular charitable institution or institutions; (b) (in general terms) the method by which it is to be determined—(i) what proportion of the consideration given for goods or services sold or supplied by him, or of any other proceeds of a promotional venture undertaken by him, is to be applied for those purposes, or (ii) what sums by way of donations by him in connection with the sale or supply of any such goods or services are to be so applied, as the case may require; and (c) the method by which it is to be determined how the charitable contributions referred to in the representation are to be distributed between different charitable institutions.'

[22] It is not disputed that the regulation applied to the activities of the company and was not observed. It follows that the factual issue mentioned in [12](e), above is admitted and the ground summarised in [13](4), above is established. The importance or otherwise of the failure to comply will be more readily apparent when I have considered in greater detail how the company carried on its business.

[23] It is also the case that the company made no attempt to comply with the provisions of reg 25 of the 1999 regulations. This prohibits unsolicited calls for direct marketing services to individuals who have notified the Telephone Preference Service that they do not wish to receive such calls. This is not a ground for winding up because there is no evidence of any such call. But it is alleged in the petition (see [12](g), above) as a relevant aspect of the company's business methods. In that respect it is established. Indeed the failure of the company to comply with the provisions of reg 25 is the more surprising given that the e-address of the Telephone Preference Service is given in the annual guide for both 2003 and 2004 as a useful business website.

[24] Mr Simister told Mr Usher that when he set up the company's business he took informal advice from a lawyer and an accountant but that neither of them told him about either s 3(1) of the 1971 Act, reg 7 of the 1994 regulations, or reg 25 of the 1999 regulations. He repeated this claim in his evidence before me. I accept that he did not know about the detail of any of these provisions. I also accept that he did not know that payment for a directory entry may not be demanded unless the order has been made or confirmed in writing. He did not consider, rightly, that he was publishing a directory and even Mr Usher was not aware of the provisions of the 1971 Act until this matter was put in the hands of the Treasury Solicitor.

[25] But I do not accept that Mr Simister was unaware of the fact that there were and are restrictions on 'cold calling'. As I have already mentioned, both annual guides referred to the e-address of the Telephone Preference Service as a useful business website. Mr Simister must have known what service it



a provided in order to describe it as 'useful'. Similarly Mr Simister admitted in the course of his cross-examination that he obtained advice on how to account for charitable donations and how to obtain tax relief in respect of them. He knew that there were regulations relating to collections for and donations to charity but not their detail.

b [26] At their first meeting on 18 March 2003 Mr Usher asked Mr Simister how sales of advertising space were achieved. Mr Simister described how the company employed a telephone sales team of 10–12 staff whose job it was to find leads from newspapers, magazines and other similar sources and then ring them up. Mr Usher asked if there was a sales script. Mr Simister told him that there had been one but that it had not been used for the last six to nine months (ie since June or September 2002) as only experienced sales staff were then  
c employed. On 3 July Mr Usher went through a list of items to be produced by Mr Simister one of which was a copy of the initial sales script last used nine months ago. At their further meeting on 10 July Mr Usher noted that it had still not been produced. On 16 July Mr Simister produced to Mr Usher a document described as the first sales script (the first script).

d [27] The first script is in the following terms:

'Hello. Is that (Name)? Hello (Name). My name is (Name). I am calling from Supporting Link Alliance.

How are you today? Excellent/Fantastic/Great.

e How's business? Good/Brilliant/Never Mind, I am sure your business will pick up soon!

Anyway, I won't keep you, I know you are busy. We are currently contacting businesses in the local area regarding advertising space we still have available in our business publication—The Annual Business Guide,  
f which comes out for the start of the business tax year and was wondering if you would be interested in purchasing some space to advertise your company's services in around your regional area? Could I take two minutes of your time to give you a few more details? Yes. Excellent.

The publication itself is distributed free of charge to  
g businesses/employers in and around your surrounding area. It is sent to all kinds of businesses ranging from builders, joiners, solicitors, doctors, plumbers, retail outlets, supermarkets, public houses, schools and mechanics etc. The approximate distribution is roughly 5,000 copies in total. The publication itself contains the latest rules and regulations that have been introduced in this year's government budget that will affect  
h your business in the new tax year covering issues such as Health & Safety, National Insurance, Corporation tax and VAT charges as well as many other topics. You will find this an extremely useful aid as it is printed in a very easy to understand language. Unfortunately if you want to be  
j guaranteed a copy of this free information guide you do need to purchase some space as we cannot guarantee when we distribute the publication your business will be sent one.

We as a company on a monthly basis donate money to children's charities as well with profits made from our work, so if you do place an advert in this publication you will also be benefiting underprivileged children, as well as generating more business for your company.

The sizes we have available are: Best Wishes Mention @ £149.00; 1/6 of a Block @ £199.00; 1/2 of a Block @ £299.00; Full Block @ £499.00

Which size would you like to take? Fantastic. What I will do now is I will pass your details on to our admin team. One of them will give you a call back later today just to confirm this order and to make sure we have all the correct details for your advert. They will also discuss any extra artwork requirements you have like company logo's etc.

Can I just take this opportunity to thank you for your time and for placing your order with us and I would like to wish your business all the best for the future. The admin person only will keep you around 60 seconds! Thank you. Bye!

[28] It is apparent from the document that it relates to the Annual Business Guide and describes the extent of the distribution to be undertaken in due course. In his first affidavit Mr Simister said that the first script had not been used since 2001. In his fourth affidavit he said that it had not been used since early 2002. In his oral evidence-in-chief he confirmed the latter date. But in cross-examination he claimed that the first script had not been used in relation to the annual guide for 2003 at all. He said that as Mr Usher appeared not to believe him when he said that there had not been a script he altered the script which had been used for the wallplanner and gave it to Mr Usher as the script which had been used in relation to the annual guide for 2003. Thus Mr Simister admitted deceiving Mr Usher when handing him the first script on 16 July 2003 and lying in his fourth affidavit when he said or implied that there had been a script in use with regard to the annual guide for 2003 in the form he had produced. In the end this episode only goes to the honesty and credibility of Mr Simister for he agreed that whether or not a script was actually used the salesperson would cover the topics in the words used in the first script.

[29] The relevant features of the first script are (1) the description of the area in which the advertisements will circulate and the occupation of the individuals to whose attention it was intended to bring them and (2) the references to children's charities. As indicated at the end of the first script if the person contacted agreed to take space they were telephoned later by a member of the administration team. A script (the confirmation script) was provided to and used by members of the administration team. Given my conclusion on the inapplicability of s 3 of the 1971 Act it is unnecessary to quote it. It is sufficient to note that it is clear that a contract was concluded orally on the telephone. It was indicated that an invoice would be sent out in due course and was to be paid within 14 or 30 days thereafter.

[30] As Mr Simister made plain in his oral evidence an advertisement would not be inserted into an annual guide, unless and until it had been paid for. Mr Simister produced to Mr Usher the standard form invoice and five subsequent standard form letters designed to obtain payment. He did not produce or refer to any letter from a firm called Elliott, Hammond Worthing & Co. Such letters were provided to Mr Usher later by various trading standards officers in connection with various complaints from members of the public.

[31] Under the firm name appear the words 'Legal Services'. It is stated to have offices in Belfast, Dublin, Manchester, Harrogate and Bristol. Its address

a in Manchester is described as 'Suite 4'. After the signature appear the names of the 'Principal' and 'Practice Manager'. The reader is told: 'A list of Associates is available on request.' The text of the letter states:

b 'We are instructed by The Supporting Link Ltd in relation to the above outstanding invoice to take action against you to recover the total amount due. Despite reminders for payment in writing and by telephone you have failed to discharge this debt. If payment is not received by The Supporting Link Ltd within 7 Days of the date of this letter, we are instructed to take the next legal course of action against you. This will be done without further notice to you. If you fail to take notice of this letter and then court proceedings are brought against you and a judgment is c enforced against you or your business, this debt will then be legally registered with the courts and you may find it difficult to obtain credit in the future. Please make your cheque payable to the Supporting Link Ltd and send payment direct to them at: Suite 1, 1st Floor, 20 Dale Street, Manchester M1 1EZ. Please note payment must be received within the d stipulated period, and can be made by credit or debit card. We are NOT prepared to discuss this over the telephone. If you have any comments to make please put them in writing and they will be assessed accordingly.'

e In a follow-up letter from the company this firm is referred to as 'our company solicitor'.

f [32] The cross-examination of Mr Simister revealed that he concocted the letter for use by the company instead of retaining the firm of solicitors in Wallasey he had previously used for debt collection. The named principal and practice manager were respectively the national and deputy sales managers of the company. There are no associates or other offices; there is no firm; no services, legal or otherwise are provided from Suite 4 or from the telephone or fax numbers attributed to that address. Mr Simister agreed that he should not have concocted or allowed the use of this standard letter and regretted having done so. The letter is not a ground for winding up as the true facts were not known until the cross-examination of Mr Simister. But it is relevant g to the honesty and credibility of Mr Simister and the acceptability of undertakings offered by him on behalf of the company, not least because Mr Simister was still using this letter in September 2003.

h [33] If and when the invoice was paid the advertisement would be included in the annual guide. Contrary to the representation made in telephone conversations indicated by the first script there were no pre-planned local or regional editions. When sufficient advertisements to fill an annual guide had been paid for then an edition containing those advertisements would be printed. Thus the area or region covered by any particular edition depended on the success or otherwise of the sales staff. Even accepting the fact that some advertisers might specify an area other than that in which they carried j on business, the geographical coverage of most editions robbed the annual guide of any local or regional value it might otherwise have had. Accordingly the allegation summarised in [12](b), above is made out. In his first affidavit Mr Usher analysed the areas covered by each of the 13 editions of the annual guide for 2003. All of them covered areas larger than what could be described as 'local', 'surrounding' or 'regional'. Thus edition (vi) extended from

Cornwall to Kent, issue (vii) included such disparate areas as Yorkshire, Cambridgeshire and Cornwall, issue (xi) covers the whole of Scotland and issue (xii) the whole of Wales and much of the Midlands. a

[34] Issue (x) covered Northern Ireland and most of England. In his fourth affidavit Mr Simister described this edition as the 'latepayers' edition. He said that an advertiser who paid too late to be included in the regional edition of this choice was put into this edition. I do not accept that explanation for the geographical diversity of edition (x). The printer's invoices show that this edition, called the 'National Edition', was printed contemporaneously with the Wales, Scotland and East Anglia editions and only four days after the invoice for five different London editions. b

[35] The printer's invoices show that 5,000 copies of each edition were printed. Mr Simister's account of how they were distributed has not been consistent. At his meeting with Mr Usher, in the presence of his own solicitor, on 18 June he told Mr Usher that each advertiser got one copy and the rest were distributed to businesses in the advertiser's area identified from directories such as Yellow Pages. He told Mr Usher that all of them were sent by the Royal Mail. There can be no doubt about this for the solicitor intervened with an interrogatory 'All by mail' and got the unqualified answer 'Yes'. Following that meeting Mr Usher ascertained from the company's accounts that sums spent on postage were far too small to allow for the annual guide to have been sent by post to more than the individual advertisers. c d

[36] At their meeting on 23 July Mr Usher pointed out to Mr Simister that his account of the distribution of the annual guide was inconsistent with the amounts spent on postage. Later that day Mr Simister telephoned Mr Usher to tell him that only the copies, two each, sent to advertisers were sent by post and that the other 4,500 were taken by car or train to one city or town within the area covered by each edition and were there distributed by hand. Thus it is clear that the allegation summarised in [12](d), above is established. In his fourth affidavit Mr Simister referred to and exhibited what he described as a delivery chart for the distribution of the annual guide for 2003. This had never been produced to Mr Usher. It suggests two trips by two members of staff to the area covered by each edition between January and April 2003. According to the chart Mr Hughes and another were responsible for distributing editions South West 1, South West 2 and Wales. e f g

[37] In his oral evidence Mr Hughes said that he and his companion made four trips in all to the South West, two to Bristol and two to Bath. They also made two trips to distribute the Wales edition but only to Prestatyn and Rhyll. He described how they went by train with two bags each, each bag containing 500 copies. They had to change trains to get to Bath. They put the bags in the racks at the end of the carriage. When they arrived at their destination they made for large office buildings 'to get rid of as many as possible as quickly as possible'. He claimed that they distributed two or three copies to each business. By the end of the day all had been distributed and they took the train home again. h j

[38] It was pointed out to Mr Hughes that if his account was true he and his companion had each carried round two bags each containing 500 copies. At 10g per copy each bag would weigh 50 kg or 110 lb. The aggregate weight carried by each of them would be over 15.5 stone. It is plain that the evidence of Mr Hughes is unacceptable. It is clear, and I so find, that whatever



a distribution might have taken place it did not accord with the representations made in the first script. First, the distribution was neither 'local', 'regional', nor 'surrounding' for most advertisers because the area covered by each edition was more extensive than that connoted by any of those adjectives. Second, even if there was some distribution it was not effected throughout the area covered by each edition. An advertiser in the Wales edition carrying on b business in Cardiff or Swansea is unlikely to regard as consistent with what he was promised a distribution only in Prestatyn and Rhyl. Distribution in Bristol and Bath alone is inadequate coverage for the South West as a whole. Third, the national or latepayers' edition was not distributed at all. It was kept in the company's office. If and when a potential advertiser asked to see a sample of the company's product he was sent a copy of this edition. The c allegations made in paras 21 and 22 of the petition, which I have summarised in [13](2) and (3), above, are clearly established.

[39] I turn then to the second feature of the first script to which I drew attention in [29], above. It was not only in the first telephone conversation with a potential advertiser that stress was laid on the connection with d children's charities. The annual guide for 2003 bears the logos of 20 charities on the back cover under the heading: 'Here are just a few of the many charities that have benefited from the production of The Annual Business Guide 2003.' In the list of contents they are referred to as 'Supporting Link's Nominated Charities'. The standard form letters pressing for payment supplied by e Mr Simister to Mr Usher bear the legend at the foot of the page 'Constantly working to benefit the needs of others'. Those forms in use in the summer of 2003, unlike those provided to Mr Usher, also bear a logo depicting three waving children. In this connection the name 'Supporting Link' itself implies a connection between the commercial activities of the company and the children's charities referred to expressly or by implication.

f [40] It is not disputed that the company did make donations to children's charities. In the accounting periods ended on 31 December 2002 and 2003 the amounts were £1,700 and £5,500 respectively, representing just under and just over 1% of turnover. Mr Usher's analysis of the company's books identified donations of £10,550 in the year June 2002–June 2003. It is in this connection g that the seriousness or otherwise of the failure to comply with reg 7 of the 1994 regulations, must be considered. Compliance would have required the company to make a statement indicating what proportion of the advertising charge or what sums were to be given to children's charities. The truthful answer would have disclosed 'about 1%' or '£5 per full page of advertisement'. In my judgment an advertiser would have regarded such proportions or h amounts as disproportionately low when compared to the emphasis, both express and implied, placed by the company on its own generosity.

[41] In paras 62 and 85(f) of his first affidavit Mr Usher referred to charities' logos being used without their consent. In paras 66–74 of his first affidavit and paras 126–136 of his fourth affidavit Mr Simister claimed that all the charities j whose logos appear on the outside back cover of the annual guide for 2003 had given their consent. As he did not obtain such consents in writing he contacted all those he could in order to obtain corroboration for his contention. But the corroboration so obtained relates to what Mr Simister described as the company's offer of free advertising for the charity. None of the respective charities' representatives gave evidence and there is some

correspondence to suggest that whilst the charity was happy to consent to the use of its logo as an advertisement for that charity it did not consent to the use of its logo to advertise the service provided by the company.

[42] The use to which the company put the logos of those charities indicates that they were not being used to advertise the charity. Unlike the businesses that bought advertising space, the addresses, telephone numbers or other contacts with the charities were not given. Mr Simister was unable to explain why. In my judgment the charities did not consent to the use of their logos for advertising the business of the company and that was the use to which they were in fact put when reproduced on the outside back cover and described in the contents page as Supporting Link's nominated charities. Accordingly, I find that the ground for winding up summarised in [13](5), above has been established.

[43] The ground for winding up I have summarised in [13](6), above puts emphasis on the inclusion of the disclaimer rather than the intrinsic value of the editorial content of the annual guide. The relevant disclaimer is in the following terms:

'Please also note that while every care has been taken to ensure complete accuracy of editorial content, we cannot accept any responsibility for mistakes, errors or inaccuracies. Readers are strongly advised to check the information contained in this publication with institutions or seek legal advice where appropriate before acting on any information given in this publication.'

I readily accept that any person reading the disclaimer would be likely to regard it as detracting from such utility as he thought the publication might otherwise have. But such disclaimers are not uncommon. I do not think that the use of a disclaimer is a ground for winding up either generally or in the circumstances of this case.

[44] The last ground for winding up relied on is that which I have summarised in [13](7), above. The two matters relied on are (1) the misleading description of how the annual guide for 2003 was distributed given by Mr Simister to Mr Usher on 18 June and (2) the misleading description of the reason why the company changed its name on 13 March 2003. I have dealt with the first matter in [35] and [36], above. There is no doubt that Mr Simister's initial account was wrong. Having heard his evidence and that of Mr Usher, in particular his diary entry for 18 June 2003, I reject Mr Simister's explanation that he and Mr Usher were at cross-purposes. The intervention of his own solicitor shows that that was not the case.

[45] At their meeting on 18 March 2003 Mr Simister told Mr Usher that he had changed the name of the company by deleting the word 'Alliance'. He suggested that it had been included by mistake. At their later meeting on 18 June 2003 Mr Simister said that the change of name had been effected about a month previously and because the fact of Mr Usher's inquiry had leaked out and was causing embarrassment. When Mr Usher pointed out that the change of name had been effected on 13 March, some four days before the inquiry was even authorised, he agreed that the reason he had given was not true.

[46] Thus on two separate topics discussed at their meeting held on 18 June 2003 Mr Simister deliberately sought to mislead Mr Usher. I accept that in

a respect of each of them Mr Simister gave, as alleged, evasive and contradictory replies. But the extent to which either of them hampered Mr Usher in the conduct of his inquiries appears to me to be minimal. I do not think that this ground for winding up adds anything to the others. Nevertheless these episodes show yet again how unreliable Mr Simister is.

b [47] In that connection I should refer to two further episodes of a similar nature. The first affidavit of Mr Usher set out in some detail (paras 39–41) the instructions given by Mr Simister to his staff and how some infringements were met by instant dismissal. He said nothing to Mr Usher at any stage of his investigation nor in any of his four affidavits about instantly dismissing Mr Marcus Barnes, then the national sales manager of the company, and two of his associates in April 2003 for making misleading statements to potential purchasers of advertising space. Those statements related to the extent of the company's connection with charities and were clearly relevant to the inquiry Mr Usher was making. This emerged for the first time in Mr Simister's cross-examination.

d [48] The fourth episode related to Mr Simister's claim in para 56 of his fourth affidavit that the company allowed advertisers a period of 14 or 30 days in which to consider whether to go ahead with the contract. There is no justification for such a contention in any of the documents produced by the company nor in the general law as the person being solicited was not a consumer.

e [49] In summary I conclude that the grounds for winding up referred to in [13](2), (3), (4) and (5), above are made out. I reject the ground referred to in [13](1), above. In relation to the grounds mentioned in [13](6) and (7), above, though made out in fact, I do not consider them to add anything. The question, then, is whether grounds [13](2)–(5) are such as to make it just and equitable to wind up the company.

f [50] The proper approach of the court is clearly established in the judgment of Nicholls LJ in *Re Walter L Jacob & Co Ltd* [1989] BCLC 345. That case concerned an authorised dealer in securities. Having authorised an inquiry under s 447 of the Companies Act 1985 the Secretary of State presented a winding-up petition. By then the company had ceased to trade because the relevant regulatory body had required it to do so. The judge dismissed the petition because he did not think that the public interest required the company to be wound up as it had ceased to trade anyway ((1987) 3 BCC 532). The Court of Appeal considered that the judge had erred.

g [51] Nicholls LJ (at 351–352) described the balancing exercise involved in the following terms:

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‘In considering whether or not to make a winding-up order under s 122(1)(g), the court has regard to all the circumstances of the case as established by the material before the court at the hearing. Normally that will involve the court, faced with a petition presented by a creditor or a contributory, considering primarily the conflicting interests and wishes of the opposing parties to the petition, whether creditors or contributories or the company itself. The court will consider those matters which constitute reasons why the company should be wound up compulsorily, and those which constitute reasons why it should not. The court will carry out a balancing exercise, giving such weight to the various factors as

is appropriate in the particular case. In principle the exercise to be carried out where the petitioner is the Secretary of State is the same. The only difference lies in the nature of the reasons being put forward by the petitioner for the making of a compulsory winding-up order.'

[52] Later Nicholls LJ expanded on this description. He said (at 353):

'The court's task, in the case of so-called "public interest" petitions, as in the case of all other petitions invoking the court's winding-up jurisdiction under s 122(1)(g), is to carry out the balancing exercise described above, having regard to all the circumstances as disclosed by the totality of the evidence before the court. In respect of all such petitions, whoever may be the petitioner, the court has to weigh the factors which point to the conclusion that it would be just and equitable to wind up the company against those which point to the opposite conclusion. It is to the court that Parliament has entrusted this task, in all cases. Thus, where the reasons put forward by the petitioner are founded on considerations of public interest, the court, if it is to discharge its obligation to carry out the balancing exercise, must itself evaluate those reasons to the extent necessary for it to form a view on whether they do afford sufficient reason for making a winding-up order in the particular case. In the case of "public interest" petitions, the court will, of course, carry out that evaluation with the assistance of evidence and submissions from the Secretary of State and from other parties. When doing so the court will take note that the source of the submissions that the company should be wound up is a government department charged by Parliament with wide-ranging responsibilities in relation to the affairs of companies. The department has considerable expertise in these matters and can be expected to act with a proper sense of responsibility when seeking a winding-up order. But the cogency of the submissions made on behalf of the Secretary of State will fall to be considered and tested in the same way as any other submissions. His submissions are not ipso facto endowed with such weight that those resisting a winding-up petition presented by him will find the scales loaded against them. At the end of the day the court must be able to identify for itself the aspect or aspects of public interest which, in the view of the court, would be promoted by making a winding-up order in the particular case. In many, perhaps most, cases that will be a simple exercise in which the answer will be self-evident. In other cases the answer may not be so obvious.'

[53] Later Nicholls LJ considered the circumstance that by the time the petition came to be heard the company had ceased to carry on the business of which complaint was made. In that respect he observed (at 360):

'Having regard to all these matters, I would have had no doubt, if the company had still been dealing in securities, that it was just and equitable that it should be wound up. Does the fact that the company ceased to carry on that business immediately before the petition was presented make a crucial difference? In my view it does not. It is, of course, an



a important factor to be taken into account. The investing public is no longer at risk from any future activities of the company. The company is no longer a member of [the Financial Intermediaries, Managers and Brokers Regulatory Association]. But it would offend ordinary notions of what is just and equitable that, by ceasing to trade on becoming aware that the net is closing around it, a company which has miscondacted itself  
b on the securities market can thereby enable itself to remain in being despite its previous history. The wishes of those who control such a company, that it should remain extant for other purposes will, normally, carry little weight in the balancing exercise. On the other hand, by winding up such a company, the court will be expressing, in a meaningful way, its disapproval of such misconduct. Moreover, in addition to being  
c a fitting outcome for the company itself, such a course has the further benefit of spelling out to others that the court will not hesitate to wind up companies whose standards of dealing with the investing public are unacceptable.'

d [54] In this case it is suggested that the company has ceased to carry on business in the manner of which complaint is made but that any doubt on that score may be resolved by accepting the undertakings offered by Mr Simister. The proffering of undertakings has been a feature of a number of recent cases. Thus in *Re Vehicle Options Ltd* [2002] EWHC 3235 (Ch) Park J accepted  
e undertakings with regard to the conduct of a franchised vehicle-leasing broker. The Secretary of State consented to the order. In *Re Easy-Dial Ltd* [2003] EWHC 3508 (Ch) Neuberger J accepted undertakings on the basis of which the Secretary of State sought and was given leave to withdraw his petition. A similar order was made in *Re Kanmar Trustees Ltd* (22 April 2003, unreported) and by David Richards J in *Secretary of State for Trade and Industry v KTA Ltd*  
f [2003] EWHC 3512 (Ch). By contrast undertakings were refused and the company wound up by Patten J in *Re Equity and Provident Ltd* [2002] EWHC 186 (Ch), [2002] 2 BCLC 78. In only one case has the court accepted undertakings and refused to make a winding-up order where that course has been opposed by the Secretary of State, namely *Re Derek Colins Associates Ltd*  
g [2002] All ER (D) 474 (Jul) (Anthony Mann QC, sitting as a deputy judge of the Chancery Division).

[55] I do not doubt that the court has power to accept undertakings and, on that basis, to dismiss a petition to wind up presented to the court by the Secretary of State on public interest grounds. But it seems that earlier cases  
h dealing with the exercise of such a discretion have been overlooked. Thus in *Re Bamford Publishers Ltd* (1977) Times, 4 June Brightman J was concerned with such a petition presented against a company carrying on business publishing trade directories without regard to the provisions of s 3 of the 1971 Act. Undertakings were offered as to how the company's trade would be conducted in the future. Brightman J concluded:  
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'Quite clearly the company has been engaged in a disreputable system of trading. The company has offered a series of undertakings which are designed to secure that its future trading activities are free from objection. These undertakings are not acceptable to the petitioner. In case this

matter goes to a higher court it may be helpful if I say something about the undertakings. First, the undertakings offered, assuming as I do that they were implemented, would in my view make the company's trading activities free from legitimate complaint however useless those trading activities may be from the point of view of the public interest. The reason that I reject the undertakings is this. Petitions under s 35 of the Companies Act 1967 are common. Many petitions go by default. A few are opposed. If it were open to a company to oppose a petition under s 35 on the basis that undertakings are offered to regulate the future conduct of the company's business, the Department of Trade would end up with a mass of delinquent companies on probation. It is not the function of this court, or at any rate of the Chancery Division, to police undertakings given to it except perhaps in the limited field of the welfare of infants. It is for the litigant to bring to the attention of the court, if he so wishes but not otherwise, any activity which he considers a breach of an undertaking given to the court. If this court accepted undertakings by a company, which is the object of a s 35 petition, there would be thrown upon the Department of Trade, and not upon the court, the obligation of policing those undertakings. That is not the function of the department. I take the view that the court ought not to pay any attention to undertakings offered by a company, which is the object of a s 35 petition, relating to its future conduct owing to the burden which would thereby be thrown upon the Department of Trade, unless the department is willing in a particular case that such undertakings should be accepted by the court; and I do not think that the department is under the smallest obligation to exhibit such willingness.

[56] A similar principle was applied in cases under the Company Directors' Disqualification Act 1986 before its recent amendment by the Insolvency Act 2000. In *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* [1998] 1 BCLC 676, [1998] 1 WLR 422 a director against whom such proceedings had been commenced offered the most extensive undertakings if the Secretary of State would refrain from pursuing the proceedings to judgment. His offer was refused and he sought an order staying the continuation of the proceedings as an abuse of the court. His application was dismissed by Rattee J and the appeal from him was dismissed. One of the reasons given by the Court of Appeal was that 'there is no statutory procedure for the policing and variation of ... an undertaking ...' (see [1998] 1 BCLC 676 at 687, [1998] 1 WLR 422 at 433).

[57] Similarly in *Re Senator Hanseatische mbH* [1996] 2 BCLC 562, [1997] 1 WLR 515 the Secretary of State had presented a winding-up petition on public interest grounds against a company carrying on an illegal lottery. Scott V-C refused the application of the Secretary of State for the appointment of a provisional liquidator; instead he granted injunctions. Millett LJ accepted that it was necessary to procure the cessation of the company's business but indicated that he thought that the appointment of a provisional liquidator would have been preferable as putting 'in place an independent officer of the court to take charge of the company's activities pending the hearing of the petition' (see [1996] 2 BCLC 562 at 606, [1997] 1 WLR 515 at 526).

a [58] In my view unless the Secretary of State is content that the petition is disposed of on undertakings the court should be very slow indeed to accept them in preference to making a winding-up order. All the reasons given by Brightman J in *Re Bamford Publishers* remain as valid now as they were then. If the court is satisfied that the offending business has ceased and it is prepared to trust the existing management then it may be appropriate to dismiss the petition altogether. But if it is not so satisfied or does not trust the existing management then I find it hard to envisage a case in which it would be appropriate to dismiss the petition on undertakings as to the future conduct of the company's business.

c [59] Counsel for the company started his submissions with observations on the relevant statutes and regulations. He submitted, as I have accepted, that s 3 of the 1971 Act did not apply in respect of any of the company's publications. He emphasised that the Trading Standards Office of Northern Ireland had concluded that there was insufficient evidence to mount a prosecution for offences under the Trade Descriptions Act 1968. He went on to submit that therefore there was no deliberate wrongdoing. That, of course, does not follow. He pointed out, which I have already accepted, that a failure to comply with reg 25 of the 1999 regulations, is not relied on as a ground for winding up. But it is one of the material averments and the company's failure to comply with it is relevant to the question whether an undertaking from the company or Mr Simister could be acceptable.

e [60] Counsel then turned to the 1994 regulations. He submitted that Mr Simister did not know about them and did not infringe reg 7 on purpose. I have dealt with this issue in [25], above. In my judgment Mr Simister did know that there were regulations, though I accept that he did not know their terms. I am unable to overlook the fact that on his own evidence he failed to take sufficient steps to find out what they provided or to ensure that the company complied with them.

g [61] Counsel for the company emphasised that Mr Simister had never suggested that the company had not represented that it had made donations to charity. Such representations were true. By contrast, counsel for the Secretary of State criticised the company for selling its advertising space 'on the back of charity'. In my judgment both submissions are too extreme. The submission for the company underestimates the impression conveyed by the company's documents and conduct as to the extent to which it was connected with and supported children's charities. It was a great deal more than the level of contribution actually made would lead a potential advertiser to assume. The extent to which he and other members of the public are misled stems directly from the failure of the company to observe the provisions of reg 7. By contrast the submissions for the Secretary of State imply that any sales pitch involving a representation that the publisher supports charity is improper. In my view that goes too far. If reg 7 had been complied with then there is nothing wrong with representing that a proportion of the publisher's profit is devoted to charity. In this case the company's method of trading gave rise to a material misrepresentation as to the extent to which the company supported charity in fact. I have no doubt that this was intended.

j [62] Counsel for the company submitted that 5,000 copies of each edition of the annual guide for 2003 were printed. He contended that distribution in accordance with the delivery chart exhibited to Mr Simister's fourth affidavit

sufficiently complied with the company's obligation to its advertisers. For the reasons I have given in [38], above, I do not accept the latter submission. On Mr Simister's own evidence it is clear that the distribution he claims was carried out did not accord with what the advertiser was promised. For the reasons I have already given I do not accept that any such distribution took place. In any event the submission overlooks the fact that the various editions, which were printed, were not 'local', 'surrounding' or 'regional' in any sense relevant to an advertiser. a  
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[63] It follows from these central conclusions that the company carried on business and took money from potential advertisers on the basis of material misrepresentations as to the extent of its donations to charity, the production of an annual guide which could be regarded as 'local', 'surrounding' or 'regional' by each and every advertiser and the distribution of such a guide throughout the geographical area of each edition. I am unable to conclude that any of those misrepresentations was made innocently. c

[64] Counsel for the company emphasised that Mr Simister had shown financial prudence. As I have already observed, it is not suggested that the company is insolvent or has failed to keep proper books of account. There is no suggestion that the money of the company has been misapplied. Full provision has been made for Crown debts. Thus many of the indicia of a dishonest business are missing. Counsel for the company also emphasised the youth of Mr Simister, his contrition and his willingness to give extensive undertakings to the court in full knowledge of the seriousness of such a step and the consequences of not fully observing them. He invited me to give Mr Simister what both of them described as 'a second chance'. d  
e

[65] The undertakings offered by Mr Simister on behalf of the company and himself are substantially the same as those accepted by the court when dismissing, by consent, the application of the Secretary of State for the appointment of a provisional liquidator. In summary they would undertake: (1) to ensure that all orders for advertising space are made or confirmed in writing; (2) to explain to all prospective advertisers the regional variations for which publications will be prepared and, on request, to provide a description of how the publication will be distributed in those regions; (3) to distribute such publication by hand and by post throughout each region to relevant businesses within that region; (4) not to make any representation relating to any charitable donation or contribution made by the company or its directors; (5) not to use the logo of any charity without its explicit written consent; (6) to permit any person duly authorised by the Secretary of State to attend the business premises of the company during normal business hours to inspect any records and the normal business operation of the company. f  
g  
h

[66] I am unable to accept either those submissions or the undertakings. The business of the company was founded and continued on the basis of deception. If, in accordance with the undertakings offered, the deception is removed it seems unlikely that the company would have any worthwhile business to carry on. Further, the extent and nature of the undertakings and the past conduct of Mr Simister are such that it would be necessary for the Secretary of State, through his officers, to monitor due performance of the undertakings and to supervise the future conduct of the company's business. That is not his or their function. j



*a* [67] The matters to which I have referred show, in my judgment, that it is just and equitable that the company should be wound up. The acceptance of undertakings from the company or Mr Simister instead of making that order would be an abdication, not an exercise, of the court's jurisdiction.

[68] For all these reasons I will make the usual compulsory order.

*b* Order accordingly.

Celia Fox Barrister.

## Note

Secretary of State for Trade and Industry  
v Bell Davies Trading Ltd and another

[2004] EWCA Civ 1066

COURT OF APPEAL, CIVIL DIVISION

MUMMERY, SCOTT BAKER LJ AND LAWRENCE COLLINS J

10–12 MAY, 30 JULY 2004

*Company – Compulsory winding up – Petition by Secretary of State – Secretary of State taking view that it is expedient in the public interest that company be wound up – Approach to be adopted by court on public interest petitions – Insolvency Act 1986, s 124A.*

In its judgment of the court on this appeal, delivered by **MUMMERY LJ** but to which all of its members contributed, the Court of Appeal gave the following guidance on the approach to be adopted by the court on petitions by the Secretary of State, under s 124A<sup>a</sup> of the Insolvency Act 1986, to wind up companies on public interest grounds:

[110] A valuable review of the authorities on the proper approach of the court to s 124A public interest petitions, in general, and to the practice relating to the acceptance of undertakings, in particular, was carried out by Sir Andrew Morritt V-C in his judgment in *Re Supporting Link Ltd* [2004] EWHC 523 (Ch), [2005] 1 All ER 303. The judge has a discretion whether or not to make a winding-up order. As for undertakings, the court has a discretion whether or not to accept them if they are proffered and whether or not to make the giving of them a condition of dismissing the petition. In considering the exercise of his discretion the willingness or otherwise of the Secretary of State to accept undertakings, which have to be policed by the Department of Trade and Industry, is an important factor.

[111] Thus, in the exercise of the discretion, the judge is entitled (a) to dismiss the petition on undertakings if, for example, he is satisfied that the offending business has ceased or if the undertakings are acceptable to the Secretary of State; or (b) to dismiss the petition on undertakings, even if that course is opposed by the Secretary of State, although that will be unusual; or (c) to refuse to accept undertakings and to wind the company up, if, for example, he is not satisfied that those giving the undertakings can be trusted.'

The full text of the judgment in this case, in which *Richard Siberry QC* (instructed by *LeBoeuf, Lamb, Greene & MacRae*) acted for the appellant companies, and *Richard Ritchie* (instructed by the *Treasury Solicitor*) acted for the Secretary of State, can be found on our daily online service at [2004] All ER (D) 598 (Jul).

Celia Fox Barrister.

<sup>a</sup> Section 124A, so far as material, provides: '(1) Where it appears to the Secretary of State ... that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so ...'

# *a* Inland Revenue Commissioners v Scottish Provident Institution

[2004] UKHL 52

## *b* HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD AND LORD WALKER OF GESTINGTHORPE

18–20 OCTOBER, 25 NOVEMBER 2004

*c* *Income tax – Corporation tax – Debt contracts – Company entering into tax avoidance scheme creating debt contracts under which options granted and premiums paid in relation to gilts so as to create loss – Whether single composite transaction – Finance Act 1994, ss 147A, 150A(1).*

*d* In 1995 the taxpayer, an incorporated mutual life office, decided to enter into a scheme devised by a bank to take advantage of a prospective change in the system of taxing gains on options to buy or sell bonds and government securities (gilts). Under the legislation then in force the taxpayer was not liable to tax on any gain realised on the grant or disposal of such an option. Under the new system all returns on such options would be treated as income and losses made on disposals would be allowable as income losses. The scheme envisaged that the taxpayer *e* would grant the bank an option (the bank option) to buy short-dated gilts, at a price representing a heavy discount from market price, in return for a correspondingly large premium. The premium received on the grant of the option would not be taxable under the old system. After the new system came into force, the bank would exercise the option. The taxpayer would have to sell the gilts at well below *f* market price and would suffer an allowable loss. The possibility of a rise or fall in interest rates during the currency of the option created a commercial risk for one side or the other. The scheme therefore provided for the first option to be matched by an option (the taxpayer option) to buy the same amount of gilts granted by the bank to the taxpayer and the premium and option prices were calculated carefully *g* to deal with that risk. The scheme was carried out the following year, the Inland Revenue refused to allow the loss, and the taxpayer appealed. The Special Commissioners found that when the transactions had been entered into there had been a genuine commercial possibility of movement of interest rates and gilt prices such that it would have been in the bank's commercial interests either to refrain from exercising its option or exercising it on a date different from the exercise of the taxpayer of its option. They concluded there had been a genuine practical *h* likelihood or a genuine commercial possibility that the taxpayer would not have exercised its option and held that that degree of uncertainty saved the two transactions from being ignored for tax purposes and allowed the appeal. The Revenue were unsuccessful in their appeal to the Court of Session and appealed to *j* the House of Lords. The taxpayer's analysis was that it was entitled to treat the loss it had suffered on the exercise of the bank option as an income loss on the basis that the option was a 'qualifying contract' within s 147A<sup>a</sup> of the Finance Act 1994. The effect of s 150A(1)<sup>b</sup> of the 1994 Act was the contract had to be one under which the

*a* Section 147A, so far as material, is set out at [18], below

*b* Section 150A, so far as material, is set out at [18], below

taxpayer 'has any entitlement ... to become party to a loan relationship'. The definition of a loan relationship included a government security. The Revenue submitted that the application of the principle of construction in *WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865 meant that the scheme as a whole had to be regarded as a single composite transaction, and that so regarded, there had been no qualifying contract. The taxpayer contended that, even if the bank and the taxpayer had intended that both options should be exercised together, the court could treat them as a single transaction only if there was no practical likelihood that that would not have happened.

**Held** – It would destroy the value of the *Ramsay* principle of construing provisions such as s 150A(1) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned. In the instant case the contingency upon which the taxpayer relied for saying that there was no composite transaction was part of that composite transaction. It had been chosen not for any commercial reason but solely to enable the taxpayer to claim that there was no composite transaction. It was true that it created a real commercial risk, but the odds were favourable enough to make it a risk which the parties were willing to accept in the interests of the scheme. It followed that the Special Commissioners had erred in law in concluding that their finding that there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. It was to be regarded as a single composite transaction, and so viewed, it created no entitlement to gilts, and there was, therefore, no qualifying contract. Accordingly, the appeal would be allowed (see [22]–[24], [26], below).

*WT Ramsay Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865 applied.

*Craven (Inspector of Taxes) v White, IRC v Bowater Property Development Ltd, Baylis (Inspector of Taxes) v Gregory* [1988] 3 All ER 495 distinguished.

## Notes

For general rules for the interpretation of taxing Acts, and for interest rate contracts currency contracts and debt contracts, generally, see 23(1) *Halsbury's Laws* (4th edn reissue) paras 22, 893.

Sections 147A, 150A of the Finance Act 1994 were repealed by the Finance Act 2002, ss 83(2), 141, Sch 40, Pt 3(13), with effect for accounting periods beginning after 30 September 2002.

## Cases referred to in the report

*Craven (Inspector of Taxes) v White, IRC v Bowater Property Development Ltd, Baylis (Inspector of Taxes) v Gregory* [1988] 3 All ER 495, [1989] AC 398, [1988] 3 WLR 423, HL.

*Ramsay (WT) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.



### Cases referred to in list of authorities

- a** *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853, [2003] STC 66; *aff'd* [2004] UKHL 51, [2005] STC 1.  
*Carreras Group Ltd v Stamp Comr* [2004] UKPC 16, [2004] STC 1377.  
*Chevron UK Ltd v IRC* [1995] STC 712.  
*Chinn v Collins (Inspector of Taxes)* [1981] 1 All ER 189, [1981] AC 533, [1981] 2 WLR 141, HL.
- b** *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2004) 6 ITLR 454, HK CFA.  
*Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14, [1955] 3 WLR 410, HL.  
*Fitzwilliam v IRC* [1993] 3 All ER 184, [1993] 1 WLR 1189, HL.  
*Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530, [1984] AC 474, [1984] 2 WLR 226, HL.
- c** *Griffin (Inspector of Taxes) v Citibank Investments Ltd* [2000] STC 1010.  
*IRC v Burmah Oil Co Ltd* [1982] STC 30, HL.  
*IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991, HL.  
*Jenks v Dickinson (Inspector of Taxes)* [1997] STC 853.
- d** *Luke v IRC* [1963] 1 All ER 655, [1963] AC 557, [1963] 2 WLR 559, HL.  
*MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] 1 All ER 865, [2003] 1 AC 311, [2001] 2 WLR 377.  
*Moodie v IRC* [1993] 2 All ER 49, [1993] 1 WLR 266, HL.  
*Save Britain's Heritage v Secretary of State for the Environment* [1991] 2 All ER 10, [1991] 1 WLR 153, HL.
- e** *South Bucks DC v Porter* [2004] UKHL 33, [2004] 4 All ER 775, [2004] 1 WLR 1953.

### Appeal

- The Commissioners of Inland Revenue appealed from the decision of the First Division of the Inner House of the Court of Session as the Court of Exchequer in Scotland (the Lord President (Lord Cullen of Whitekirk), Lady Cosgrove and Lord Eassie) on 3 July 2003 ([2003] STC 1025) refusing the Inland Revenue's appeal from the decision of the Special Commissioners (J Gordon Reid QC and Dr John F Avery Jones CBE) on 4 April 2002 ([2002] STC (SCD) 252) allowing the appeal of the Scottish Provident Institution (SPI) against a tax assessment for the accounting period ended 31 December 1996. The facts are set out in the report of the Appellate Committee.

- f** *Gerry Moynihan QC* (of the Scottish Bar), *David Ewart* and *Jane Paterson* (of the Scottish Bar) (instructed by the *Solicitor of Inland Revenue*) for the Inland Revenue.
- h** *Graham Aaronson QC* and *Colin Tyre QC* (of the Scottish Bar) (instructed by *Maclay Murray & Spens*, Edinburgh) for SPI.

Their Lordships took time for consideration.

- j** 25 November 2004. The APPELLATE COMMITTEE delivered the following report.

[1] The following is the opinion of the Committee to which all its members have contributed.

[2] This appeal concerns an artificial scheme devised in 1995 to take advantage of a prospective change in the system of taxing gains on options to buy or sell bonds and government securities (gilts). Under the legislation then in force, the

Scottish Provident Institution (SPI), as a mutual life office, was not liable to corporation tax on any gain realised on the grant or disposal of such an option. Under the system proposed in an Inland Revenue consultation document published in May 1995, all returns on such options would be treated as income and losses made on disposals would be allowable as income losses.

#### THE SCHEME IN OUTLINE

[3] The central element of the scheme devised by Citibank International plc (Citibank) to enable SPI to take advantage of the changeover was extremely simple. During the old regime, SPI would grant Citibank an option (the Citibank option) to buy short-dated gilts, at a price representing a heavy discount from market price, in return for a correspondingly large premium. The premium received on the grant of the option would not be taxable. After the new regime came into force, Citibank would exercise the option. SPI would have to sell the gilts at well below market price and would suffer an allowable loss.

[4] If that was all there was to the transaction, there would also have been a risk that SPI or Citibank would have made a real commercial profit or loss. The premium would have been fixed by reference to the current market price, but the possibility of a rise or fall in interest rates during the currency of the option created a commercial risk for one side or the other. Neither side wanted to incur such a risk. The purpose of the transaction was to create a tax loss, not a real loss or profit. The scheme therefore provided for Citibank's option to be matched by an option to buy the same amount of gilts (the SPI option) granted by Citibank to SPI. Premium and option price were calculated to ensure that movements of money between Citibank and SPI added up to the same amount, less a relatively small sum for Citibank to retain as a fee. In addition, SPI agreed to pay Citibank a success fee if the scheme worked, calculated as a percentage of the tax saving.

[5] The calculation of the SPI option price obviously needed careful thought. In one sense, of course, it did not matter. Whatever price was selected would be reflected in the corresponding premium and subsequent movements in the market price would cancel each other out. But the option price for SPI had to be higher than the option price for Citibank, otherwise the 'profit' realised by SPI on the exercise of its option would cancel out the 'loss' which it suffered on the exercise of the Citibank option and the whole exercise would be futile. Indeed, the greater the difference between the Citibank price and the SPI price, the greater would be the net tax loss created by the scheme. The difference did give rise to a potential cash flow problem because, if Citibank paid the premium for its option, it would be out of pocket in respect of the difference between the two premiums between the date on which the options were granted and the date on which they were exercised. But this was covered by a collateral agreement under which SPI agreed to deposit the difference with Citibank, free of interest, until its option had been exercised or lapsed. This enabled the payment of both premiums to take the form of book entries.

[6] On the other hand, the purpose of the SPI option was to reduce or eliminate the possibility that the outcome of the transaction would be affected by events in the real world such as movements in interest rates. So the SPI option price had to be sufficiently below market price as to be, for practical purposes, out of the possible range of such movements. There was also a third consideration. Plainly it was inconceivable that Citibank, having parted with a large premium for its option, would not exercise it. Equally, if the SPI price had been very low, it would have been inconceivable that SPI would not have countered by the

a exercise of its own option. That might have given rise to a doubt about whether in truth there was any transaction in gilts at all. It would have been inevitable that the obligations of Citibank and SPI to deliver gilts would cancel each other out and that none would change hands. So the SPI option price had to be close enough to the market price to allow for some possibility that this would not happen.

b THE SCHEME AS IMPLEMENTED

[7] The scheme was proposed by Ms Harrold of Citibank to Mr Burke, group taxation manager of SPI, in a fax dated 22 June 1995. At that stage, it proposed option or 'strike' prices of 95 and 70 (assuming market value on the trade date to be 100) respectively. The scheme as implemented used 90 and 70; a narrower spread which gave SPI a smaller tax loss but provided Citibank with greater security against a commercial loss. The way the scheme would work was explained with great clarity by Ms Harrold in a fax to Mr Paterson, senior corporate manager of SPI, on 27 June 1995:

d '1. The Company buys a nine month in-the-money Bermudan style call option contract which gives it the right but not the obligation to purchase 5 year Gilts at a strike price of 90, in return for paying an up front premium.

e 2. The Company sells a nine month in-the-money Bermudan style call option contract which gives Citibank the right but not the obligation to purchase 5 year gilts at a strike price of 70, in return for paying an up front premium.

f All options are to be settled for physical delivery. The strikes on the options are set at a level assuming that the value of the Gilt is 100 on trade date. The style of the options is "Bermudan" ie European for the first 2 months and American thereafter. Both options should be considered as qualifying "financial options" for the purposes of taxation.

f Expected taxation treatment

g The premium received on the call option sold is treated as an exempt capital gain under the current tax regime. Drawing an analogy with the new Financial Instruments regime, it is conceivable that the premium paid on the option purchased may be added to the purchase price of the bonds when the option is exercised (since no relief has been obtained under the capital gains tax rules).

h After the date of commencement of the new legislation relating to the taxation of Gilts and bonds ("commencement date"), the first call option is exercised by the Company and immediately afterwards, Citibank exercises the second call option. The purchase and sale of the Gilts under the options are netted down within the Central Gilts Office clearing accounts and therefore neither counterparty needs to take delivery of the Gilts. The net of the two strikes is paid by the Company to Citibank—in the example above 20.

j The loss on sale of the bonds is expected to be an income expense to the Company under the new tax legislation and may be offset against other taxable income. This will be calculated as the sale proceeds of 70 less the cost of purchasing the bonds. If the premium on the option purchased is added to the cost of the bonds (see above), the net loss will be calculated as 30—ie 70 less the strike of 90 plus the option premium of 10. The amount of the loss available for offset should be at least the difference between the two

strikes on the options—ie 90 less 70—in the case that the premium on the option purchased is not added to the cost of the bonds.

Collateralisation of premium paid by Citibank to the company

The cash paid to the Company as the net of the two option premiums (20 in the above example) can be passed back to Citibank as collateral against the exposure to the Company. If this cash collateral is interest free, this will enable the options to be priced as American style, ie with only intrinsic value and no time value. This means that no funding costs are borne by the Company through the option pricing. The collateral is refundable when the option sold to Citibank is exercised, effectively neutralising the attractiveness of early exercise of the deep-in-the-money American style call option. At the same time, Citibank has cash collateral against its credit exposure to the Company.

The net option premium received by the Company is the net intrinsic value of the options ie the difference between the two strikes (in our example, 20) and this is also the amount of the net cash which passes back to Citibank on exercise of both the options.

Citibank, N.A. is pleased to present to you the proposed transaction or transactions described herein. Under no circumstance is it to be considered as an offer to sell, or a solicitation to buy, any investment.

[8] At a board meeting held in Dublin on 27 June 1995, SPI's board of directors decided to enter into the scheme as outlined in a paper prepared by the group actuary, Mr Gillon. The board minutes stated:

'Citibank: Cross Options Scheme. The Board received a paper. We were satisfied that we were running no risks other than the cost of the fixed fees involved (£100,000). The tax loss which would be established would be set against future capital gains (which would probably arise within the next few years). The announcement on which it all depended was expected to be made in July and implemented in the Finance Act 1996. There was perhaps only a 50-50 chance of it being successful (it was unlikely that we were the only people who had been approached). Part of the total fee to Citibank was deferred until it was confirmed that the scheme had been successful.'

[9] The formal documents were executed on 30 June 1995. Apart from an elaborate master agreement in the standard form produced by ISDA (the International Swap Dealers Association) which neither side relied on, there were four essential documents: the 'transaction A' option agreement (designated no 1224895), the 'transaction B' option agreement (designated no 1224905), the collateral agreement and the fees letter. These documents contained some elaborate definitions and administrative provisions but their essentials were accurately summarised by the Special Commissioners ([2003] STC 1035 at 1039 and [2002] STC (SCD) 252) (in sub-paras (7), (8), (10) and (11) of para 5 of their written decision—sub-para (9) referred to the ISDA master agreement) as follows (but slightly amended to avoid repetition):

(i) Under transaction A, the taxpayer company granted a call option to Citibank in respect of £100m of nominal amount of 8% UK gilts due 7 December 2000 at an option strike price of 70% of the par value of the bond plus accrued interest. The option was exercisable at any time between 30 August 1995 and 1 April 1996. The premium for the option was £29.75m payable to the taxpayer company on 5 July 1995. Provision was made for



a notice of exercise of the option to be given. If the option were to be exercised, then settlement was to be "physical" ie the bonds were to be delivered in exchange for payment.

b (ii) Under transaction B, Citibank granted a call option to the taxpayer company in respect of £100m of nominal amount of 8% UK gilts due 7 December 2000 at an option strike price of 90% of the par value of the bond plus accrued interest. The option was exercisable at any time between 30 August 1995 and 1 April 1996. The premium for the option was £9.81m payable by the taxpayer company on 5 July 1995. Provision was made for notice of exercise of the option to be given. If the option were to be exercised then settlement was to be "physical", ie the bonds were to be delivered in exchange for payment.

c (iii) Under the collateral agreement, the taxpayer company [was] required to pay Citibank on 5 July 1995 the collateral amount, defined as "an amount of Pounds Sterling equal to the Bond Entitlement of Transaction A multiplied by the difference between the Option Strike Price of Transaction A and the Option Strike Price of Transaction B". This d amounted to £20m. Under the agreement, it fell to be repaid, without interest, on the earlier of the day on which Transaction A was exercised and 1 April 1996.

e (iv) The [Structuring Fee Agreement] entitled Citibank to a structuring fee calculated by reference to the taxpayer company's long term business funds including and excluding the two option contracts, less the initial fee of £60,000, and subject to a maximum of £240,000. The maximum total fee was thus £300,000. The agreement provided for payment on 1 September 1996.'

[10] It will be apparent that the stated consideration for option A exceeded the stated consideration for option B by £60,000 less than £20m. The sum of £60,000 f was Citibank's minimum fee, to be retained even if the scheme failed to save tax. The Special Commissioners accepted Ms Harrold's evidence that Citibank regarded the minimum fee as including the cost of hedging the risk Citibank was undertaking. The Special Commissioners also found (at para 5(12)):

g 'These option contracts created a genuine economic risk for Citibank. That risk was passed to Citibank, Frankfurt. Citibank, Frankfurt managed a pool of options to which the said two options were added. Citibank's bond option trading activities and risk management took place at Citibank, Frankfurt.'

h However, the £60,000 stayed in Citibank International plc. That appears from Ms Harrold's 'booking summary' prepared on 3 July 1995. This document (written when the timing of the new legislation was still uncertain) repeated almost word for word what had been stated in the proposal sent to SPI on 27 June:

j 'After the date of commencement of the new legislation relating to the taxation of gilts and bonds, the first call option is exercised by Scottish Provident and immediately afterwards Citibank exercises the second call option. The purchase and sale of the gilts under the options are netted down within the Central Gilts Office ("CGO") clearing accounts and therefore neither counterparty needs to take delivery of the gilts. The payment for the gilts on exercise of the options are also netted by the CGO.'

[11] On 12 July 1995 Mr Burke wrote an internal memorandum commenting on the Inland Revenue press release which had been put out two days before. The last date for exercise of the options was 1 April 1996, and it appeared from the press release that this was to be the date on which the new tax regime would start to apply to SPI. Mr Burke observed in his memorandum:

'The options themselves would also have to be exercised on 1 April 1996 in order to generate tax losses on the first day of the new rules. We will have to wait until the transitional rules are published to see if we have a chance of retaining these losses.'

Holding the options until 1 April 1996 introduces two further issues: one for SPI and one for Citibank.

- First, the options will be held over the year end and we will have to be satisfied that the accounting treatment, and disclosure, in the statutory accounts and returns does not have any adverse implications for either tax, or commercial purposes.

- Second, we are extending the period over which there is a potential investment risk for Citibank. If the price of the underlying gilt drops below 90% of its nominal value SPI begin to make a profit on the arrangement. This is because the cost of satisfying SPI's obligation under the option we have written is less than the net premium received. Ultimately, the profit could be £20million in the extreme case where the price of the underlying gilt drops below 70% of its nominal value.'

[12] There are no further relevant documents before the House until a letter which Mr Paterson wrote to Ms Harrold on 20 March 1996, as follows:

'This is to let you know that we presently expect to exercise our option under Transaction B on 1 April 1996. This is not formal notice of such exercise except in the circumstances considered in the third paragraph below. However, it may facilitate settlement to discuss consequences now. If, as seems likely, the option under transaction A is also exercised (by Citibank) on 1 April 1996, I would suggest that we agree in terms of Section 2(c) of the ISDA Master Agreement that stock deliveries and all sums due (including the £20m collateral deposit under Transaction A) be netted off for settlement purposes. The result would be that neither stock nor money would be exchanged between us. In the absence of our further instructions otherwise, please note that if Citibank does exercise its option under Transaction A on 1 April 1996 then you should consider this paragraph to constitute notice by Scottish Provident Institution of exercise of its option under transaction B also on 1 April 1996. Please confirm that the above proposals are acceptable and let me know any other matters which you think may usefully be considered before 1 April.'

[13] Ms Harrold replied by fax on 28 March. She confirmed that if on 1 April both options were exercised, stock deliveries and sums due (including the £20m collateral deposit) would be netted off—

'with the result that neither stock nor money would be exchanged between us. Moreover, as there will be no requirement for settlement through the CGO there is no need for either Citibank or Scottish Provident to issue instructions regarding settlement to the CGO nor notify the CGO in any other respect of the exercise of the above Transactions.'

- a She also stated that if SPI exercised its option on 1 April 'then you should consider this paragraph to constitute notice by Citibank of exercise of its option under Transaction A also on 1 April 1996'.

[14] On 1 April 1996 Mr Paterson faxed to Ms Harrold:

- b 'We hereby exercise our option. I note that per your letter of 28 March 1996 your option under transaction ref 1224895 is also exercised. Settlement is agreed to be by offset per your letter of 28 March 1996 and my letter to you of 20 March 1996.'

Ms Harrold replied by fax:

- c 'I confirm receipt of your fax this morning notifying exercise of your option and accepting consequent exercise of our option under our letter of 28 March 1996. I confirm that settlement is to be by offset as per our letter of 28 March 1996 and your letter of 20 March 1996.'

- d [15] Despite Mr Burke's note as to the need for caution SPI made an accounting error in reporting its results for 1995. The Special Commissioners (at para 8) described it as follows:

- e 'Because of an error caused by the absence of values for the options in the investment summary, the asset of the collateral deposit but not the net liability of the options was included in the accounts, resulting in an overstatement of assets by £20m. This was discovered when the Department of Trade and Industry return was made. The auditors agreed that the error was not material.'

#### THE SPECIAL COMMISSIONERS

- f [16] The Special Commissioners (Mr J Gordon Reid QC and Dr John F Avery Jones CBE) gave a detailed written decision (reported at [2003] STC 1035 at 1039 and [2002] STC (SCD) 252) which began by summarising the course of the hearing, and the scheme in outline. Then para 5 (headed 'Principal findings-in-fact') contained 19 sub-paragraphs, some of which have already been quoted. Parts of para 5 contained, not only findings of primary fact, but also evaluative findings; and there were more evaluative findings in later paragraphs.
- g The most important of these are as follows:

(i) Paragraph 5(18):

- h 'Transactions A and B were entered into by [the] taxpayer company and Citibank acting at arm's length. The options and premiums payable were negotiated at market rates. When transactions A and B were entered into along with the collateral agreement, there was a genuine commercial possibility of movement of interest rates and gilt prices such that it would be in Citibank's commercial interests to either refrain from exercising option A or exercising or attempting to exercise it on a date different from the exercise by the taxpayer company of option B. There was a genuine commercial possibility and a real practical likelihood that the two options would be dealt with separately. Likewise, there was a genuine commercial possibility and a real practical likelihood that option B would not be exercised by the taxpayer company.'
- j

It will be apparent that these observations assume that Citibank and SPI were at liberty to act as either thought fit in relation to its option, regardless of the terms

of the scheme which Citibank had sold to SPI. The Special Commissioners returned to this point in para 26, below. a

(ii) Paragraphs 22, 24, 25:

'22. ... The options are therefore self-cancelling if there is no practical likelihood or no genuine commercial possibility of the price falling below 90

...

24. ... Our decision, based on this evidence, is that the price falling below 90 was unlikely but not so unlikely that one could say that there was no practical likelihood of its occurring, and accordingly that there was a genuine practical likelihood or to put it another way a genuine commercial possibility that the taxpayer company would not exercise option B ... It follows that there was a genuine practical likelihood or a genuine commercial possibility that the taxpayer company would not exercise option B. The result would be that the taxpayer company would make a profit and Citibank a loss. b

25. We consider that, while it is near the limit, this degree of uncertainty saves the transactions from being ignored for tax purposes ... They were genuine transactions under which the parties could make a profit or loss even though the expectation was that they would not.' c  
d

(iii) Paragraph 26: 'There was no agreement that the options would not be exercised early. Each party was free to exercise the options if it wanted.'

(iv) Paragraph 28:

'We find that the collateral agreement is separate from the two options. It consisted of a genuine loan or at least a genuine deposit. Its purpose was to provide Citibank with security and to remove the incentive for Citibank to exercise option A early. There was no right to offset it against payments under the options.' e

(v) Paragraph 39:

'The collateral agreement is clearly linked to the options but it is a separate agreement making a loan or deposit that is not part of the options.' f

(vi) Paragraph 40:

'Mr Moynihan argues that because of the agreement to net off made on 28 March 1996 there were no subsisting rights and duties under the options. We do not agree. The agreement to net off said merely that if both parties exercised their options, then neither stock nor money would be exchanged, and if the taxpayer company did exercise its option then Citibank should be taken to have exercised its option. Both options continued in place and although, by 28 March 1996, both parties expected to exercise their options, their rights and duties under the two options continued to subsist.' g

The Special Commissioners thus made a finding of fact, which a court hearing an appeal on a question of law is not entitled to disturb, that there was an outside but commercially real possibility that circumstances might occur in which the two options would not be exercised so as to cancel each other out. The question of law is whether, in a case in which they were in fact exercised so as to cancel each other out, the existence of this contingency prevented the Special Commissioners from applying the statute to the scheme as it was intended to h  
j



- a operate and as it actually did operate. The Special Commissioners thought that it obliged them to treat the options as separate transactions.

#### THE INNER HOUSE

- b [17] The Inner House of the Court of Session (the Lord President (Cullen), Lady Cosgrove and Lord Eassie) dismissed the Inland Revenue's appeal in a reserved opinion of the court delivered by the Lord President (see [2003] STC 1035 at 1056). The court rejected the Inland Revenue's criticisms of the Special Commissioners' findings and reasoning.

#### THE QUESTION OF CONSTRUCTION

- c [18] SPI is entitled to treat the loss suffered on the exercise of the Citibank option as an income loss if the option was a 'qualifying contract' within the meaning of s 147(1) of the Finance Act 1994. Section 147A(1) (inserted by the Finance Act 1996) provides that a 'debt contract' is a qualifying contract if the company becomes subject to duties under the contract at any time on or after 1 April 1996. By s 150A(1) (also inserted by the 1996 Act) a 'debt contract' is d contract under which a qualifying company (which means, with irrelevant exceptions, any company: see s 154(1)) 'has any entitlement ... to become a party to a loan relationship'. A 'loan relationship' includes a government security. So the short question is whether the Citibank option gave it an entitlement to gilts.

- e [19] That depends upon what the statute means by 'entitlement'. If one confines one's attention to the Citibank option, it certainly gave Citibank an entitlement, by exercise of the option, to the delivery of gilts. On the other hand, if the option formed part of a larger scheme by which Citibank's right to the gilts was bound to be cancelled by SPI's right to the same gilts, then it could be said that in a practical sense Citibank had no entitlement to gilts. Since the decision of this House in *WT Ramsay Ltd v IRC*, *Eilbeck (Inspector of Taxes) v Rawling* [1981] f 1 All ER 865, [1982] AC 300 it has been accepted that the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions which were intended to have a commercial unity. Indeed, it is conceded by SPI that the court is not confined to looking at the Citibank option g in isolation. If the scheme amounted in practice to a single transaction, the court should look at the scheme as a whole. Mr Aaronson QC, who appeared for SPI, accepted before the Special Commissioners that if there was 'no genuine commercial possibility' of the two options not being exercised together, then the scheme must fail.

- h APPLYING THE CONSTRUCTION

- j [20] Mr Aaronson submitted, as had been argued successfully before the Special Commissioners and the Inner House, that even if the parties intended that both options should be exercised together, as contemplated in Ms Harrold's memorandum of 27 June 1995, the court could treat them as a single transaction only if there was 'no practical likelihood' that this would not happen. On this point, SPI has the benefit of the findings of fact by the Special Commissioners to which we have referred in [16], above. The Special Commissioners adopted (at para 24) the analogy of horse race betting:

'If the chance of the price movement occurring was similar to an outsider winning a horse race we consider that this, while it is small, is not so small

that there is no reasonable or practical likelihood of its occurring; outsiders do sometimes win horse races.'

[21] Mr Aaronson said that a test of 'no practical likelihood' derived from the speech of Lord Oliver of Aylmerton in *Craven (Inspector of Taxes) v White* [1988] STC 476 at 507, [1989] AC 398 at 514 and assented to by Lords Keith of Kinkel and Jauncey of Tullichettle. In that case, however, important parts of what was claimed by the Revenue to be a single composite scheme did not exist at the relevant date. As Lord Oliver said ([1988] 3 All ER 495 at 515, [1989] AC 398 at 498):

'[T]he transactions which, in each appeal, the Revenue seek now to reconstruct into a single direct disposal from the taxpayer to an ultimate purchaser were not contemporaneous. Nor were they preordained or composite in the sense that it could be predicated with any certainty at the date of the intermediate transfer what the ultimate destination of the property would be, what would be the terms of any ultimate transfer or even whether an ultimate transfer would take place at all.'

[22] Thus there was an uncertainty about whether the alleged composite transaction would proceed to completion which arose, not from the terms of the alleged composite transaction itself, but from the fact that, at the relevant date, no composite transaction had yet been put together. Here, the uncertainty arises from the fact that the parties have carefully chosen to fix the strike price for the SPI option at a level which gives rise to an outside chance that the option will not be exercised. There was no commercial reason for choosing a strike price of 90. From the point of view of the money passing (or rather, not passing), the scheme could just as well have fixed it at 80 and achieved the same tax saving by reducing the Citibank strike price to 60. It would all have come out in the wash. Thus the contingency upon which SPI rely for saying that there was no composite transaction was a part of that composite transaction; chosen not for any commercial reason but solely to enable SPI to claim that there was no composite transaction. It is true that it created a real commercial risk, but the odds were favourable enough to make it a risk which the parties were willing to accept in the interests of the scheme.

[23] We think that it would destroy the value of the *Ramsay* principle of construing provisions such as s 150A(1) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-*Ramsay* devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.

[24] It follows that in our opinion the Special Commissioners erred in law in concluding that their finding that there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. We think that it was and that, so viewed, it created no entitlement to gilts and that there was therefore no qualifying contract.

*a* [25] Mr Aaronson submitted that SPI have merely taken legitimate advantage of a gap in the transitional provisions of the 1996 Act. Paragraph 25 of Sch 15 has the effect of preventing a company from claiming that a loss made after 1 April 1996 as a result of the exercise of an option granted before that date is an income loss. But it applies only to companies which would have been liable to tax before 1 April 1996 if the transaction had produced a gain: see para 25(1)(b). SPI was not  
*b* so liable and Mr Aaronson submits that it was entitled to order its affairs to take advantage of its position.

[26] It may be that if the Citibank option had stood alone, it would have been a qualifying contract and SPI would have sailed through the gap. Mr Moynihan QC, for the Inland Revenue, advanced a number of arguments of a more or less technical nature which he said would have prevented this from happening. But we  
*c* need not discuss these points because SPI chose to enter into arrangements which, viewed as a whole, did not create a qualifying contract at all. On this ground we would allow the appeal.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# EIC Services Ltd and another v Phipps and others

[2004] EWCA Civ 1069

COURT OF APPEAL, CIVIL DIVISION

GIBSON, SEDLEY LJ AND NEWMAN J

25 JUNE, 30 JULY 2004

*Company – Dealing with company – Person dealing with company in good faith – Statutory provision operating in favour of ‘a person dealing with a company’ – Whether shareholder receiving bonus shares such a person – Companies Act 1985, s 35A(1) – Council Directive (EEC) 68/151, art 9.*

A shareholder receiving bonus shares is not ‘a person dealing with a company’ for the purposes of s 35A(1)<sup>a</sup> of the Companies Act 1985, which provides that, in favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company’s constitution. Having regard to (i) the nature of a bonus issue (the essence of which is that profits and other available reserves are capitalised and applied in paying up unissued shares or debentures which are issued to the existing shareholders in proportion to their entitlement to dividends) and (ii) the fact that it is an internal arrangement with no diminution or increase in the company’s assets or liabilities, with no change in the proportionate shareholdings and with no action required from any shareholders, the shareholder is not a person dealing with the company as a matter of ordinary language. Moreover, s 35A of the 1985 Act seeks to give effect to art 9<sup>b</sup> of the First Council Directive (EC) 68/151 (on company law), which provides that limits on the powers of the organs of the company may never be relied on ‘as against third parties’. In the context of a company, the term ‘third parties’ naturally refers to persons other than the company and its members. The directive therefore supports the view that a member receiving a bonus issue is not ‘a person dealing with a company’ (see [17], [35], [37], [43], [44], below).

Decision of Neuberger J [2003] 3 All ER 804 reversed.

## Notes

For powers of directors to bind the company, see 7(1) *Halsbury’s Laws* (4th edn) (2004 reissue) para 431.

For the Companies Act 1985, s 35A, see 8 *Halsbury’s Statutes* (4th edn) (1999 reissue) 135.

## Cases referred to in judgments

*Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255.

*Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1, HL.

a Section 35A, so far as material, is set out at [13], below

b Article 9, so far as material, provides: ‘(2) The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.’



- a *Cleveland Trust plc, Re* [1991] BCLC 424.
- Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2002] 4 All ER 689, [2003] QB 679, [2002] 3 WLR 1617.
- Hill v Permanent Trustee Co of New South Wales Ltd* [1930] AC 720, [1930] All ER Rep 87.
- b *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
- Smith v Henniker-Major & Co* [2002] EWCA Civ 762, [2002] 2 BCLC 655, [2003] Ch 182, [2002] 3 WLR 1848.
- Whittome v Whittome (No 1)* 1994 SLT 114.

c **Appeal**

- The third defendant, Jeremy Lee Barber, appealed with permission of Neuberger J from parts of his order of 4 April 2003 ([2003] EWHC 891 (Ch), [2004] 2 BCLC 589), giving effect to his decision of 13 March 2003 ([2003] EWHC 1507 (Ch), [2003] 3 All ER 804) determining preliminary issues in
- d proceedings brought by the claimant companies, EIC Services Ltd and European Internet Capital Ltd, to determine the validity of an issue of bonus shares made by the first claimant company on 15 December 1999. The first and second defendants, Stephen Lawry Phipps and Jonathan Paul, took no part in the appeal. The fourth and fifth defendants, Stella Sutton and Hambros Bank
- e Nominees Ltd, took no part in the proceedings below or in the appeal. The facts are set out in the judgment of Peter Gibson LJ.

Mr Lee Barber appeared in person.

The claimant companies were not represented.

f **PETER GIBSON LJ.**

- [1] This is an appeal by the third defendant, Jeremy Lee Barber, from parts of the order made by Neuberger J on 4 April 2003 ([2003] EWHC 891 (Ch), [2004] 2 BCLC 589). The first claimant, EIC Services Ltd (the company) and the second claimant, its Guernsey parent company, European Internet Capital Ltd
- g (the Guernsey company), sought a determination as to the validity of an issue of bonus shares made by the company on 15 December 1999. Master Moncaster ordered the trial of preliminary issues. The judge, in determining those preliminary issues, held that a large number of the bonus shares were allotted to shareholders whose shares were not paid up and that the issue of the
- h bonus shares, including the capitalisation of the share premium account for the issue, was not authorised by an ordinary resolution of the company, as it should have been, or otherwise effectively authorised by members of the company. However, he also held that, despite those defects, apart from s 35A(1) of the Companies Act 1985 (the 1985 Act) the bonus shares were validly issued but were nil paid and that s 35A(1) was capable in principle, subject to outstanding
- j issues yet to be determined, of operating to render unpaid bonus shares fully paid up.

[2] The appeal is brought with the permission of the judge. At the hearing before him the claimants, appearing by Mr Philip Gillyon, adopted a largely neutral stance. The first defendant, Stephen Phipps, and the second defendant, Jonathan Paul, appearing by David Chivers QC, represented all who were

interested in arguing for the validity of the issue of bonus shares. Mr Lee Barber, appearing by Mr David Mabb QC, represented all whose interest it was to argue that the bonus shares were not fully paid, that the capitalisation of the share premium account and the issue of bonus shares were not properly authorised and that the bonus shares were not validly issued. On this appeal, neither the claimants nor Mr Phipps and Mr Paul have chosen to appear or to be represented and Mr Lee Barber appears in person. He relies on two skeleton arguments which Mr Mabb prepared for the appeal. No inference can be drawn from the non-appearance of Mr Phipps or Mr Paul other than that they are content with the judge's judgment and conclusions. Those of the issues which are live on this appeal are very technical, and it is unfortunate that there is no professional representation of any party on this appeal. However, the judge's full and detailed judgments, running to 240 paragraphs, and Mr Mabb's skeletons for the appeal, coupled with the skeleton argument and other written submissions of Mr Chivers before the judge, are sufficient to enable us to reach conclusions on all the issues, much as we would have welcomed the opportunity to test those conclusions in a dialogue with counsel in the ordinary way.

#### THE FACTS

[3] The company was incorporated on 8 April 1999 with an authorised capital of £1,000 divided into 1,000 £1 shares. On 20 May 1999 James Spickernell and Julian Bryson were appointed directors in place of the first director of the company. They acquired the company for the purpose of investing in internet-related businesses. On 21 July 1999 the two nil paid subscriber shares were transferred to Mr Spickernell and Mr Bryson respectively and the authorised share capital was divided into 100,000 ordinary shares of 1p each, so that Mr Spickernell and Mr Bryson each had 100 1p shares.

[4] On 12 November 1999 the authorised capital was increased to £300,000 by the creation of an additional 29,900,000 1p shares and Mr Spickernell and Mr Bryson, as directors, approved transfers of Mr Spickernell's 100 shares to Berdino International Ltd (Berdino), a company owned by him, and of Mr Bryson's 100 shares to Okimax International Ltd (Okimax), a company owned by him. The directors also that day allotted to Berdino, Okimax, Simon Reid (whom the directors appointed as a third director) and 13 others (collectively 'the 16 shareholders') a total of 110,320 shares at a price of 1p each.

[5] On 15 December 1999 at a board meeting Mr Spickernell as chairman and Mr Reid (Mr Bryson was not present) allotted a total of 27,035 shares at a price of £29 each to 5 of the 16 shareholders and to 28 new shareholders (the 28 shareholders), thereby increasing the number of shares in issue to 137,555. They also passed a resolution (the bonus issue resolution) in the following terms:

'It was noted that prior to this meeting there were 110,520 Ordinary Shares in issue and following the issue of 27,035 Ordinary Shares referred to above that there were now 137,555 Ordinary Shares in issue. It was noted that following the share issue referred to above the company now has £783,744.65 in its share premium account and IT WAS RESOLVED THAT £136,179.45 of the sum standing to the credit of the share premium account of the company be capitalised and appropriated to the holders of the Ordinary Shares on the register of members at the close of business on

a the date of this meeting in the same proportion as they would be entitled to that sum were it distributed by way of dividend on condition that that sum be applied on their behalf in paying up in full at par all the Ordinary Shares to be issued and distributed credited as fully paid up to those persons in the proportion of 99 Ordinary Shares for each Ordinary Share now registered in their names.'

b [6] On 22 December 1999 Mr Lee Barber agreed to subscribe for 2,500,000 shares at a price of £1.25 each and shortly after that he paid £3,125,000 for them. On 20 January 2000 the company issued those shares to him and a further 220,000 shares to others also at a price of £1.25 per share. Between 4 February and 23 March 2000 the company issued a total of 5,542,000 more shares at a price of £2.50 per share.

c [7] On 24 March 2000 the Guernsey company made an offer to acquire all of the existing issued shares on the basis of 3 ordinary shares of 1p each in the Guernsey company for each fully paid up share in the company. On 9 April 2000 the company became a wholly owned subsidiary of the Guernsey company. Shortly thereafter Mr Spickernell, Mr Bryson and Mr Reid ceased to be directors of the company.

#### THE PROCEEDINGS

e [8] On 18 December 2001 the company and the Guernsey company began these proceedings, joining as defendants Mr Phipps, Mr Paul and Mr Lee Barber as well as two others, all shareholders in the Guernsey company and former shareholders in the company, to represent different interests.

f [9] On 26 June 2002 Master Moncaster directed the determination of the preliminary issues. The first part of the first issue was whether the subscriber shares were fully paid up at the time of the bonus issue on 15 December 1999. The second part of that issue was whether the shares issued on 12 November 1999 to the 16 shareholders were fully paid up on 15 December 1999. The second issue was whether the capitalisation of reserves and the issue and allotment of the bonus shares were effectively authorised by the members of the company. The third issue, expressed to be conditional on the judge thinking fit to determine it, was whether, in the light of the determination on the other issues, the bonus shares were validly issued or allotted.

g [10] On 13 March 2003 the judge handed down his reserved judgment ([2003] EWHC 1507 (Ch), [2003] 3 All ER 804, [2003] 1 WLR 2360). On 4 April 2003 at a further hearing on the terms of the order, the judge delivered a further judgment to clarify several points in his earlier judgment ([2004] 2 BCLC 589).

h [11] As the judge explained, the importance of the first and second preliminary issues arises from the provisions of regs 110 and 104 of the 1985 version of Table A, incorporated as they were into the company's articles of association. By reg 110 so far as relevant:

j 'The directors may with the authority of an ordinary resolution of the company—(a) ... resolve to capitalise ... any sum standing to the credit of the company's share premium account ... (b) appropriate the sum resolved to be capitalised to the members who would have been entitled to it if it were distributed by way of dividend and in the same proportions and apply such sum on their behalf ... in paying up in full unissued shares ... of the

company of a nominal amount equal to that sum, and allot the shares ...  
credited as fully paid to those members ...'

By reg 104, so far as relevant: '... all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid.'

[12] The judge concluded, having regard to the evidence on the first preliminary issue, that the subscriber shares were fully paid up at the time of the bonus issue, but that the shares issued to the 16 shareholders in November 1999 were not. On the second preliminary issue, the judge reluctantly concluded that the capitalisation of reserves and the issue of bonus shares paid up were not authorised by an ordinary resolution of the company or otherwise effectively authorised by the members of the company. On the third preliminary issue the judge considered the contention advanced by Mr Mabb for Mr Lee Barber that the bonus issue was void for mistake. He agreed with observations made by Scott J in *Re Cleveland Trust plc* [1991] BCLC 424 at 434 to the effect that the issue and allotment of bonus shares, once accepted by the allottee shareholder, involved a relationship between the company and the shareholder analogous to a contractual relationship. Neuberger J accepted that the fact that the shares issued in November were not paid up at the time of the bonus issue and the absence of an ordinary resolution could properly be characterised as common mistakes. However, he considered on the facts of the case that the issue of the bonus shares to the 16 shareholders was not void by reason of the shares issued in November 1999 not being paid up at the time of the bonus issue. As for the failure of the directors to obtain the approval of the shareholders to the issue and allotment of the bonus shares, the judge took the view that that mistake did not vitiate so as to render void the issue and allotment of the bonus shares. The judge said that if that was wrong, he would still have rejected the contention that the bonus shares were void, any voidness attaching only to the paying up of the shares rather than to the shares themselves.

[13] The judge then considered an argument by Mr Mabb that there was no power to issue bonus shares on the facts found by the judge and the counter-argument of Mr Chivers that s 35A of the 1985 Act applied. That section provides, so far as relevant:

'(1) In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution.

(2) For this purpose—(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party ...'

[14] The judge accepted the argument put forward on behalf of Mr Phipps and Mr Paul that each shareholder who received bonus shares was a person dealing with the company and that the issue and allotment of bonus shares constituted a 'transaction or other act to which the company is a party'. The judge indicated that Mr Reid, Mr Spickernell and Mr Bryson and their shareholder companies did not know that the issue and allotment of the bonus shares were beyond the power of the directors for the purposes of s 35A(2)(b). He expressed his strong inclination to conclude that the directors acted in good faith for the purposes of s 35A(2)(c). If wrong on the applicability of s 35A, the judge would have concluded that the effect of the two defects would not have rendered any bonus shares invalid, but would only have rendered the paying



a up of some of the shares invalid. That conclusion, expressed tentatively in the judge's first judgment, was expressed as a final decision in the judge's further judgment.

[15] Finally, the judge said that if he had decided that the issue and allotment of the bonus shares was void in whole or in part he would have thought it right to grant a declaration to that effect.

b THE APPEAL

[16] Mr Lee Barber appeals on the points on which he failed before the judge. He submits that: (1) apart from s 35A(1), the bonus issue was void by proceeding on the mistaken footing that the directors had power to capitalise a sum standing to the credit of the share premium account and appropriate it to all the members and that each of the 137,555 shares in issue conferred an equal right to participate in the bonus issue; (2) s 35A(1) was not capable of operating to validate, and did not validate, the bonus issue to any extent.

THE NATURE OF A BONUS ISSUE

d [17] It is convenient at this point to refer briefly to the nature of a bonus issue. Its essence is, as Mr Mabb submitted in his first skeleton argument for the appeal, that profits and other available reserves are capitalised and applied in paying up unissued shares or debentures, which are issued to the existing shareholders in proportion to their entitlement to dividends. The effect is that, in contrast to a dividend which reduces the assets of a company, a bonus issue e does not reduce those assets since the assets and liabilities side of the balance sheet remains unchanged but the capital and reserves side of the balance sheet is rearranged with a reduction in the amount of the profits or other relevant reserves and an equal increase in the amount of the paid up share capital reflecting the increase in the issued share capital (see *Hill v Permanent Trustee Co of New South Wales Ltd* [1930] AC 720 at 731–732, [1930] All ER Rep 87 at 92–93 f per Lord Russell).

[18] Since the Companies Act 1947 the premium on the issue of a share, viz the amount by which the consideration received by a company for a share exceeds its nominal value, has had to be credited to the share premium account, but by s 130(2) of the 1985 Act the share premium account can be applied by the company in paying up unissued shares to be allotted to the members as fully g paid up bonus shares.

BONUS ISSUE APART FROM SECTION 35A

h [19] Mr Lee Barber relies on the two defects found by the judge in the bonus issue. The first was that although the directors passed a resolution with a view to making the bonus issue, they did not act with the authority of an ordinary resolution of the company nor had the equivalent authority been obtained by all its members agreeing. The second was that 110,320 of the 137,555 issued shares in the company were not paid up and they would have had to be paid up, like the remaining 27,235 shares, if each of the 137,555 shares was to have the j right to participate therein. It is plain that the bonus issue proceeded on the footing that all the issued shares had that right.

[20] The consequence of the defects was that the directors had no power to capitalise any sum standing to the credit of the share premium account or to appropriate it to members, because reg 110 did not give them that power and the directors had no other power to that effect. They did have power to issue

unpaid shares, and if the bonus issue resolution could be construed, as the judge accepted, as providing for the issue of unpaid shares, their action would be effective to issue bonus shares nil paid. However, it seems plain that the resolution cannot be so construed. It was part and parcel of the resolution that the sum which was specified in the resolution and stood to the credit of the share premium account was to be capitalised and appropriated to the holders of the 137,555 shares in issue on condition that the sum was to be applied in paying up in full at par all the bonus shares to be issued and distributed credited as fully paid up. That it was assumed for the purpose of the bonus issue that the shares would be fully paid up is, in my view, clear. The resolution corresponded with reg 110 in that respect. The evidence shows that the greater part of all the shareholders knew that they were to receive 99 bonus shares for every share held by them. No shareholder was asked to accept unpaid shares and none agreed to do so. As Mr Chivers in his written submissions rightly said to the judge: 'If one asks the question—"what was the fundamental subject matter of the contract?" it was that every shareholder should receive fully paid bonus shares.' That fundamental assumption was falsified by what occurred.

[21] What then is the consequence of the fundamental assumption being mistaken? It was conceded before the judge, and the judge accepted, as I have noted in [12] above, that the law relating to common mistake can be applied by analogy to the issue of bonus shares. The observations of Scott J in *Re Cleveland Trust plc* [1991] BCLC 424, which the judge approved, were made in a case where three companies with common directors were involved. One company, McInnes, used a capital profit to pay a dividend to a second company, Gunnergate, which in turn paid a dividend to a third company, Cleveland. The directors of Cleveland, with the authority of a resolution of its shareholders in general meeting authorising a bonus issue capitalising part of the balance standing to the credit of the profit and loss account (largely consisting of the Gunnergate dividend), made a bonus issue. However, McInnes under its memorandum of association was prohibited from paying a dividend out of capital profit, and so Gunnergate received the sum as constructive trustee for McInnes. The profit and loss account of Gunnergate was thereby falsified. Cleveland received the dividend paid to it as constructive trustee for Gunnergate.

[22] The question for Scott J was whether the bonus issue by Cleveland was void. Of the four grounds for voidness advanced by Cleveland the third was that the resolution passed at the general meeting did not authorise the directors to allot partly paid or nil paid shares, and the fourth was that the fundamental, but mistaken, premise underlying the resolution of the shareholders in general meeting and the decision of the board to recommend the issue of the bonus shares was that the capital profit made available to Cleveland via the Gunnergate dividend could be utilised in paying up the shares. The amicus curiae, Mr Charles, submitted, and Scott J agreed, that in fact the bonus shares were fully paid up. However Scott J recorded Mr Charles's acceptance that if Cleveland's analysis were correct and the shares were not paid up, the conclusion that the issue was void for mistake would be inescapable, the shareholders having accepted fully-paid shares and not having accepted shares on which they had a liability to pay calls. Scott J commented (at 433): 'I have no doubt that that is right.'

- a [23] Scott J also accepted the correctness of Cleveland's fourth point. He said that a fundamental premise underlying the bonus issue was that Cleveland had profits available for distribution sufficient in amount to pay up the bonus shares. He thought the relationship between company and shareholder vis-à-vis the authorised bonus issue was sufficiently analogous for the principle of common law mistake to be as applicable to the bonus issue as to an ordinary contract.
- b After considering what was said in *Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1 on the principles of mistake Scott J expressed his opinion that the fundamental premises underlying the bonus issue satisfied the tests enunciated by Lord Atkin ([1932] AC 161 at 217 and 225, [1931] All ER Rep 1 at 27 and 31) and Lord Thankerton ([1932] AC 161 at 235, [1931] All ER Rep 1 at 36) in that case as to what assumptions, if mistaken, will make a contract void. Scott J also referred
- c to Steyn J's remarks in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1988] 3 All ER 902 at 912–913, [1989] 1 WLR 255 at 268 that the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. Scott J said (at 436):

- d "The "subject matter" of the contract, for present purposes, was the issue of the bonus shares. It was fundamental to the issue that the dividend deriving from McInnes's capital profit could be used in paying up the bonus shares. The true state of affairs, in which the capital profit could not be so used and the Gunnergate dividend was repayable, did, in my judgment,
- e "render essentially and radically different the subject matter which the parties believed to exist". I am, accordingly, satisfied that the bonus issue can properly be declared void on the ground of common mistake."

- [24] Neuberger J's approach was to look at each defect separately and at the effect of each defect on individual groups of shareholders. It is understandable that a judge, in setting out his reasons, should wish to deal with the points
- f arising one by one, but the danger of that approach is that it takes no account of the cumulative effect of the interlinked defects. Thus to decide, as the judge did, that the absence of shareholder approval was not such a fundamental or essential mistake that it rendered the issue and allotment of the bonus issue void leaves out of account the consequence flowing from that absence that any bonus shares issued could only have been nil paid. It is not relevant to pose the
- g question, as the judge did, whether the failure to obtain the consent of the 16 shareholders to the issue of the bonus shares was a fundamental mistake. The fact is that there was neither an ordinary resolution nor the authority of the members of the company. An exercise by the directors of their power to issue nil paid shares would have been fundamentally different from what the bonus
- h issue resolution shows was contemplated. Further, to look at individual groups of shareholders and the hardship to them if the bonus issue is void leaves out of account the fundamental mistake, again apparent from the bonus issue resolution, that the bonus shares were to be allotted fully paid to all the members (on the mistaken footing that all were entitled to distributions by way
- j of dividend).

[25] I have the following further comments on the judge's reasoning.

[26] The judge referred to the decision of this court in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, *The Great Peace* [2002] EWCA Civ 1407, [2002] 4 All ER 689, [2003] QB 679, although Mr Chivers had not relied on it. That authority is rightly described by the judge as representing a significant

development in the law and as having considered, among other cases, *Bell v Lever Bros Ltd* and the *Associated Japanese Bank* case cited by Scott J in *Re Cleveland Trust plc*. But Neuberger J does not say that the views of Scott J were wrong in the light of *Great Peace*: on the contrary, he plainly cited them with approval. One of the three factors relied on by the judge as combining to lead him to the conclusion that the issue of bonus shares to the 13 shareholders (viz the 16 shareholders other than Berdino, Okimax and Mr Reid) was that whereas they were innocent of responsibility for the mistake, in contrast 'on one view, its directors had misled the 16 shareholders by telling him that their shares would be paid up by one of the directors, who then failed to pay up the shares' (see [2003] 3 All ER 804 at [166], [2003] 1 WLR 2360). The judge then refers to propositions (ii) and (iii) of the five necessary elements for common mistake set out in the judgment in *Great Peace* [2002] 4 All ER 689 at [76], [2003] QB 679 of which proposition (iii) would appear to be the more relevant, viz that 'the non-existence of the state of affairs [the subject of the mistaken common assumption] must not be attributable to the fault of either party'. However, because the judge accepts that there were common mistakes, he does not appear to adopt the possible view which he had set out. That may be because the evidence suggests that Mr Spickernell, in giving his assurance to the 13 shareholders, was not doing so on behalf of the company but in his personal capacity to members of the family or friends, nor was he saying that the shares issued in November 1999 would be paid up by the time of the bonus issue (Mr Spickernell appears to have been unaware that this was necessary for compliance with regs 104 and 110), but rather that the 13 shareholders would not be asked to pay for their shares.

[27] The judge also referred to para [90] of the judgment in *Great Peace* for the general proposition that the law ought to uphold rather than destroy apparent contracts. Whilst that is undoubtedly correct, if circumstances arise such as Scott J considered in *Re Cleveland* the law must declare such contracts void. I do not think that the correctness of Scott J's view is affected by *Great Peace*.

[28] The second factor which led the judge to conclude that the issue of the bonus shares to the 13 shareholders was not void was that the 28 shareholders whose shares were fully paid up on 15 December 1999 (in fact the judge must have meant also to include the 5 shareholders who were also allotted shares at £29 each that day) and subsequent shareholders would enjoy a windfall. That is a factor which weighed heavily with the judge, but it is only correct if the judge is right that the issue on 15 December 1999 of bonus shares to shareholders with paid up shares was valid even though the bonus issue resolution contemplated that bonus shares would be issued to all shareholders. For the reasons to which I will come shortly I do not think that the judge is right on that point. As for subsequent shareholders, they are not relevant to the question whether the issue of bonus shares on 15 December 1999 is void.

[29] The third factor on which the judge relied was the fact that the mistake as to the 110,320 shares being paid up was one which as at 15 December 1999 would have been perceived as capable of being put right, the amount of money needed to make the shares fully paid up being just over £1,000, which, in the context of the then perceived value of the shares, the judge described as 'virtually de minimis'. The difficulty with that is that the validity of the issue of the bonus shares to the 16 shareholders must be judged at 15 December 1999.



a At that date, in the absence of shareholder approval, the directors could not issue bonus shares to the 16 shareholders other than as nil paid shares.

[30] The judge said that *Re Cleveland* did not cast doubt on his conclusion for four reasons. The first was the windfall in the present case (but not found in *Re Cleveland*) to which I have referred in [28] above, and which I reject for the reasons to which I come in [31] below. The second is that in *Re Cleveland* b neither the company nor its directors misled the shareholders whereas the directors misled 13 shareholders in the present case. But in the instant case, for the reasons given in [26] above, Mr Spickernell was not acting as a director or otherwise on behalf of the company in giving his assurance. The third is that there was no question of Cleveland being able to recover from anyone a sum equal to the amount wrongly paid to it by McInnes via Gunnergate, whereas in c the present case it was clear at 15 December 1999 that the shares issued in November to the 16 shareholders could and would be paid up in due course. That assumes that the issue of bonus shares to the 16 shareholders would by such payment for the shares issued in November be validated, whereas the true position in law was that at 15 December 1999 the directors of the company only d had power to issue nil paid shares to the 16 shareholders. The fourth reason was that the mistake in *Re Cleveland* was 'conceptually, as well as commercially, far more "essential" or "fundamental" to the issue of the bonus shares than the mistake in this case' (see [2003] 3 All ER 804 at [174], [2003] 1 WLR 2360). That would appear to be at variance with Scott J's view that the issue of nil paid e shares, when the shareholders thought that they were accepting fully paid shares, would be void for mistake, and again it takes no account of the fact that at 15 December 1999 the directors could only issue nil paid shares. With respect to the judge, I am not persuaded by his reasons for distinguishing *Re Cleveland*.

f [31] I come now to the question whether, if the issue of bonus shares to the 16 shareholders was void, the issue of bonus shares to the holders of the other shares already in issue and paid up was valid. In relation to this question it is important to bear in mind that of the 137,555 issued shares, 110,320 shares were nil paid and only 27,235 were fully paid. If the bonus share resolution is read in the light of that fact, it would be very surprising if it were to have effect by g leaving valid the issue in respect of some 20% of the issued shares while the issue in respect of some 80% of the shares was invalid. It is obvious from the bonus issue resolution that it was a fundamental assumption underlying the bonus issue that each of the 137,555 shares in issue conferred an equal right to participate in the issue.

h [32] Further, the directors only had power to issue bonus shares nil paid. But it is clear from the bonus issue resolution that the specified sum in the share premium account was to be capitalised and that this was a necessary step to the issue of the bonus shares as fully paid up at par.

j [33] Accordingly I conclude, in respectful disagreement with the judge, that (subject to s 35A) the issue of the bonus shares by the bonus issue resolution was void. I do not accept that it is open to the court to preserve its validity in relation only to a small portion of the shares in respect of which the issue was to be made by striking out the provisions in the resolution for capitalising reserves and paying up the shares. That surgery is too violent and produces a result far removed from what was plainly intended.

## SECTION 35A

[34] For s 35A(1) to validate the bonus issue it was necessary to find that the shareholders receiving the shares were persons dealing with the company in good faith and that the reasons why the bonus issue would otherwise have been invalid were limitations under the company's constitution on the power of the board of directors to bind the company. The judge held that a shareholder of a company receiving shares (whether or not bonus shares) from the company is 'a person dealing with the company' within the scope of s 35A(1). He considered that as a matter of ordinary language, such a shareholder would be within the ambit of those words, and he said that, in the absence of a powerful reason to the contrary, it is inappropriate to treat naturally wide words in a statute as subject to an implied limitation. The judge also referred to the decision of this court in *Smith v Henniker-Major & Co* [2002] EWCA Civ 762, [2002] 2 BCLC 655, [2003] Ch 182 and found that the reasoning of each member of this court appeared, if anything, to support his conclusion. He also found that s 322A of the 1985 Act indirectly supported his conclusions. That section sets out circumstances in which s 35A cannot be relied on. Those circumstances are limited to transactions between a company and a director of it or of its holding company or a person connected with the directors or a company with whom such a director is associated. Finally the judge expressed the view that the present case plainly fell within the policy behind s 35A as expressed by Carnwath LJ in *Smith v Henniker-Major & Co* ([2002] 2 BCLC 655 at [108], [2003] Ch 182):

'The general policy seems to be that, if a document is put forward as a decision of the board by someone appearing to act on behalf of the company, in circumstances where there is no reason to doubt its authenticity, a person dealing with the company in good faith should be able to take it at face value ...'

[35] I have to say that my immediate reaction to the question whether a shareholder receiving bonus shares is 'a person dealing with the company' is not the same as that of the judge. Having regard to the nature of a bonus issue (see paras [17] and [18] above) and the fact that it is an internal arrangement with no diminution or increase in the assets or liabilities of the company, with no change in the proportionate shareholdings and with no action required from any shareholders (see *Whittome v Whittome (No 1)* 1994 SLT 114 at 124 per Lord Osborne), I do not think that the shareholder is a person dealing with the company as a matter of ordinary language. The section contemplates a bilateral transaction between the company and the person dealing with the company or an act to which both are parties such as will bind the company only if the section applies and it will not apply if the person deals with the company other than in good faith. It would be very surprising if a bonus issue made by a single resolution applicable to all shareholders were to be rendered by the section binding in part but void in part depending on the circumstances of the individual shareholders. Nor do I agree with the judge that it matters not whether the shareholder receives a bonus issue or pays for his new shares. If a shareholder receives shares otherwise than by way of a bonus issue (for example, by a rights issue requiring payment of new consideration), then he would have to deal with the company, and the question would be whether a shareholder is within the intended reach of the section.

a [36] I turn to that question. Section 35A, as Robert Walker LJ pointed out in *Smith v Henniker-Major & Co* [2002] 2 BCLC 655 at [19], [2003] Ch 182, represents Parliament's second attempt to give effect to art 9 of the First Council Directive on company law (EEC) 68/151 (JO L065 14.03.68 p 8 (Sp Ed 1968 (I) p 41)). The section was introduced by s 108 Companies Act 1989. The First Directive was, of course, adopted before the United Kingdom joined the European Community and so there was no United Kingdom input into the language of the Directive. Article 9(2) provides that limits on the powers of the organs of the company may never be relied on 'as against third parties.'

b [37] The judge said that he did not find the reference to 'third parties' in the Directive to be of much assistance to Mr Lee Barber's case for two reasons. The first was that it was not entirely clear what is meant by 'third parties' in art 9(2). With respect, although 'third parties' is not defined, to my mind it is tolerably clear from the Directive itself that third parties do not include members of the company (see, for example, the sixth preamble). In the context of a company, the term 'third parties' naturally refers to persons other than the company and its members. The judge's second reason was that art 9(2), if not requiring legislation to protect members dealing with the company, did not prevent s 35A going further, as Schiemann LJ pointed out in *Smith v Henniker-Major & Co* [2002] 2 BCLC 655 at [119], [2003] Ch 182. That is true, but in construing s 35A, given that its purpose was to implement the Directive, it must be relevant to have regard to the extent of the requirement of art 9(2) in the absence of any other known mischief which the section was designed to counteract. In my judgment the Directive supports the view that a member receiving a bonus issue is not 'a person dealing with a company'.

c [38] As for the other reasons given by the judge as to why s 35A applied, I am not able to derive assistance for the present case from the court's judgment in *Smith v Henniker-Major & Co*. The issues in that case were entirely different, relating as they did to the actions of a director. The explanation of the policy of the section given by Carnwath LJ does not purport to explain who is a person dealing with the company for the purposes of the section. Nor, in my view, does s 322A assist. It does not follow from the fact that the legislature has dealt specifically with transactions between a director and a company that an inference can be drawn about the applicability of s 35A to shareholders who in that capacity deal with the company.

d [39] In his supplemental skeleton argument for this appeal Mr Mabb referred to certain parliamentary material which Mr Lee Barber wished to adduce in accordance with *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. In view of the conclusion which I have reached on 'a person dealing with a company', it is unnecessary to go into that.

e [40] The judge left open the question of the good faith of the shareholders, and that issue is not before this court.

f [41] Mr Mabb in his skeleton argument for this court took the point, on which he failed before the judge, that the words of reg 110 'with the authority of an ordinary resolution of the company' and the provision in reg 110(b) that the sum resolved to be capitalised was to be appropriated 'to the members who would have been entitled to it if it were distributed by way of dividend and in the same proportions and appl[ied] ... on their behalf' were not limitations under the company's constitution with the meaning of s 35A(1). In view of my

conclusions on the applicability of s 35A it is unnecessary to deal with this point either.

a

**CONCLUSION**

[42] For these reasons, I would allow the appeal and declare that the bonus issue on 15 December 1999 was void.

**SEDLEY LJ.**

b

[43] I agree.

**NEWMAN J.**

[44] I also agree.

*Appeal allowed.*

Ian Denham Barrister.



# R (on the application of Morris) v Westminster City Council

[2004] EWHC 2191 (Admin)

b QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

KEITH J

28–30 JULY, 7 OCTOBER 2004

*Housing – Homeless person – Duty of housing authority to provide accommodation – Duty to provide accommodation to person they have reason to believe may be homeless and have a priority need – British citizen having dependent child who was subject to immigration control – Statutory provision requiring such a child to be disregarded when determining whether British citizen had priority need for accommodation – Whether provision incompatible with prohibition on discrimination in enjoyment of convention right to respect for family life – Housing Act 1996, ss 185(4), 189(1) – Human Rights Act 1998, Sch 1, Pt I, arts 8, 14.*

The claimant, who came from Mauritius, and her young dependent daughter were given leave to enter the United Kingdom as visitors. Subsequently, the claimant was recognised as British citizen by descent, and obtained a British passport. However, it was thought at the time that the claimant's daughter was not eligible for British citizenship, that she remained a national of Mauritius alone and that accordingly she remained subject to immigration control. Save for certain inapplicable exceptions, a person from abroad who was subject to such control was not eligible for housing assistance under Pt VII of the Housing Act 1996—the Part of the Act which contained the provisions dealing with homelessness. The claimant applied to the defendant local authority for accommodation under Pt VII. By virtue of s 189(1)(b)<sup>a</sup>, one of the provisions of Pt VII, homeless persons were regarded as having a priority need if they had dependent children living with them. However, s 185(4)<sup>b</sup> required a person from abroad who was not eligible for housing assistance to be disregarded in determining for the purposes of Pt VII whether another person had a priority need for accommodation. The authority invoked that provision in refusing the claimant's application on the ground that she could not rely on the need to accommodate her daughter as giving her a priority need for accommodation. On an application by the claimant for judicial review, the judge held that the authority was correct in concluding that s 185(4) required it to disregard the claimant's daughter in determining whether the claimant had a priority need for accommodation. At a subsequent hearing, the judge was required to determine whether, in the circumstances, s 185(4) was incompatible with the claimant's right, under art 14<sup>c</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), to enjoy without discrimination on grounds of national origin her right to respect for her family life under art 8<sup>d</sup> of the convention.

a Section 189, so far as material, is set out at [1], below

b Section 185 is set out at [1], below

c Article 14 is set out at [4], below

d Article 8, so far as material, is set out at [9], below

**Held** – Section 185(4) of the 1996 Act was incompatible with art 14 of the convention to the extent that it required a British citizen's dependent child, who was subject to immigration control, to be disregarded when determining whether the British citizen had a priority need for accommodation. The undoubted purpose of s 189(1)(b) of the 1996 Act was to ensure that families were not split up. In those circumstances, the relevant provisions of Pt VII of the Act were intended to promote family life, and accordingly the facts of the instant case fell within the ambit of art 8 of the convention. Moreover, there was a difference in treatment between the claimant and, inter alia, an applicant for housing assistance under Pt VII who was a British citizen and had a dependent child who was not subject to immigration control. That difference in treatment was on grounds of national origin, and positive justification for that difference was required. Although s 185 had the legitimate aim of encouraging illegal entrants to regularise their status in the United Kingdom, it was difficult to see why it would encourage them to do that. If they applied for leave to remain in the United Kingdom, any such leave would only be granted on the basis that they would not have recourse to public funds. Thus they would still be ineligible for housing assistance under Pt VII. That was hardly an incentive for illegal entrants to regularise their stay. Section 185 also had the legitimate aim of discouraging persons from coming to the United Kingdom to claim benefits and services, but s 185(4) was unlikely to achieve that aim. There was no reason to suppose that that provision would deter persons who were not themselves subject to immigration control, ie British citizens, and who had dependent children abroad, from bringing them to the United Kingdom simply to render themselves eligible for housing assistance under Pt VII. If they brought their dependent children into the United Kingdom, it was because they wanted to live with them and provide for them in the United Kingdom, not because the British citizen would, in consequence, be treated by s 189(1)(b) as having a priority need for accommodation, but for the fact that that right was trumped by s 185(4). If a particular measure, which would otherwise be discriminatory, was unlikely to achieve the intended result, the difference in treatment between persons on the ground of their nationality which the measure produced could hardly be a reasonable and proportionate way of achieving that result. It followed that the authority's refusal to treat the claimant as having a priority need for accommodation in circumstances where a parent with a dependent child, who was not subject to immigration control, would have been treated as having such a need, amounted to an infringement of her right under art 14 to enjoy without discrimination her right to respect for her family life under art 8. Accordingly, a declaration of incompatibility would be granted (see [13], [15], [16], [25], [26], [31], [33]–[36], [42], below).

## Notes

For the convention right to respect for family life and prohibition of discrimination, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 151, 164, and for ineligibility of persons from abroad for housing assistance and priority need, see 22 *Halsbury's Laws* (4th edn reissue) paras 252, 255.

For the Housing Act 1996, ss 185, 189, see 21 *Halsbury's Statutes* (4th edn) (1997 reissue) 893, 896.

For the Human Rights Act 1998, Sch 1, Pt I, arts 8, 14, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707, 708.

**Cases referred to in judgment**

- a** *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR. *Din v Wandsworth London Borough* [1981] 3 All ER 881, [1983] 1 AC 657, [1981] 3 WLR 918, HL.
- Gaygusuz v Austria* (1997) 23 EHRR 364, [1996] ECHR 17371/90, ECt HR. *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113.
- b** *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2004] 1 AC 983, [2003] 3 WLR 792.
- Petrovic v Austria* (1998) 4 BHRC 232, ECt HR.
- R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577; *affg* [2002] EWHC 978 (Admin), [2002] 3 All ER 994.
- c** *R (on the application of G) v Barnet London BC*, *R (on the application of W) v Lambeth London BC*, *R (on the application of A) v Lambeth London BC* [2003] UKHL 57, [2004] 1 All ER 97, [2004] 2 AC 208, [2003] 3 WLR 1194.
- R (on the application of J) v Enfield London BC* [2002] EWHC 432 (Admin), [2002] LGR 390.
- d** *R (on the application of S) v Chief Constable of South Yorkshire*, *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- e**

**Application for judicial review**

The claimant, Sylviane Pierrette Morris, applied for judicial review of the decision of the defendant, Westminster City Council, on 18 November 2002 confirming its refusal on 7 October 2002 of her application for accommodation under Pt VII of the Housing Act 1996. Following an earlier judgment in the proceedings by Keith J on 13 October 2003 ([2003] EWHC 2266 (Admin), [2004] HLR 265), the First Secretary of State intervened. The facts are set out in the judgment.

- g** *Matthew Hutchings* (instructed by *TMK Solicitors*, Southend-on-Sea) for the claimant.
- David Warner* (instructed by *Colin Wilson*) for the council.
- Lisa Giovannetti* (instructed by the *Treasury Solicitor*) for the First Secretary of State.

*Cur adv vult*

**h** 7 October 2004. The following judgment was delivered.

**KEITH J.**

**j INTRODUCTION**

[1] In this claim for judicial review, the claimant seeks various declarations relating to the true construction of s 185(4)(b) of the Housing Act 1996 and the compatibility of s 185 with art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). But the claim has an unusual history, which has been chronicled in two previous judgments of mine given on 13 October 2003 ([2003]

EWHC 2266 (Admin), [2004] HLR 265) and 26 May 2004 ([2004] EWHC 1199 (Admin), [2004] All ER (D) 389 (May)) respectively. For present purposes, the following passages in my judgment of 26 May 2004 set out the background:

[1] The issue which this case originally raised was set out in the introduction to an earlier judgment which I handed down in this case on 13 October 2003 ([2004] HLR 265 at [1]): "Homeless persons are regarded as having a priority need for accommodation if they have dependant children living with them. In that event, the local housing authority has to ensure that they are provided with accommodation. If they do not have a priority need, the local housing authority may secure accommodation for them, but is not obliged to do so. The question which this case raises is whether a homeless parent has a priority need if, unusually, the child is subject to immigration control but the parent is not." I decided that where the child is subject to immigration control but the parent is not, the parent is not to be regarded as having a priority need for accommodation.

[2] The facts of the case were fully set out in my earlier judgment. For present purposes, all that needs to be said is that the claimant comes from Mauritius. She has a daughter now aged three and is her daughter's sole carer. They arrived in the United Kingdom in April 2002, and were given leave to enter as visitors. Their leave to remain in the United Kingdom expired on 10 June 2002. They did not leave the United Kingdom then. Instead, the claimant applied for a British passport on the basis that she was a British citizen by descent. That status was subsequently recognised, and on 9 August 2002 she obtained a British passport. At the time of the last hearing, it was thought that her daughter was not eligible for British citizenship, and that she remained a citizen of Mauritius alone.

[3] The claimant and her daughter lived with relatives until August 2002 when the claimant's aunt, who lived in Westminster, refused to let them stay any longer. The claimant applied to the defendant, Westminster City Council (the council), for accommodation under Pt VII of the 1996 Act which relates to homelessness. That application was finally refused on 7 October 2002 on the basis that the claimant was not in priority need of accommodation. Section 189(1)(b) of the 1996 Act provides that "a person with whom dependent children reside or might reasonably be expected to reside" will have a priority need for accommodation, but the council decided that the claimant could not rely on the need to accommodate her daughter as giving her a priority need for accommodation because of her daughter's immigration status. The claimant requested a review of that decision, but by its letter dated 18 November 2002 to the claimant the council confirmed its decision. That was the decision challenged on this claim for judicial review, which was heard on 16 September 2003.

[4] In reaching the conclusion that the claimant's daughter's immigration status was decisive, the council relied on s 185 of the 1996 Act, which provides:

"(1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.

(2) A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State.



a (2A) No person who is excluded from entitlement to housing benefit by section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) shall be included in any class prescribed under subsection (2).

(3) The Secretary of State may make provision by regulations as to other descriptions of persons who are to be treated for the purposes of this Part as persons from abroad who are ineligible for housing assistance.

b (4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether another person—(a) is homeless or threatened with homelessness, or (b) has a priority need for accommodation.”

c It was common ground that the claimant’s daughter was “subject to immigration control within the meaning of the Asylum and Immigration Act 1996”, and that she was not included in any class prescribed by regulations made by the Secretary of State. The council’s case was that s 185(2) therefore prevented her from being eligible for housing assistance, and since she was to be treated as coming from abroad, s 185(4) prevented the claimant from relying on her daughter to bring herself (the claimant) within the class of persons identified by s 189(1)(b) as having a priority need for accommodation. I agreed with this argument. Applying the ordinary canons of statutory construction, I concluded in my judgment of 13 October 2003 that the claimant’s daughter was “[a] person from abroad who is not eligible for housing assistance” within the meaning of s 185(4). The council therefore had had to disregard her in determining whether the claimant had a priority need for accommodation.

e [5] However, my judgment continued ([2004] HLR 265 at [17]): “But that is not the end of the matter. The claimant’s case is that this construction of s. 185(4) prevents her and her daughter from being able to enjoy their right to respect for their home and their family life under Art. 8 of the European Convention on Human Rights (‘the ECHR’) in the way that other people can. In short, the question is whether the Council’s refusal to treat the claimant as having a priority need for accommodation in circumstances where a parent with a dependant child who was not subject to immigration control would have been treated as having a priority need for accommodation amounted to an infringement of her right under Art. 14 of the ECHR to permit her rights under the ECHR to be enjoyed without discrimination (‘the discrimination issue’). If that argument is correct, two further issues arise. First, is it possible for s. 185(4) to be read and given effect in a way which is compatible with the right guaranteed by Art. 14 as required by s. 3(1) of the Human Rights Act 1998 (‘the HRA’) (‘the construction issue’)? Secondly, if not, and if s. 185(4) is therefore incompatible with the right guaranteed by Art. 14, should the Court make a declaration of that incompatibility as permitted by s. 4(2) of the HRA (‘the declaration issue’)?” I did not think that it was appropriate for me to address those issues until the Crown had been given by the court the notice required by CPR 19.4A(1). That notice was given, and on 14 November 2003 the First Secretary of State decided to intervene in the proceedings as an interested party ...’

[2] The First Secretary of State’s intervention was subject to one reservation. When the Treasury Solicitor was notified of my judgment of 13 October 2003, the Treasury Solicitor made inquiries about the claimant’s daughter’s immigration status. It was discovered that she had been registered as a British

citizen on 12 June 2003, and had therefore no longer been subject to immigration control. In these circumstances, the claimant had been in priority need for accommodation since then, and on the assumption that her application for accommodation would be decided on that basis, she no longer needed a remedy for herself. Moreover, the claimant's circumstances had considerably improved in the meantime, and she no longer intended to rely on the public sector for assistance with her housing needs and those of her daughter.

[3] Despite his concern as to whether the claimant's claim should be permitted to proceed, the First Secretary of State did not object to the claim proceeding. For their part, both the claimant and the council wanted the claim to proceed. Not without hesitation, I decided that the claim should proceed, and my judgment of 26 May 2004 explains why I reached that conclusion. I therefore directed that the case be relisted for the discrimination, construction and declaration issues to be argued. This is the court's judgment following that hearing.

#### THE DISCRIMINATION ISSUE

[4] Article 14 of the convention provides:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Mr Matthew Hutchings for the claimant argued that the court's refusal to treat her as having a priority need for accommodation in circumstances where a parent with a dependent child who was not subject to immigration control would have been treated as having a priority need for accommodation amounted to an infringement of her right under art 14 to enjoy her right to respect for her family life under art 8 without discrimination.

[5] In *Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617, Brooke LJ (with whom the other members of the court agreed) identified the approach which courts should usually adopt when dealing with a claim which raises art 14. He said (at [20]):

'It appears to me that it will usually be convenient for a court, when invited to consider an art 14 issue, to approach its task in a structured way. For this purpose I adopt the structure suggested by Steven Grosz, Jack Beatson QC and the late Peter Duffy QC in their book *Human Rights: the 1998 Act and the European Convention* (2000). If a court follows this model it should ask itself the four questions I set out below. If the answer to any of the four questions is No, then the claim is likely to fail, and it is in general unnecessary to proceed to the next question. These questions are: (i) Do the facts fall within the ambit of one or more of the substantive convention provisions (for the relevant convention rights, see s 1(1) of the 1998 Act)? (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other? (iii) Were the chosen comparators in an analogous situation to the complainant's situation? (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment

a bear a reasonable relationship of proportionality to the aim sought to be achieved?

b He added (at [22]) that this classification was only a 'framework', and that there was 'a potential overlap between the considerations that are relevant when determining, at any rate, the last two, and possibly the last three questions'. He also pointed out that there may sometimes 'be a need for caution about treating the four questions as a series of hurdles, to be surmounted in turn', and that questions (iii) and (iv) tended 'to merge into' each other. Subject to one reservation, all counsel agreed that this approach was appropriate for the present case.

c [6] Their reservation related to a fifth question which needs to be asked, since art 14 on the face of it only prohibits discrimination on certain specified grounds. The question was first formulated by Stanley Burnton J in *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) at [52], [2002] 3 All ER 994 at [52]:

d '[I]s the basis for the ... treatment of the complainant as against ... the chosen comparators based on "any ground such as sex, race, colour, language ... or other status" within the meaning of art 14?'

e Although Stanley Burnton J thought that this question might be encapsulated in the third question, it is now plain that this question is a free-standing one. That is borne out by what Lord Steyn said in *R (on the application of S) v Chief Constable of South Yorkshire*, *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39 at [42], [2004] 4 All ER 193 at [42], [2004] 1 WLR 2196. Building on Brooke LJ's classification, as amplified in *Carson's* case, he interposed a fifth free-standing question, between Brooke LJ's second and third questions:

f 'If so, was the difference in treatment [between the complainant and others put forward for comparison] on one or more of the proscribed grounds under art 14?'

g Baroness Hale of Richmond had said much the same thing in *Ghaidan v Mendoza* [2004] UKHL 30 at [133]–[134], [2004] 3 All ER 411 at [133]–[134], [2004] 3 WLR 113, though she did not think it appropriate to identify at what stage in the analysis the further question would always be asked.

[7] I agree with counsel that it is appropriate for Brooke LJ's classification, with the additional new question, to be applied to this case. I therefore deal with each of the five questions in turn.

h (i) *Ambit*

j [8] It is well established in European jurisprudence that there does not have to have been a breach of one of the substantive articles of the convention for art 14 to be engaged: see, for example, *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 at 283 (para 9). If it were otherwise, art 14 would have hardly any effect. If there was not a breach of a substantive article, art 14 would not be engaged. If there was a breach of a substantive article, there would be a breach of a convention right irrespective of art 14. Moreover, the jurisprudence shows that art 14 can apply to rights which a state *chooses* to guarantee, even if it is not *obliged* to do so: see the comments of Lord Nicholls of Birkenhead and Lady Hale in *Ghaidan's* case [2004] 3 All ER 411 at [6] and [135] respectively. If a state

chooses to legislate in a particular area, it must not do so in a discriminatory manner. But it is not every area in which the state chooses to legislate that it must not act in a discriminatory manner. Article 14 is only engaged when the state legislates in an area which falls within the ambit of one of the substantive rights in the convention.

[9] In this case, the substantive right relied upon is art 8 which provides so far as material: '1. Everyone has the right to respect for his private and family life, his home and his correspondence.' It is accepted that the restrictions on the right to housing assistance under Pt VII of the Housing Act 1996 do not amount to a breach of art 8. That is because art 8 does not give anyone the right to be provided with a home. As Lord Scott of Foscote said in *Harrow London BC v Qazi* [2003] UKHL 43 at [125], [2003] 4 All ER 461 at [125], [2004] 1 AC 983:

'Article 8 was intended to deal with the arbitrary intrusion by state or public authorities into a citizen's home life. It was not intended to operate as an amendment or improvement of whatever social housing legislation the signatory state had chosen to enact. There is nothing in Strasbourg case law to suggest the contrary.'

But art 8 focuses not only on respect for one's home, but also for one's family life. Accordingly, what is contended is that having chosen to confer the right for parents with dependent children to be provided with housing assistance, any restriction on that right should not be discriminatory because that is state intervention in an area which falls within the ambit of the right to respect for one's family life in art 8.

[10] The test for determining whether the area in which the state has chosen to legislate falls within the ambit of one of the substantive rights in the convention is somewhat elusive. In *Petrovic v Austria* (1998) 4 BHRC 232 at 237 (para 28), the European Court of Human Rights said:

'The court has said on many occasions that art 14 comes into play whenever "the subject-matter of the disadvantage ... constitutes one of the modalities, of the exercise of the right guaranteed" ... or the measures complained of are "linked to the exercise of a right guaranteed" ...'

These concepts are not all that easy to grasp, and perhaps the test is best understood by looking at examples of the way the concepts have been applied. Thus, in *Petrovic v Austria* itself, the complaint related to the refusal of the Austrian authorities to grant to men a parental leave allowance which was available to women. The court held that art 8 itself was not infringed since it did not impose any particular obligation on the state to provide financial assistance of the kind in question. But it nevertheless held that art 14 was engaged. It said:

'27. ... this allowance paid by the state is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children ...

29. By granting parental-leave allowance states are able to demonstrate their respect for family life within the meaning of art 8 of the convention; the allowance therefore comes within the scope of that provision. It follows that art 14—taken together with art 8—is applicable.'

Accordingly, since (a) the payment of the parental leave allowance was intended to promote family life (because it enabled one of the parents to stay at home to



a look after the children), and (b) the promotion of family life was one of the aims of art 8, the legislation relating to parental leave allowance fell within the ambit of art 8 so as to engage art 14.

b [11] It follows that if the relevant provisions in Pt VII of the Housing Act 1996 were intended to promote family life, any discriminatory restrictions on such rights as those provisions created on any of the prohibited grounds would amount to an infringement of art 14. This was the argument advanced by Mr Hutchings, and Ms Lisa Giovannetti for the First Secretary of State did not contend otherwise. What she contended was that Pt VII of the Housing Act 1996 was not specifically intended to promote family life. Its intention was to provide a comprehensive regime to combat homelessness, one element of which was to provide assistance for vulnerable persons who have a priority need for accommodation (ss 188 and 193). Persons with dependent children are just one category of the vulnerable (see s 189). The Housing Act 1996 could not have been intended to keep families together at all costs. That is apparent from the fact that parents with dependent children are only entitled to be provided with accommodation if they did not become homeless intentionally. If they became homeless intentionally, the provision of accommodation is dependent on the local housing authority's discretion (see s 192(3)).

c [12] I cannot go along with this argument. The ultimate predecessor of Pt VII of the Housing Act 1996 was the Housing (Homeless Persons) Act 1977. Of the 1977 Act, Lord Wilberforce said in *Din v Wandsworth London Borough* [1981] 3 All ER 881 at 883, [1983] 1 AC 657 at 663 that 'it is designed for the expressed purpose of bringing families together'. Lord Fraser of Tullybelton said ([1981] 3 All ER 881 at 887, [1983] 1 AC 657 at 668):

f 'One of the main purposes of that Act was to secure that, when accommodation is provided for homeless persons by the housing authority, it should be made available for all the members of his family together and to end the practice which had previously been common under which adult members of a homeless family were accommodated in hostels while children were taken into care, and the family thus split up. The emphasis on treating the family as a unit appears from s 1 which provides that a person is homeless for the purposes of the Act if he has no accommodation, and that he is to be treated as having no accommodation if there is no accommodation which he "together with any other person who normally resides with him as a member of his family ... is intended to occupy" (s 1(1)(a)). The particular emphasis on families with children appears from s 2 which provides that a homeless person has "a priority need for accommodation" when the housing authority is satisfied that he is within one of certain categories, the first of which is that "he has dependent children who are residing with him or who might reasonably expect to reside with him" (s 2(1)(a)).'

g The language of ss 1(1)(a) and 2(1)(a) of the 1977 Act was reproduced in ss 176(a) and 189(1)(b) of the Housing Act 1996. Thus, what Lord Fraser described as one of the 'main purposes' of the 1977 Act, ie the need to prevent the splitting up of families, must be treated as one of the main purposes of Pt VII of the Housing Act 1996. The fact that Pt VII does not mandate families being kept together at all costs does not mean that one of its aims was not to keep families together wherever possible.

j [13] In any event, whatever may or may not have been the main purpose of Pt VII as a whole, the undoubted purpose of s 189(1)(b) was to ensure that

families would not be split up. In these circumstances, the relevant provisions in Pt VII of the Housing Act 1996, namely ss 188, 189 and 193, especially when seen against the background of s 176, were intended to promote family life. It follows that if s 185(4) amounts to a discriminatory restriction on the rights created by ss 188, 189 and 193 on any of the prohibited grounds, it would infringe art 14.

[14] Mr David Warner for the council adopted a different line of attack. His argument, reduced to its core, was that the rights conferred by Pt VII of the Housing Act 1996 were part of the general welfare regime which was held by the Court of Appeal in *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577 to be beyond the scope of art 8. Thus, other welfare provisions, such as those in Pt III of the Children Act 1989, cater for the situation where a dependent child is homeless. I do not agree. In *R (on the application of G) v Barnet London BC*, *R (on the application of W) v Lambeth London BC*, *R (on the application of A) v Lambeth London BC* [2003] UKHL 57, [2004] 1 All ER 97, [2004] 2 AC 208, the House of Lords held that Pt III of the 1989 Act did not oblige a local authority to provide accommodation to enable a dependent child to live with its parents. But apart from that, the provision of accommodation to the homeless parents of dependent children is specifically dealt with by Pt VII of the 1996 Act. Even if there had been a final safety net elsewhere to prevent them from being split up or on the streets, the existence of such a safety net would not have prevented the relevant provisions in Pt VII of the Housing Act 1996 from being regarded as having been intended to promote family life. And once that intention has been recognised, the necessary link between the relevant provisions in Pt VII and art 8 has been established.

[15] For these reasons, the facts of the case, in my view, fall within the ambit of art 8.

(ii) *Difference in treatment*

[16] The claimant's advisers have chosen two comparators: (a) an applicant for housing assistance under Pt VII of the Housing Act 1996 who is a British citizen and who has a dependent child who is not subject to immigration control, and (b) an applicant for housing assistance who is a British citizen and who is pregnant at the time of her application. It is not disputed that these comparators would have had a priority need for accommodation under s 189(1), and would have been entitled to housing assistance under ss 188 and 193 if they were, or were believed to be, homeless and eligible for assistance, and if, in the case of the comparator in (a), the child might reasonably be expected to reside with her. There was, therefore, a difference in treatment between the claimant and her chosen comparators.

(iii) *Prohibited ground*

[17] In order for the difference in treatment between the claimant and her chosen comparators to infringe art 14, the difference in treatment has to have been on one of the prohibited grounds, namely—

'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Her case is that the difference in treatment was because of her daughter's nationality. No other case was advanced on her behalf. For example, it was not

- a contended that, if the difference in treatment was not because of her daughter's nationality, but because of her daughter's status as someone who was subject to immigration control, that amounted to a difference in treatment on a ground relating to her daughter's status.

[18] It should be noted that the word 'nationality' is not used in art 14. Article 14 talks of 'national ... origin'. But in *Gaygusuz v Austria* (1997) 23 EHRR 364, the European Court of Human Rights equated nationality with national origin. In that case, an emergency advance on the applicant's pension was refused on the ground that, subject to certain exceptions, the legislation prohibited the payment of such an advance to a non-Austrian national such as the applicant. The court said (at 380–381 (para 41)) that 'his nationality' was 'a ground of discrimination covered by Article 14', though it looks as if any possible distinction between nationality and national origin was not addressed. Both the council and the First Secretary of State were content for me to proceed on the basis that national origin equated with nationality, but they reserve the right to argue the contrary elsewhere.

- d [19] At first blush, it seems obvious that the difference in treatment between the claimant and her chosen comparators was because of her daughter's nationality. It is true that, unlike the legislation in *Gaygusuz v Austria*, s 185 of the Housing Act 1996 does not speak of nationality. Instead, it uses the phrases 'from abroad' and 'subject to immigration control'. But s 185(2) provides that the phrase 'subject to immigration control' has to be given the meaning assigned to it by the Asylum and Immigration Act 1996. Section 13(2) of that Act provides
- e that the phrase—

“‘person subject to immigration control’ means a person who under [the Immigration Act 1971] requires leave to enter or remain in the United Kingdom (whether or not such leave has been given).”

- f Section 3(1) of the 1971 Act in effect exempts only British citizens from the requirement to obtain leave to enter or remain in the United Kingdom. Thus, a person who is subject to immigration control within the meaning of s 185(2) of Housing Act 1996 Act can be equated with someone who is not a British citizen.

[20] But that is far from being the end of the matter. The whole of s 185 has to be considered, together with the regulations made under it, since it is the whole of the relevant statutory scheme which has to be addressed. The governing provision is s 185(1), because that is the provision which identifies the class of persons who are not eligible for assistance under Pt VII: that class comprises persons from abroad who are 'ineligible for housing assistance'. Section 185 then proceeds to identify two categories of persons who are to be

g treated as 'ineligible for housing assistance'. Those two categories of persons are identified in s 185(2) and (3).

- (a) Section 185(2) is the provision which provides that persons who are subject to immigration control within the meaning of the Asylum and Immigration Act 1996 are ineligible for housing assistance, though importantly the Secretary of State may by regulation provide that particular classes of persons from abroad
- j who are subject to immigration control can nevertheless be eligible for assistance under Pt VII. The Secretary of State has done that, and the classes of persons who are subject to immigration control but who are nevertheless eligible for assistance under Pt VII are set out in reg 3 of the Homelessness (England) Regulations 2000, SI 2000/701. The classes of persons set out in reg 3 include refugees, persons with exceptional leave to remain in the United Kingdom who

are not subject to a restriction on their access to public funds, various asylum seekers, and subject to one minor exception, persons who have leave to enter or remain in the United Kingdom which is not subject to any restriction or condition and who are habitually resident in the Common Travel Area (broadly speaking, the British Isles, since the Common Travel Area is defined in reg 2(1) as 'the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively'). The exception is a person—

(i) who has been given leave to enter or remain in the United Kingdom upon an undertaking given by another person (his "sponsor") in writing in pursuance of the immigration rules to be responsible for his maintenance and accommodation; (ii) who has been resident in the United Kingdom for less than five years beginning on the date of entry or the date on which the undertaking was given in respect of him, whichever date is the later; and (iii) whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive ...' (See reg 3(1)(c).)

(b) Section 185(3) enables the Secretary of State by regulation to provide that other classes of persons be treated as persons from abroad who are ineligible for housing assistance. The Secretary of State has done that as well. Regulation 4 of the 2000 regulations provides that, subject to certain minor exceptions, persons who do not habitually reside in the Common Travel Area are ineligible for assistance under Pt VII, even though they are not subject to immigration control.

[21] Against that background, the core point taken by the First Secretary of State and the council is that the critical dividing line between those who are eligible for assistance under Pt VII and those who are not is long-term residence in the British Isles, not nationality. Nationality is not the dividing line because (a) British citizens may be ineligible for assistance under Pt VII: even though they are not subject to immigration control, reg 4 of the 2000 regulations renders them ineligible for assistance if they are not habitually resident in the British Isles, and (b) non-British citizens may be eligible for assistance under Pt VII: even though they are subject to immigration control, reg 3 of the 2000 regulations renders them eligible for assistance if they are habitually resident in the British Isles (provided that they have been granted unconditional leave to enter or remain in the United Kingdom). Long-term residence is the true dividing line because (a) subject to certain minor exceptions, anyone who is habitually resident in the British Isles (with unconditional leave to enter or remain in the United Kingdom) is eligible for assistance under Pt VII, irrespective of their nationality, and (b) subject again to certain minor exceptions, anyone who is not habitually resident in the British Isles is ineligible for assistance under Pt VII, irrespective of their nationality.

[22] I cannot accept this argument. Concentrating on the first of the two categories of persons who are to be treated as ineligible for housing assistance, ie the class of persons to whom s 185(2) relates, the fact is that that category of persons encompasses exclusively persons who are subject to immigration control. It therefore applies only to those persons who are in effect not British citizens. I appreciate that the Secretary of State has created, in reg 3 of the 2000 regulations various exceptions, but the dividing line in s 185(2) between those who are eligible for assistance under Pt VII and those who are not is nationality, because non-British citizens are ineligible for such assistance unless they come within any of the exceptions. Very few of them will come within the exceptions for persons who are habitually resident within the British Isles because (a) the



a overwhelming majority of non-British citizens from abroad will not be habitually resident in the British Isles, and (b) they will not have unconditional leave to enter or remain in the United Kingdom. Simply because there may be a relatively small number of non-British citizens from abroad who will be eligible for assistance because they come within the exceptions created by reg 3 is insufficient to justify saying that the dividing line in s 185(2) between those who are eligible for assistance under Pt VII and those who are not is something other than nationality.

b [23] That is borne out by *Gaygusuz v Austria*. There were two exceptions to the rule that non-Austrian nationals were not entitled to an emergency advance on their pension. First, they were entitled to the advance if they had been born in Austria and had lived uninterruptedly in Austria since their birth or if they had lived uninterruptedly in Austria since 1930. Secondly, the relevant minister was entitled to grant the advance to unemployed nationals of other countries which granted a similar advance to Austrian nationals, and to unemployed persons who had been employed in Austria for three years making compulsory unemployment insurance contributions. The European Court of Human Rights did not regard the existence of these exceptions to the rule as undermining its conclusion that the rule discriminated on the ground of nationality. It may be different, of course, if the exception to the rule is in such wide terms that the rule can no longer be regarded as the norm. But that cannot be the case with the exceptions to s 185(2).

c [24] If s 185(2) is viewed in that light, s 185(3) can make no difference. Section 185(3) increased the categories of persons who would not be eligible for assistance under Pt VII. Persons who are ineligible for assistance under Pt VII by virtue of s 185(2) because they are subject to immigration control and do not come within any of the exceptions in reg 3 will not become eligible for assistance as a result of the single exception created by reg 4.

d [25] For these reasons, the difference in treatment between the claimant and her chosen comparators was on one of the grounds prohibited by art 14 of the convention, namely national origin.

(iv) *Analogous situation*

e [26] The council did not contend that the situation of the claimant's chosen comparators was not analogous to the situation of the claimant. However, the First Secretary of State did contend that. In the Court of Appeal in *Carson's case* [2003] 3 All ER 577 at [61], Laws LJ said that questions (iii) and (iv) posed in *Michalak's case* [2002] 4 All ER 1136 (now questions (iv) and (v)) could be asked compendiously:

f '... are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X?'

g Ms Giovannetti contended that on the facts of the present case, the single compendious question identified by Laws LJ could be formulated (at any rate so far as the claimant's first chosen comparator is concerned) as follows:

j 'X is an individual with a dependent child who has unconditional permission to reside permanently in the United Kingdom. X is eligible for homelessness provision. Y is an individual with a dependent child who is in the United Kingdom as a visitor. Y is not eligible for homelessness provision.'

Would a rational and fair-minded person consider that a positive justification for this difference in treatment was called for?' a

She submitted that the answer to that question should be, No. I disagree. If one adds into the equation the fact that both X and Y are British citizens, the answer seems to me to be clear. Positive justification for the difference in treatment between them is called for. b

[27] Whether the situation of the second of the claimant's comparators was analogous to the situation of the claimant is less clear-cut. I acknowledge that the priority need of that comparator was not dependent on someone else, but the need for accommodation is just as compelling for a pregnant woman as it is for a mother with a dependent child. However, I do not have to reach a conclusion about the second of the claimant's chosen comparators in view of the conclusion c which I have reached about the first.

(v) *Justification*

[28] The European jurisprudence shows that a difference in treatment must have an objective and reasonable justification if it is to be regarded as non-discriminatory. For such justification to be established, it has to be shown d that the difference in treatment (a) pursues a legitimate aim, and (b) bears a reasonable relationship of proportionality between the aim sought to be realised and the means used to achieve it.

[29] In the past, local authorities generally discharged their duties to homeless persons by providing them with secure tenancies from their own housing stock or by ensuring that they were rehoused under assured tenancies by registered social landlords. The automatic priority for accommodation which the homeless enjoyed meant that they often got what were in effect tenancies for life at a below market rent, whereas those who were not homeless, but were nevertheless living in unsuitable accommodation, had to wait much longer to be allocated suitable e accommodation. The Housing Act 1996 attempted to address this problem by (a) enabling local authorities to discharge their duties to the homeless by providing them with *temporary* accommodation, and (b) restricting the power of local authorities to allocate *long-term* accommodation except in accordance with Pt VI of the Housing Act 1996. However, in practice homeless persons still tend f to be given quite a high priority for being allocated long-term accommodation, because local authorities are required to take into account the financial and other g implications of having to secure temporary accommodation for the homeless until a settled home becomes available. The practical effect of this is that there is, both nationally and within the council's own area, a growing gap between the number of households to whom the full homelessness duty is owed and the h available supply of long-term accommodation.

[30] At about the same time as the proposals which ultimately formed Pts VI and VII of the Housing Act 1996 were being considered, there was a drive to restrict the eligibility of persons from abroad for accessing welfare benefits, including housing assistance. It had always been a requirement of the i immigration rules that persons coming to the United Kingdom should be able to support and accommodate themselves without recourse to public funds. It was thought to be wrong for people who come to the United Kingdom on the basis that they could provide for themselves to receive benefits paid for by the taxes of United Kingdom residents. It was against this background that concerns were expressed about local authorities being required to accommodate persons who j

a met the statutory criteria for homelessness assistance, but who would not be entitled to claim housing benefit. Since such people would often be unable to contribute to their housing costs without housing benefit, an unreasonable burden could well be placed on local authorities.

[31] Accordingly, s 185 of the 1996 Act was one of a number of statutory initiatives intended to give effect to the policy—

b 'that those who have not established a right to remain permanently in the United Kingdom, who are settled here on an undertaking that their relatives will support them, or whose entry is conditional on them not having recourse to public funds, should not have welfare provision on the same basis as those whose citizenship or immigration status gives them an entitlement to benefits when in need ...' (Paragraph 25 of the witness statement of Terrie Alafat, director of the Homelessness and Housing Support Directorate at the Office of the Deputy Prime Minister.)

c In the context of housing, that policy was to be achieved by releasing local authorities from the duty of housing the homeless if they are subject to immigration control (which would itself enable more long-term accommodation to be available for persons who are not subject to immigration control), and by denying such persons access to housing benefit. In that way, it was hoped that (a) people would be less likely to come to the United Kingdom to claim benefits or services ('benefit tourism'), and (b) people who were in the United Kingdom illegally would be more likely to regularise their status (para 25 of Ms Alafat's witness statement). These aims are perfectly legitimate, and Mr Hutchings did not suggest otherwise.

e [32] It follows that the critical question is whether the measures in s 185 which resulted in the difference in treatment between the claimant and that of her chosen comparators amounted to a reasonable and proportionate way of achieving these aims. The court's approach to that question should be informed by what Lord Nicholls said in *Ghaidan's* case [2004] 3 All ER 411 at [19]:

g '... Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reason said to constitute justification. The reasons must be cogent if such differential treatment is to be justified.'

j To that list can be added differential treatment on the ground of nationality since the court in *Gaygusuz v Austria* said ((1997) 23 EHRR 364 at 381 (para 42)) that 'very weighty reasons' had to be shown if differential treatment on the ground of nationality was to be justified.

[33] Although one of the aims of s 185 was to encourage illegal entrants to regularise their status in the United Kingdom, it is difficult to see why s 185 would

encourage them to do that. If they applied for leave to remain in the United Kingdom, any such leave would only be granted on the basis that they would not have recourse to public funds. Thus, they would still be ineligible for housing assistance under Pt VII. That is hardly an incentive for illegal entrants to regularise their stay. It is true that when the claimant's daughter's application for British citizenship was granted, the claimant became eligible for housing assistance under Pt VII. But that was not a case of someone remaining subject to immigration control. It was a case of someone ceasing to be subject to immigration control because they acquired British citizenship. a  
b

[34] The aim of discouraging benefit tourism is, in my view, a different matter—especially when the benefit which is sought, namely temporary accommodation which may well turn out in practice to be long-term accommodation, is a scarce commodity for which the demand exceeds the supply. I have no reason to doubt that a measure such as s 185 is likely to deter some persons from abroad from coming to the United Kingdom and claiming such a benefit, thus making the benefit more available for persons already in the United Kingdom. But this case is only about s 185(4), and I have no reason whatever to suppose that s 185(4) would deter persons who were not themselves subject to immigration control, ie British citizens, and who have dependent children abroad, from bringing them to the United Kingdom simply to render themselves eligible for housing assistance under Pt VII. If they bring their dependent children into the United Kingdom, they do so because they want to live with them and provide for them here, not because the consequence of *that* would be that the British citizen would be treated by s 189(1)(b) of the Housing Act 1996 as having a priority need for accommodation, but for the fact that that right is trumped by s 185(4). The same applies to the other categories of persons in s 189(1)(a) and (c) of the Housing Act 1996. In short, I have not been persuaded at all that the principal aim which the First Secretary of State says s 185(4) was intended to achieve is, or even is likely to be, achieved by it. If a particular measure which would otherwise be discriminatory is unlikely to achieve the result which it was intended to achieve, the difference in treatment between persons on the ground of their nationality which the measure produces can hardly be a reasonable and proportionate way of achieving that result. c  
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[35] I have not overlooked the point made on behalf of both the council and the Secretary of State that the effect of s 185(4) was not to create a comprehensive prohibition on the provision of temporary accommodation to a homeless person in the position of the claimant. It simply prevented her from being treated as having a priority need for accommodation. Although local authorities are not *obliged* to accommodate them, local authorities may nevertheless do so: see s 192(3) of the 1996 Act. In addition, other powers are available under Pt III of the 1989 Act and s 2 of the Local Government Act 2000 which might be invoked as a final safety net to prevent families from being split up or on the streets if the circumstances warrant their invocation. All that is true, and if I had found that s 185(4) was likely to achieve what it was intended to achieve, I might have regarded the existence of these powers as providing the means whereby hard cases could be considered sympathetically and therefore justifying s 185(4). But as I have said, I do not believe that s 185(4) is likely to achieve what it was intended to achieve. g  
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#### *Conclusion on the discrimination issue*

[36] For these reasons, I have concluded that the council's refusal to treat the claimant as having a priority need for accommodation in circumstances where a parent with a dependent child who was not subject to immigration control would



- a have been treated as having a priority need for accommodation amounted to an infringement of her right under art 14 to enjoy her right to respect for her family life under art 8 without discrimination.

#### THE CONSTRUCTION ISSUE

- b [37] Mr Hutchings had originally contended that if the discrimination issue was decided in the claimant's favour, s 185(4) could be read in a way which made it compatible with art 14. That was his stance at the first hearing of this claim (see [2004] HLR 265 at [18]), and in para 87 of his skeleton argument for the latest hearing. However, in the light of what the House of Lords had to say in *Ghaidan's* case about the correct approach to s 3(1) of the 1998 Act, he accepted at the later hearing that it was difficult for him to contend that s 185(4) could be read in a way which made it compatible with art 14. That was the stance which the council had always adopted, and the First Secretary of State did not argue otherwise.

- c [38] I agree with the stance now adopted on all sides. If I were to read s 185(4) in such a way as made it compatible with art 14, I would be falling into the trap of amending s 185(4), not interpreting it. To use the words of Lord Rodger of Earlsferry in *Ghaidan's* case [2004] 3 All ER 411 at [110], I would be changing 'a provision from one which Parliament says that  $x$  is to happen into one saying that  $x$  is not to happen'.

#### THE DECLARATION ISSUE

- e [39] That brings me to the declaration issue. Three objections to the making of a declaration are advanced on behalf of the First Secretary of State. First, in *R (on the application of J) v Enfield London BC* [2002] EWHC 432 (Admin) at [72], [2002] LGR 390 at [72], Elias J held that where a convention right would be infringed if a local authority concluded that it was not open to it to exercise a particular power which it had, but that the infringement could be avoided by exercising some other power which it had, the power to exercise that other power becomes a duty to exercise it. The rationale presumably is that no local authority could reasonably refuse in the exercise of its discretion to exercise that power if the effect of refusing to do so would be to infringe a person's convention rights. It may be that this reasoning does not apply to some legislative measures. For example, it is possible that the effect of the decision of the House of Lords in *R (on the application of G) v Barnet London BC* [2004] 1 All ER 97, [2004] 2 AC 208 is that Elias J's reasoning does not apply to some of the provisions in Pt III of the 1989 Act. But Ms Giovannetti contended that there was no reason why it should not apply to a local authority's power under s 192(3) of the Housing Act 1996 to secure accommodation for persons to whom the full homelessness duty would have been owed but for the fact that the local authority is not satisfied that they have a priority need for accommodation. In these circumstances, Ms Giovannetti argued that I should not make a declaration of incompatibility. I disagree. It may be that the consequences of the incompatibility of s 185(4) with art 14 can be ameliorated by converting the power in s 192(3) into a duty. But that does not make s 185(4) any the less incompatible with art 14. Its incompatibility should be brought home by a formal declaration under s 4(2) of the 1998 Act.

j [40] Secondly, it is said that if the incompatibility of s 185(4) with art 14 arises at all, it does not arise because of the language of s 185(4), but because of the current extent of the regulations made under s 185(2), which could have provided for additional categories of persons who are subject to immigration control nevertheless to be eligible for housing assistance. I cannot go along with this

argument either. It may be that the incompatibility could be remedied by promulgating new regulations under s 185(2), though the limitation on that power contained in s 185(2A) could well prevent even that. But even if the incompatibility could be remedied in that way, the fact remains that the incompatibility arises because of the primary legislation. Section 185(4) is incompatible with art 14 because, by s 185(2), persons are ineligible for housing assistance if they are subject to immigration control.

[41] Thirdly, it is said that I should not exercise my discretion to make a declaration of incompatibility because the claim is academic on the facts of the claimant's case, and she now wishes to secure accommodation for herself and her daughter in the private sector. That is tantamount to saying that this is not an appropriate case in which to make a declaration of incompatibility. I dealt with that argument in my judgment of 26 May 2004 and rejected it.

[42] Accordingly, I have concluded that I should make a declaration of incompatibility, and I declare that s 185(4) of the Housing Act 1996 is incompatible with art 14 of the convention to the extent that it requires a dependent child of a British citizen to be disregarded when determining whether the British citizen has a priority need for accommodation, when that child is subject to immigration control.

#### CONCLUSION

[43] I do not think it appropriate to grant any relief other than to make that declaration. As I told the parties at the conclusion of the hearing, I wish to spare the parties the expense of attending court when this judgment is handed down. I leave it to the parties to see whether an appropriate order for the costs of the claim can be agreed. In case such an order cannot be agreed, I give the parties liberty to apply for the issue of costs to be determined by me. The same applies to the council and the First Secretary of State if they wish to apply for permission to appeal, and to the claimant if she wishes to cross-appeal against the decision in my judgment of 13 October 2003 about the proper construction of s 185(4) applying the ordinary canons of construction. Any such application for permission to appeal should be filed within seven days of the handing down of this judgment, and I will consider such an application without a hearing on the basis of any written representations which the parties wish to make.

*Order accordingly. Permission to appeal granted.*

Aaron Turpin Barrister.

**Phonographic Performance Ltd v  
Department of Trade and Industry and  
another**

[2004] EWHC 1795 (Ch)

CHANCERY DIVISION

SIR ANDREW MORRITT V-C

7, 8, 23 JULY 2004

- Limitation of action – When time begins to run – Action for damages for breach of statutory duty – Accrual of cause of action – Crown breaching obligation under Community law in relation to domestic copyright law – Whether single cause of action commencing on date of breach of obligation – Limitation Act 1980, s 2 – Council Directive (EEC) 92/100, art 8(2).*
- Action – Dismissal – Abuse of process of court – Claim for damages for breach of statutory duty – Claim capable of having been brought by application for judicial review – Whether abuse of process.*

The membership of the claimant, a company limited by guarantee, included over 3,000 record companies carrying on business in the United Kingdom which owned or were exclusive licensees of the copyright in the sound recordings made by them. Members which owned copyright assigned to the claimant the right to play sound recordings in public or to authorise others to do so (the performing right). Members who were exclusive licensees appointed the claimant as exclusive agent in respect of the exercise of the performing right. Certain sections of the Copyright, Designs and Patents Act 1988 provided that certain actions did not constitute an infringement of the copyrights therein mentioned. One section related to copyright in sound recordings and playing them as part of the activities of a club and another dealt with the copyright in a broadcast or cable programme or any sound recording or film included in it and showing or playing it to an audience who had not paid for admission to the place where it was to be seen or heard. Council Directive (EEC) 92/100 (the rental directive) provided in art 8(2)<sup>a</sup> that member states were to provide a right in order to ensure that a single equitable remuneration was paid by the user, if a phonogram published for commercial purposes, or a reproduction of such a phonogram, was used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration was shared between the relevant performers and phonogram producers. Article 15(1)<sup>b</sup> of the rental directive provided that member states were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive not later than 1 July 1994. The United Kingdom did not comply with that requirement. As the rights conferred on the claimant by its members enabled it to grant licences to others in respect of performing rights and to collect and distribute amongst its members payments received as consideration for such licences, the claimant was concerned to limit or remove the exemptions from copyright infringement afforded by the relevant sections of the 1988 Act. It

<sup>a</sup> Article 8, so far as material, is set out at [2], below

<sup>b</sup> Article 15, so far as material, is set out at [2], below

commenced a campaign on the basis, inter alia, that those sections were limitations on the right to a single equitable remuneration for which art 8(2) of the rental directive required the United Kingdom to make legislative provision. On 10 March 2003 the claimant issued proceedings against the defendants (the Crown) for declarations and damages on the basis that the Crown was in breach of its obligation in community law arising under art 8(2). The Crown contended, inter alia, that any cause of action the claimant might have had arose on 1 July 1994, and was barred by s 2<sup>c</sup> of the Limitation Act 1980 which prescribed a limitation period of six years from the date on which the cause of action accrued for a claim founded on tort. At a trial of preliminary issues the court considered (i) whether the failure of the Crown to do what art 15 of the rental directive required gave rise to a single cause of action accruing on 1 July 1994 with continuing consequential damage or successive causes of action accruing when and as often as further damage in consequence of the continuing failure was sustained by the claimant; and (ii) whether the claims were liable to be struck out as abuses of the process of the court; and whether they should be. The Crown contended (i) that while the cause of action was categorised as a breach of statutory duty for some purposes, it did not have to be so regarded in all contexts; (ii) that, there being no unifying element in the illegality which arose on 2 July 1994, all damage occurring afterward was the consequence of the breach of duty which had crystallised on that date; and (iii) that the claim was inherently a public law claim which ought to be pursued in proceedings for judicial review so that the court had jurisdiction to strike out the action as an abuse of the process of the court.

**Held** – (1) The Crown's breach of the duty imposed by art 8(2) of the rental directive was a continuing one and gave rise to a fresh cause of action on each occasion when the claimant suffered consequential damage. The categorisation of the cause of action as breach of a statutory duty was correct. In any event the Crown's obligation was not contractual and therefore had to be recognised as 'founded on tort', thus falling within the express words of s 2 of the 1980 Act, which therefore applied directly. Further, the Crown's obligation had not ceased on 2 July 1994; it had continued but had not been performed. In those circumstances the crystallisation of the breach of duty on 2 July 1994 had not been a unifying element and all subsequent damage could not be attributed to the initial breach. Rather, the claimant had been deprived of a right on each subsequent occasion when a sound recording had been played in circumstances which, because of the Crown's failure to do what art 8(2) required, had not constituted an infringement. The requirement that there be a direct causal link between the breach of the obligation resting on a member state and the damage sustained demonstrated that a claim for damages where a member state incurred liability to a person under Community law was not actionable per se. It followed that damage was an essential ingredient of the cause of action and could found a claim as and when it was sustained. Accordingly, the claimant's claims were not statute-barred because they were both claims in respect of a continuing breach of duty and a cause of action in which damage was an essential ingredient. The loss for which damages might be recovered was limited to that sustained within the six years immediately preceding the issue of proceedings on 10 March 2003 (see [11], [22]–[28], below); *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1992]

<sup>c</sup> Section 2, so far as material, is set out at [13], below



- a IRLR 84, *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] 2 All ER 785 and *Darley Main Colliery Co v Mitchell* [1886–90] All ER Rep 449 considered.
- (2) Where remedies both of judicial review and of ordinary action were available the choice of either could be an abuse of process. The obligation of member states under community law to compensate individuals who sustained consequential loss gave rise to a correlative right in one who had suffered such damage. Such a right was not discretionary. Nor could it be categorised as a public law right, even though the Crown's obligations under community law and how to discharge them fell to be considered. As in the context of the 1980 Act, the remedy was for damages for breach of a statutory duty. To regard the continuation of the claims in the instant case as ordinary actions as an abuse of process would be to subject the rights of an individual to a discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of community law (see [36], [37], [47], [48], [50]–[53], below); *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752 considered.
- d **Notes**
- For the general limitation period in tort, and for the procedural exclusivity of judicial review, see respectively, 28 *Halsbury's Laws* (4th edn reissue) para 885, and 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 71.
- For the Limitation Act 1980, s 2, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 937.
- e **Cases referred to in judgment**
- A-G v *Able* [1984] 1 All ER 277, [1984] QB 795, [1983] 3 WLR 845, DC.
- An Bord Bainne Co-operative Ltd (Irish Dairy Board) v Milk Marketing Board* [1984] 2 CMLR 585, CA.
- f *Arkin v Borchard Lines Ltd* [2000] Eu LR 232.
- Boddington v British Transport Police* [1998] 2 All ER 203, [1999] 2 AC 143, [1998] 2 WLR 639, HL.
- Bourgoin SA v Ministry of Agriculture, Fishery and Foods* [1985] 3 All ER 585, [1986] QB 716, [1985] 3 WLR 1027, CA.
- g *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* Joined cases C-46 and C-48/93 [1996] All ER (EC) 301, [1995] QB 404, [1996] 2 WLR 506, [1996] ECR I-1029, ECJ.
- City of Westminster v Clifford Culpin & Partner* (1987) 12 Con LR 117, CA.
- Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988, CA.
- h *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, [1886–90] All ER Rep 449, HL.
- Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197, [1989] 2 WLR 578, HL.
- Francovich v Italy* Joined cases C-6/90 and C-9/90 [1992] IRLR 84, [1991] ECR I-5357, ECJ.
- j *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] 2 All ER 770, [1984] AC 130, [1983] 3 WLR 143, HL.
- Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2003] 2 All ER 785, [2004] 1 AC 715, [2003] 2 WLR 711; *rvsg in part* [2001] EWCA 56, [2001] 1 All ER (Comm) 455.
- Lonrho plc v Tebbit* [1992] 4 All ER 280, CA.

*Matra Communication SA v Home Office* [1999] 3 All ER 562, [1999] 1 WLR 1646, CA.

*O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237, [1982] 3 WLR 1096, HL.  
*R (on the application of Factortame) v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 942.

*R v Secretary of State for Transport, ex p Factortame Ltd* [1999] 4 All ER 906, [2000] 1 AC 524, [1999] 3 WLR 1062, HL; *affg* [1999] 2 All ER 640n, [1998] 3 CMLR 192, CA; *affg* [1998] 1 All ER 736n, [1998] 1 CMLR 1353, DC.

*Steed v Secretary of State for the Home Dept* [2000] 3 All ER 226, [2000] 1 WLR 1169, HL.

### Cases referred to in skeleton arguments

*Aprile Srl (in liq) v Amministrazione delle Finanze dello Stato (No 2)* Case C-228/96 [2000] 1 WLR 126, [1998] ECR I-7141, ECJ.

*Board of Trade v Cayzer, Irvine and Co Ltd* [1927] AC 610, HL.

*Cartledge (widow and administratrix of the estate of Fred Hector Cartledge (decd)) v E Jopling & Sons Ltd* [1963] 1 All ER 341, [1963] AC 758, [1963] 2 WLR 210, HL.

*Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 All ER 434, [1990] 2 AC 738, [1990] 2 WLR 1320, HL.

*Central Electricity Generating Board v Halifax Corp* [1962] 3 All ER 915, [1963] AC 785, [1962] 3 WLR 1313, HL.

*Cholmondeley (Marquis) v Lord Clinton (1820)* 2 Jac & W 1, 37 ER 527; *on appeal* (1821) 4 Bli 1, 4 ER 721, HL.

*Coburn v Colledge* [1897] 1 QB 702, [1895-9] All ER Rep 539, CA.

*Comet BV v Produktschap voor Siergewassen* Case 45/76 [1976] ECR 2043, ECJ.

*Cooke v Gill* (1873) LR 8 CP 107.

*Crumbie v WallSEND Local Board* [1891] 1 QB 503, CA.

*Dillenkofer v Germany* Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94 [1996] All ER (EC) 917, [1997] QB 259, [1997] 2 WLR 253, [1996] ECR I-4845, ECJ.

*Emery's Investments' Trusts, Re, Emery v Emery* [1959] 1 All ER 577, [1959] Ch 410, [1959] 2 WLR 461.

*Emmott v Minister for Social Welfare* Case C-208/90 [1993] ICR 8, [1991] ECR I-4269, ECJ.

*Fantask A/S v Industriministeriet (Erhvervsministeriet)* Case C-188/95 [1998] All ER (EC) 1, [1997] ECR I-6783.

*Frawley v Neill* [1999] CA Transcript 360, (1999) 143 Sol Jo LB 98.

*Hordern Richmond Ltd v Duncan* [1947] 1 All ER 427, [1947] KB 545.

*Kirklees Metropolitan BC v Wickes Building Supplies Ltd* [1992] 3 All ER 717, [1993] AC 227, [1992] 3 WLR 170, HL.

*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221.

*Local Authorities Mutual Investment Trust v Customs and Excise Comrs* [2003] EWHC 2766 (Ch), [2004] STC 246.

*Metallgesellschaft Ltd v IRC, Hoechst AG v IRC* Joined cases C-397/98 and C-410/98 [2001] All ER (EC) 496, [2001] Ch 620, [2001] 2 WLR 1497, [2001] ECR I-1727, ECJ.

*Nelson v Rye* [1996] 2 All ER 186, [1996] 1 WLR 1378.

*Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* Case C-127/95 [1998] ECR I-1531, ECJ.

*Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* Case C-261/95 [1997] ECR I-4025, ECJ.

- a** *Pauling's Settlement Trusts, Re, Younghusband v Coutts & Co* [1961] 3 All ER 713, [1964] Ch 303, [1963] 3 WLR 742, CA.
- Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 1 All ER 65, [1983] 2 AC 1, [1983] 2 WLR 6, HL.
- Preston v Wolverhampton Healthcare NHS Trust, Fletcher v Midland Bank plc* Case C-78/98 [2000] All ER (EC) 714, [2001] 2 AC 415, [2001] 2 WLR 408, [2000] ECR I-3201, ECJ.
- b** *R v Customs and Excise Comrs, ex p Eurotunnel* [1995] CLC 392.
- Reeves v Butcher* [1891] 2 QB 509, [1891–4] All ER Rep 943, CA.
- Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* Case 33/76 [1976] ECR 1989, ECJ.
- c** *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, [1992] 1 AC 624, [1992] 2 WLR 239, HL.
- Sevcon Ltd v Lucas CAV Ltd* [1986] 2 All ER 104, [1986] 1 WLR 462, HL.
- Shingara v Secretary of State for the Home Dept* [1999] Imm AR 257, CA.
- Tate v Minister for Social Welfare* [1995] 1 CMLR 825, Ir HC.
- d** *Three Rivers DC v Bank of England (No 3)* [1996] 3 All ER 558; *affd* [1999] 4 All ER 800n, [2003] 2 AC 1, [2000] 2 WLR 15, CA; *affd in part* [2000] 3 All ER 1, [2003] 2 AC 1, [2000] 2 WLR 1220, HL.
- X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.
- e** **Preliminary issue**
- In proceedings brought by the claimant, Phonographic Performance Ltd (PPL), on 10 March 2003 against the Department of Trade and Industry and the Attorney General (the Crown) for declarations and damages for breach of the Crown's obligation in community law arising under art 8(2) of Council Directive (EEC) 92/100, Lawrence Collins J ordered, on 1 December 2003, the trial of the preliminary issues set out at [9], below. The facts are set out in the judgment.
- f** *David Pannick QC and Pushpinder Saini* (instructed by GSC Solicitors) for PPL.  
*Daniel Alexander QC and Jemima Stratford* (instructed by the Treasury Solicitor) for the Crown.

g

Cur adv vult

23 July 2004. The following judgment was delivered.

## SIR ANDREW MORRITT V-C.

h

### INTRODUCTION

- j** [1] Sections 67 and 72 of the Copyright Designs and Patents Act 1988 provide that certain actions do not constitute an infringement of the copyrights therein mentioned if carried out in accordance with the provisions of those respective sections. Section 67 relates to copyright in sound recordings and playing them as part of the activities of a club. Section 72 deals with the copyright in a broadcast or cable programme or any sound recording or film included in it and showing or playing it to an audience who have not paid for admission to the place where it is to be seen or heard.

[2] By Council Directive (EEC) 92/100 (on rental right and lending right and on certain rights related to copyright in the field of intellectual property) (OJ 1992

L346 p 61) (the rental directive), promulgated by the Council of the European Communities on 19 November 1992, it was provided in art 8(2) that— a

‘Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers.’ b

Article 10 entitled member states to provide for limitations to that right. In particular art 10(2) provided that—

‘any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.’ c

Article 15(1) provided that— d

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 1 July 1994.’

[3] The claimant Phonographic Performance Ltd (PPL) is a company limited by guarantee. Its membership includes over 3,000 record companies carrying on business in the United Kingdom. Such members own or are exclusive licensees of the copyright in the sound recordings made by them. The right to play them in public or to authorise others to do so (the performing right) is assigned by the member to PPL if he owns the copyright. In cases where the member is only an exclusive licensee then PPL is appointed the exclusive agent of the member in respect of the exercise of the performing right. The rights so conferred on PPL enable it to grant licences to others and to collect and distribute amongst its members payments received as consideration for such licences. Accordingly both PPL and its members were and are concerned to limit or remove altogether the exemptions from infringement afforded by ss 67 and 72 of the 1988 Act. e

[4] Shortly after the promulgation of the rental directive PPL commenced a campaign to secure the repeal of ss 67 and 72 on the basis, amongst others, that each of them was a limitation on the right to a single equitable remuneration for which art 8(2) required the Crown to make legislative provision and neither of them was a limitation on such right permitted by art 10. The Crown did not agree and so informed PPL. This has remained the position of both PPL and the Crown ever since. f

[5] The rental directive was not implemented by the United Kingdom on or before 1 July 1994. The Copyright and Related Rights Regulations 1996, SI 1996/2967, which were intended to do so, were made on 26 November 1996. No alteration was thereby made to either of ss 67 and 72 of the 1988 Act. On the same day PPL made it clear that it did not intend to make either a complaint to the European Commission (the Commission) or an application for judicial review of the Crown’s failure to repeal either section. g

[6] On 22 May 2001 Council Directive (EC) 2001/29 (on the harmonisation of certain aspects of copyright and related rights in the information society) (OJ 2001 L167 p 10) (the harmonisation directive) was promulgated by the European h



a Parliament and the Commission. By art 11 there was added to art 10 of the rental directive art 10(3) which provided that the permitted limitations on the right to a single equitable remuneration should—

‘only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

b Accordingly the scope for providing for limitations on the right to a single equitable remuneration was narrowed still further by the three-step approach that art 10(3) required. Member states were required to implement the harmonisation directive by 22 December 2002. In common with most other member states the United Kingdom did not. The relevant regulations, the c Copyright and Related Rights Regulations 2003, SI 2003/2498 did not come into force until 31 October 2003.

[7] The scope of art 10 of the rental directive has been considered by the Commission both before and after its amendment by the harmonisation directive. On 23 February 1995 the Commission indicated to the United d Kingdom that it considered that s 67 of the 1988 Act was a limitation permitted by art 10(2). But on 26 July 2001 the Commission announced that it had instituted infringement proceedings against the United Kingdom in the European Court of Justice (the ECJ) on the grounds that s 72 of the 1988 Act was inconsistent with art 8(2) of the rental directive and not a limitation permitted by art 10. That claim is still proceeding, but, as the proceedings are confidential, there is no evidence e before me as to the stage it has now reached.

[8] On 10 March 2003 PPL instituted proceedings against the Department of Trade and the Attorney General (the Crown) for declarations and damages on the footing that the Crown is in breach of its obligation in European Community law arising under art 8(2) of the rental directive by failing to provide in domestic law f for a single equitable remuneration to be paid by the persons and in the circumstances prescribed by ss 67 and 72 of the 1988 Act. In its defence the Crown contends for a number of reasons that it is not in breach of any obligation whether under Community law or otherwise. In addition it contends that any cause of action PPL might otherwise have had arose on 1 July 1994, the date by which the United Kingdom should have implemented the rental directive, was on g 10 March 2003 and is now barred by s 2 of the Limitation Act 1980. In the alternative the Crown contends that PPL's claim is barred by laches, alternatively that it is estopped from advancing it.

[9] On 1 December 2003 Lawrence Collins J ordered that there be tried as preliminary issues the question—

h ‘Whether, or the extent to which, the claims made in [these actions] are barred by limitation, and/or whether, or the extent to which, in all the circumstances, the pursuit of those claims constitutes an abuse of process and/or is barred by estoppel and/or laches.’

j Those are the issues now before me. It is common ground that I must approach them on the assumption that PPL has established the liability of the Crown for which it contends.

[10] It is also common ground that the preliminary issues raise three questions, namely (1) whether the failure of the Crown to do what art 15 of the rental directive required, whether by 1 July 1994 or at all, gives rise to a single cause of action accruing on that date with continuing consequential damage or

successive causes of action accruing when and as often as further damage in consequence of the continuing failure is sustained by PPL; and if not (2) whether the claims are liable to be struck out as abuses of the process of the court in accordance with the propositions enunciated by Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988; and if so (3) whether on the facts of this case the claims should be struck out as such an abuse. I will deal with those questions in that order.

#### ONE CAUSE OF ACTION OR SEVERAL?

[11] At the outset it is necessary to consider the nature of PPL's claim. The decisions of the ECJ in *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1992] IRLR 84, [1991] ECR I-5357 and *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport, ex p Factortame Ltd* Joined cases C-46 and C-48/93 [1996] All ER (EC) 301, [1995] QB 404 have established, and it is not disputed, that a member state may incur liability to a person under Community law where three conditions are satisfied. They are that (1) the rule of Community law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious, and in particular that there was a manifest and grave disregard by the member state of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party. As I have already pointed out for the purposes of these preliminary issues I have to assume that all those conditions will be established.

[12] The nature of such a claim in English law was considered by Hobhouse LJ in *R v Secretary of State for Transport, ex p Factortame Ltd* [1998] 1 CMLR 1353. In that case the Divisional Court concluded that liability had been established and went on to consider whether exemplary damages could and should be awarded. It was in that context that Hobhouse LJ considered that the liability was best understood as a breach of statutory duty. In so doing he relied on the dictum to the same effect of Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1983] 2 All ER 770 at 775, [1984] AC 130 at 141 and the conclusion of Mann J in *Bourgoin SA v Ministry of Agriculture, Fishery and Foods* [1985] 3 All ER 585 at 597, [1986] QB 716 at 733 that the duty was imposed by the relevant article and s 2(1) of the European Communities Act 1972. Transposed to the facts of this case the duty for the breach of which the Crown is sued is that imposed by art 8(2) of the rental directive and s 2(1) of the 1972 Act.

[13] Thus there is no dispute that the claim is one 'founded on tort' for which s 2 of the 1980 Act prescribes a limitation period of six years 'from the date on which the cause of action accrued' (see *R (on the application of Factortame) v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 942). Similarly it is clear, and not disputed, that a cause of action accrued on 2 July 1994 when the date by which the rental directive was to be given effect had passed. The issue which divides the parties is whether that is the only cause of action. The Crown contends that it is so that it is now barred by s 2 of the 1980 Act. PPL submits that it is not. It submits that the breach of duty imposed by art 8(2) is a continuing one and, not being actionable per se, gives rise to a fresh cause of action on each occasion when PPL suffers consequential damage. On that basis PPL claims to be entitled to recover damage sustained within the six years immediately preceding the issue of proceedings on 10 March 2003.

[14] The distinction between the two is demonstrated by two recent cases. The first chronologically is *Arkin v Borchard Lines Ltd (Preliminary Issue)* [2000] Eu LR 232. The case concerned the operation of agreements alleged to infringe

a arts 81 and 82 EC. Colman J (at 242) recorded that it was common ground that a cause of action for breach of a statutory duty first arises when the breach causes damage to the claimant. He continued:

b 'In this connection it is important to recognise that there are different ways in which such a breach may cause damage. Thus, an isolated event amounting to such a breach may cause a chain of damage development commencing when the effects of the breach first affect the claimant, and those [effects] may continue for a long period of time. If that period commences prior to the cut-off date for the purposes of a period of limitation, the claim will prima facie be time-barred notwithstanding that the effects of the breach may continue beyond that date. The position is similar to a claim in tort for negligence. By contrast, there may be a continuing or repeated breach of statutory duty, over an extended period, such as an unlawful emission of toxic fumes which continues to affect and injure those exposed to it over the whole period of that breach. In such a case, if the limitation cut-off date occurs during the period, the claimant's cause of action for the damage suffered after the date in question will not be time-barred.'

Colman J concluded that the case before him fell into the latter category.

e [15] The second is *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2001] EWCA 56, [2001] 1 All ER (Comm) 455. In that case cargo had been negligently stowed so that damage from condensation occurred during the subsequent voyage. The claimant in respect of that damage only acquired title to the cargo after the voyage had commenced. The defendants contended that no duty of care could be owed to one who was not the owner of the cargo at the time of the negligent act. It was not submitted that the negligent act of stowage constituted a continuing breach only that the fresh damage occurring after the claimants had acquired title to the cargo created new causes of action on which they could sue to recover that damage (see [2001] 1 All ER (Comm) 455 at [95] per Rix LJ). The Court of Appeal (see [96]–[98], [196]) held that the cause of action was completed once and for all when, following the negligent stowage, more than insignificant consequential damage was caused to the cargo.

f [16] This conclusion was upheld in the House of Lords ([2003] UKHL 12, [2003] 2 All ER 785, [2004] 1 AC 715). Lord Bingham of Cornhill (at [40]) adopted the judgment of Rix LJ on this point as his own. Lord Steyn also agreed (at [64]). Similarly Lord Hoffmann concluded (at [90]) that—

h 'there was a single cause of action which accrued to the persons who owned the cargo at the time when the negligent stowage caused it any significant damage. That cause of action comprised all damage caused by the negligent stowage, even if some of that damage did not manifest itself until after they had parted with ownership.'

j [17] I have also been referred to extracts from three textbooks. In *Clerk and Lindsell on Torts* (18th edn, 2000) pp 1711–1713 (paras 33-06, 33-07) the editors deal respectively with cases of a continuing wrong and a tort only actionable on proof of special damage. With regard to the former they express the view that—

'every fresh continuance is a fresh cause of action, and therefore an injured party who sues after the cessation of the wrong may recover for such portions of [the damage] as lie within the period limited.'

In the case of the latter they point out that—

‘When the tort is actionable only on proof of damage, then there is no cause of action, and time does not begin to run until some damage actually occurs.’

[18] In *McGee Limitation Periods* (4th edn, 2002) pp 64–66 (paras 5.002–5.004) the same points are made. The author expresses the view (p 492 (para 27.040)) that the decision of Colman J in *Arkin’s* case demonstrates that the principles to be applied for the purposes of determining the accrual of a cause of action are the same irrespective of whether the action is governed by the 1980 Act or is an action created by European legislation, to which the principles of limitation are applied by analogy.

[19] The third textbook to which I have been referred is *McGregor on Damages* (17th edn, 2003). The author also points out (pp 346–347 (para 9.021)) that in the case of a continuing wrong a fresh cause of action arises from time to time for so long as the wrongful state of affairs continues and in the case of a single act not actionable per se the cause of action arises when and as often as consequential damage occurs.

[20] All three textbooks refer to *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, [1886–90] All ER Rep 449. As Lord Hoffmann pointed out in *The Starsin* [2003] 2 All ER 785 at [91], that case was unusual because the cause of the damage, digging coal underground, was not itself a wrongful act but gave rise to a cause of action only in so far as it let down some part of the surface. He added:

‘So there was no unifying element in the cause of action such as, in this case, is provided by the negligent stowage. Each letting down of the surface was a separate cause of action. In the present case, all damage caused by the negligent stowage is a single cause of action which is complete once any significant damage has occurred.’

[21] Counsel for the Crown submitted that the fact that this cause of action has been pigeon-holed as a breach of statutory duty for some purposes, for example the availability of exemplary damages, does not mean that it must be so regarded in other contexts. He suggested that, as in the *Darley Main Colliery* case, there was a unifying element in the illegality, as he described it, arising on 2 July 1994 when the United Kingdom failed to do what art 8(2) of the rental directive required it to do. He pointed out that to regard the state of affairs which arose on that day as a continuing breach gives rise to undesirable consequences in that the Crown will remain liable for an indeterminate period for substantial sums which it is unable to quantify or recover from those who have benefited from its failure to do what European Community law required. He submitted that the proper view was that all damage occurring on or after 2 July 1994 was the consequence of the breach of duty which crystallised on that date.

[22] Counsel for the Crown submitted that properly regarded the breach of statutory duty alleged falls within the first of the categories described by Colman J in *Arkin’s* case, not the second. He pointed out that after 2 July 1994 nothing further occurred. He suggested by analogy with *Matra Communication SA v Home Office* [1999] 3 All ER 562 at 569–570, [1999] 1 WLR 1646 at 1656 that the loss sustained by PPL was the loss of the chance to sue those who would be infringers but for the provisions of ss 67 and 72 of the 1988 Act and that loss was sustained once and for all on 2 July 1994.



a [23] I am unable to accept these submissions. First, the categorisation of the cause of action as the breach of a statutory duty appears to me to be correct for the Crown's obligation arises under statute, namely art 8(2) of the rental directive and s 2(1) of the 1972 Act. In any event the Crown's obligation is not contractual and must therefore be recognised as being 'founded on tort'. So regarded it falls within the express words of s 2 of the 1980 Act. In my view, therefore, the  
b 1980 Act applies directly and not by analogy as suggested in *McGee* p 492 (para 27.040).

c [24] Second, it was common ground that the obligation of the United Kingdom imposed by art 8(2) of the rental directive did not cease on 2 July 1994 when the date by which the obligation was to be performed had passed. No doubt it is true that had the duty been performed on or before 1 July 1994 then there would not have been any breach of duty on or after 2 July 1994. But the converse is not true; the obligation continued but was not performed. In these circumstances the crystallisation of the breach of duty on 2 July 1994 cannot be such a unifying element as Lord Hoffmann referred to in respect of the *Darley Main Colliery* case and the fact that nothing further occurred after that date is the  
d complaint not an answer to it.

e [25] Third, I do not agree that all subsequent damage can be attributed to the initial breach. Playing a sound recording as part of the activities of a charitable organisation in, say, 2000 was not an infringement because the Crown had not done by that time what art 8(2) required; that is to say the relevant breach is that which occurred in 2000 not that which had occurred previously in 1994. PPL was not deprived of a chance in 1994. It was deprived of a right on each subsequent occasion when a sound recording was played in circumstances which, because of the Crown's failure to do what art 8(2) required, did not constitute an infringement.

f [26] Fourth, I am unimpressed by the submission regarding the consequences to the Crown if the argument for PPL is accepted. The issue of limitation is predicated on the assumption that liability has been established. That would involve a finding that the Crown 'manifestly and gravely' disregarded its obligation. Had the Crown not done so it could have avoided an initial liability and terminated any continuation of it by doing what art 8(2) required.  
g

h [27] Fifth, the requirement of the third element of the claim I have summarised at [11], above that there is a direct causal link between the breach of the obligation and the damage sustained by the claimant demonstrates that a claim for what has been called *Francovich* damages (*Francovich v Italy* [1992] IRLR 84, [1991] ECR I-5357) is not actionable per se. It follows that damage is an essential ingredient of the cause of action and can found a claim as and when it is sustained.

j [28] For all these reasons I accept the submission for PPL that its claim falls within accepted principles relating to the accrual of causes of action summarised in all three of the textbooks to which I have referred. In my view its claims are not statute-barred because they are both claims in respect of a continuing breach of duty and a cause of action in which damage is an essential ingredient. The loss for which damages may be recovered is limited to that sustained within the six years immediately preceding the issue of proceedings on 10 March 2003 and, if the actions proceed, the particulars of claim should be amended to reflect that fact.

## ABUSE OF THE PROCESS OF THE COURT—THE LAW

[29] The starting point in relation to this issue is the decision of the Court of Appeal in *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988. In that case a student at the university had failed her final exams. Initially her papers were rejected for plagiarism. Her internal appeal was pyrrhically successful in that the finding of plagiarism was reversed but she was only awarded a zero mark. She sued the university for breach of contract. Her claim was struck out on the ground that the alleged breaches were not justiciable. The claim was amended to allege breaches of the student regulations of the university. The university maintained that the claim should have been brought, if at all, by way of judicial review and within the three months allowed for such claims and not by ordinary action. The Court of Appeal agreed that the judge was right to have struck out the claim as originally formulated but allowed the student's appeal and allowed the action to proceed on the amended pleadings.

[30] Lord Woolf MR explained the effect of the CPR on the decision of the House of Lords in *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237. He said ([2000] 3 All ER 752 at 839–840, [2000] 1 WLR 1988 at 1997–1998):

'34. The courts' approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly. (CPR 1.1(2)(d) and 1.3.) They should not allow the choice of procedure to achieve procedural advantages. The CPR are, as Pt 1.1(1) states, a new procedural code. Parliament recognised that the CPR would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (s 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the CPR.

35. Whilst in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive, this is no longer the position. Whilst to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by means of an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process, can take into account whether there has been unjustified delay in initiating the proceedings.

36. When considering whether proceedings can continue, the nature of the claim can be relevant. If the court is required to perform a reviewing role or what is being claimed is a discretionary remedy, whether it be a prerogative remedy or an injunction or a declaration, the position is different from that when the claim is for damages or a sum of money for breach of contract or a tort irrespective of the procedure adopted. Delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for

a summary judgment under CPR Pt 24 if its effect means that the claim has no real prospect of success.

37. Similarly if what is being claimed could affect the public generally, the approach of the court will be stricter than if the proceedings only affect the immediate parties. It must not be forgotten that a court can extend time to bring proceedings under Ord 53. The intention of the CPR is to harmonise  
b procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.

38. Where a student has, as here, a claim in contract, the court will not strike out a claim which could more appropriately be made under Ord 53 solely on the basis of the procedure which has been adopted. It may  
c however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the CPR. The same approach will be adopted on an application under Pt 24.'

[31] Sedley and Ward LJ agreed. Sedley LJ recognised ([2000] 3 All ER 752 at  
d 836, [2000] 1 WLR 1988 at 1993–1994 (para 17)) that to permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will circumvent the safeguards contained in CPR Pt 53. He added:

'... the CPR now enable the court to prevent the unfair exploitation of the  
e longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances—including of course the availability of judicial review—demonstrates that the court's processes are  
f being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected.'

[32] Counsel for the Crown accepts that the claim of PPL may be brought by ordinary action. But, he submits, the cause of action is *sui generis* and based on a core allegation that that the United Kingdom should have amended the 1988  
g Act so as to repeal ss 67 and 72. He contends that such a claim is inherently a public law claim which ought to be pursued in proceedings for judicial review. To require such a procedure will enable the court to exercise control over the claims and the periods for which they may be pursued. In those circumstances, he submits the court has jurisdiction to strike out the action as an abuse of the  
h process of the court.

[33] This is disputed by counsel for PPL. He accepts that the complaint of PPL could have been brought by judicial review. But, he contends, this is a private law claim which PPL is entitled to bring by ordinary action commenced within the limitation period. He relies by way of analogy on *An Bord Bainne Co-operative Ltd*  
j (*Irish Dairy Board*) *v* *Milk Marketing Board* [1984] 2 CMLR 585; *Lonrho plc v Tebbit* [1992] 4 All ER 280 at 287–288; *Boddington v British Transport Police* [1998] 2 All ER 203 at 226, [1999] 2 AC 143 at 172 and *Steed v Secretary of State for the Home Dept* [2000] 3 All ER 226, [2000] 1 WLR 1169. He maintains that in the absence of any post action conduct of which legitimate complaint may be made, and none is here alleged, the court is not entitled to strike out an action properly commenced within the limitation period.

[34] Counsel for PPL relies on the decision of the House of Lords in *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197. That case was concerned with an application under the Rules of the Supreme Court then in force to strike out a claim for want of prosecution. The writ was not issued until the end of the relevant six-year limitation period and then not served for a further nine months. There were subsequent delays on which the defendant also relied. Lord Griffiths, with whom the other members of the Appellate Committee agreed, dealt with pre-action delay ([1989] 1 All ER 897 at 902–903, [1989] AC 1197 at 1206–1207). He referred to the observation of Kerr LJ in *City of Westminster v Clifford Culpin & Partner* (1987) 12 Con LR 117 that it was questionable whether plaintiffs should be allowed the benefit of the full limitation period with virtual impunity where the facts are known and there is no obstacle to the speedy institution and prosecution of claims and continued:

‘I see the force of this observation, particularly in a case like the present, when there is no good reason why the action should not have been started much earlier than it was. But limitation periods are set by Parliament and not by the courts ... It would, I think, introduce intolerable uncertainty into the litigation process if litigants were at risk of being penalised even if they commenced their actions within the limitation period and thereafter pursued them expeditiously. The effect would be to push people into precipitate litigation for fear that the court might eventually rule that they had not started their action soon enough ... The courts must respect the limitation periods set by Parliament; if they are too long then it is for Parliament to reduce them. I therefore commence my assessment of the present regime by concluding that the plaintiff cannot be penalised for any delay that occurs between the accrual of the cause of action and the issue of the writ provided it is issued within the limitation period.’

[35] Counsel for PPL submits that those considerations remain as true today as in 1989. He contends that if and in so far as the Court of Appeal may have suggested otherwise in *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752, [2000] 1 WLR 1988 it was not open to them to do so. The latter submission is not, I think, open to counsel in this court for I am bound by the decision of the Court of Appeal in *Clark*’s case. If and to the extent that the Court of Appeal went further than the decision of the House of Lords in the *Chris Smaller (Transport)* case entitled them to go that is a matter for the Court of Appeal or the House of Lords. But I do not think that counsel need go that far. The first sentence of para 35 of the judgment of Lord Woolf MR ([2000] 3 All ER 752 at 839, [2000] 1 WLR 1988 at 1997) contains a clear recognition of the proposition expressed by Lord Griffiths in the *Chris Smaller (Transport)* case. The second sentence accepts that it remains the case that it is not an abuse to commence proceedings within a limitation period though delay may be relevant when considering whether such proceedings are abusive for other reasons. The same point is apparent from the reference by Sedley LJ ([2000] 3 All ER 752 at 836, [2000] 1 WLR 1988 at 1993–1994 (para 17)) to the ‘entirety’ of the circumstances. Further I do not accept the submission of counsel for PPL to the effect that only such cases as would have been struck out in accordance with the principles established in *O’Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 may now be regarded as an abuse of the process. If that had been the intention of Lord Woolf MR and Sedley LJ in *Clark*’s case it would have been unnecessary for them to make the comments which I have quoted at [30] and [31], above.



a [36] Each side accepts that this claim could have been brought by an application for judicial review or by ordinary action; they differ in the appropriateness of one type of proceeding over another. In my view it was to just this situation that the judgments of Lord Woolf MR and Sedley LJ in *Clark's* case were directed. I conclude that the jurisdiction to which they referred exists where the remedies both of judicial review and of ordinary action are available.

b The choice of either may be an abuse of the process. How to exercise that jurisdiction will depend on all the relevant circumstances including matters occurring before the proceedings were instituted and which remedy is in the circumstances the more appropriate.

[37] Accordingly I would reject the extreme position taken by each party. The claims instituted by PPL may be an abuse of process notwithstanding that the Crown does not rely on any event occurring after their institution. But it cannot be predicated that they are an abuse just because they involve a consideration of the duties of the Crown under European law and might have been brought by an application for judicial review.

d ABUSE OF THE PROCESS OF THE COURT—THE FACTS

[38] The background to the institution of these proceedings has been set out in exhaustive detail in the evidence of Ms Kennedy for the Crown and Mr Nevrla for PPL. I do not find it necessary to go into such detail for the relevant milestones can be more simply described.

e [39] As I have already mentioned the rental directive was promulgated on 19 November 1992. In August 1993 the Department of Trade and Industry (the DTI) issued a consultation paper on how the rental directive should be implemented. Paragraphs 7 and 8 of the consultation paper drew attention to arts 8(2) and 10 and suggested that the existing exceptions in the United Kingdom law, ie ss 67 and 72, would remain. PPL's response dated 26 November 1992, supported by the opinion of specialist leading counsel, suggested that ss 67 and 72 were not compatible with arts 8(2) and 10. In January 1994 the DTI published a summary of the responses to the consultation paper. On 5 October 1994 there was a meeting between officials of the DTI and representatives of PPL at which the differences between them were discussed but not resolved. On the same day the United Kingdom permanent representative to the European Union wrote to the Commission seeking its opinion as to the compatibility of s 67 and the rental directive. On 23 February 1995 the Commission replied to the effect that in its opinion s 67 was compatible. Evidently the Commission took a different view with regard to s 72 as, eventually on 26 July 2001 it referred the United Kingdom to the ECJ for failure to implement the rental directive in that respect.

h [40] In the meantime there was a meeting between the responsible minister and representatives of PPL on 18 May 1995. They again discussed whether arts 8(2) and 10 of the rental directive were compatible with ss 67 and 72 of the 1988 Act. The summary prepared by PPL shows that the minister indicated that PPL should assume that s 67 would not be repealed, that in his view s 72 was compatible with the rental directive so that he had no power to repeal it and that he was open to discussion whether primary legislation was required. Such discussion continued both in meetings, particularly on 21 July 1995, and by correspondence and with and without specialist leading counsel. No resolution of the underlying issues was achieved.

j

[41] Later in 1995 the government introduced a Broadcasting Bill. In a letter to the DTI from PPL dated 24 November 1995 PPL indicated that it would pursue

its contentions in relation to s 72 in that context and would seek an appropriate amendment by lobbying in the proper quarters. Such activity proved to be equally unsuccessful. In 1996 the focus shifted to the terms of the statutory instrument required to implement the rental directive, by then some two years out of time. Further correspondence ensued. On 16 September 1996 a representative of PPL wrote to the official in the Patent Office with whom much of the previous communication had taken place and indicated that in the absence of an amicable solution and if the issue became a matter of court interpretation PPL would like to disclose the correspondence to assist the court. But in the minutes of a meeting of the directors of PPL held on 26 November 1996 it is recorded that—

‘neither a formal complaint to the European Commission nor the commencement of judicial review proceedings in the UK were recommended, since the UK government would be likely to interpret this as an aggressive move and the tactic is likely to be counter-productive.’

[42] PPL continued its lobbying activities. Following the general election in May 1997 the Department for Culture, Media and Sport (the DCMS) became involved. PPL sent submissions to that department in October 1997 reiterating all its previous arguments together with several opinions of counsel. The Treasury Solicitor was unable to ascertain whether the submission had been answered. Further correspondence between PPL, the Patent Office and the DCMS took place in and after February 1998 relating to the statutory licence to which the issues concerning ss 67 and 72 had some relevance. Further consultation papers and responses took place in 1998 and 1999.

[43] The issues appear to have been dormant in the year 2000 but came to life again in May 2001 in relation to the harmonisation directive promulgated by the Commission and the European Parliament. Correspondence and meetings between PPL, the Patent Office and the DCMS took place throughout 2001 and 2002, particularly in respect of s 72. In the course of these communications the possibility of a claim for damages was adverted to in a letter dated 26 July 2002 from PPL to the Parliamentary under-secretary at the DCMS. The Parliamentary under-secretary replied on 2 September 2002 suggesting that further consultation was required before any final conclusion was reached. Further consultation took place but without either party modifying their positions. The claims were issued without warning on 10 March 2003.

[44] The evidence of the negotiations is voluminous. It shows the relative positions of the parties on the contentious issue of whether arts 8(2) and 10 permitted the United Kingdom to retain ss 67 and 72 from as early as 1993 to as late as 2003. Neither side modified its position in that ten-year period. Whilst PPL decided in November 1996 not to pursue an application for judicial review of the Crown's decisions with regard to the implementation of the rental directive, there is nothing to suggest that it intended to abandon any claim for compensation it might have.

[45] In these circumstances the Crown contends that the proceedings should be struck out, not because of anything which followed their institution but because of all that went before. The Crown accepts that mere delay is not abusive if the proceedings are commenced within the relevant limitation period. Counsel for the Crown suggests that this case is different because the delay was deliberate, has given rise to substantial claims and puts the Crown on the horns of a dilemma in that it believes that arts 8(2) and 10 of the rental directive do

a permit the retention of ss 67 and 72 but can do nothing to protect itself if it turns out to be wrong. Counsel for the Crown suggests that the delay has been prejudicial to the Crown in that the evidence as to the quantum of liability has become progressively more difficult to obtain. He contends that the failure of PPL to institute proceedings earlier and the decision taken at the meeting held on 26 November 1996 not to proceed by way of judicial review lulled the Crown  
b into a false sense of security. Indeed he went further and invited me to regard that decision as an abandonment for all time of the right to sue for compensation.

[46] These contentions were rejected by counsel for PPL. He submitted that the decision in *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197 is inconsistent with any notion that it matters whether the delay was the result of a deliberate decision or oversight. He pointed out that the effect  
c of the 1980 Act is to bar the earlier claims. He suggested that the Crown was no more on the horns of a dilemma than any other litigant against whom a claim has been made on the basis of uncertain legal principles. In the alternative he pointed out that the Crown might have applied for a negative declaration, cf *A-G v Able* [1984] 1 All ER 277, [1984] QB 795, but never tried. Further, as he submitted, any  
d evidential problem concerning the quantum of damage would prejudice PPL more than the Crown. He disputed the suggestion that PPL had lulled the Crown into a false sense of security or had in any way led the Crown to believe that it, PPL, had abandoned any private law rights to compensation or had in fact done so.

[47] I start with a consideration of the nature of the proceedings. The decision  
e of the Divisional Court in *R v Secretary of State for Transport, ex p Factortame Ltd* [1998] 1 All ER 736n, [1998] 1 CMLR 1353 to which I have referred at [12], above was considered by the Court of Appeal ([1999] 2 All ER 640n, [1998] 3 CMLR 192) and the House of Lords ([1999] 4 All ER 906, [2000] 1 AC 524), but not with regard to the claim for exemplary damages which had been abandoned. In both those  
f courts there was clear recognition that the effect of *Francovich v Italy* [1992] IRLR 84, [1991] ECR I-5357 and subsequent cases was to subject member states to an obligation under Community law to compensate individuals who have sustained consequential loss if they satisfy the conditions identified by the ECJ in those cases. Such an obligation gives rise to a correlative right in one who has suffered such damage. Such a right is not discretionary.

[48] Nor in my view can such a right be categorised as a public law right even  
g though the Crown's obligations under Community law and how to discharge them fall to be considered. As in the context of the 1980 Act, the remedy is for damages for breach of a statutory duty arising under art 8(2) of the rental directive and s 2(2) of the 1972 Act. This is recognised by the relief sought in the  
h form of a declaration and damages. Counsel for PPL accepted that a declaration was a discretionary remedy but offered to abandon it if that mattered.

[49] Neither party referred me to the provisions of CPR Pt 54. Nevertheless it appears to me that though the nature of the proceedings might fall within the definition of a claim for judicial review in CPR 54.1(2)(a) if the claim for a  
j declaration is abandoned it would be excluded by CPR 54.3(2). I do not suggest that the form of the proceedings can govern their substance but, to my mind, this confirms the view that the proceedings are essentially private law proceedings which can and prima facie should be brought by an ordinary claim.

[50] I see nothing in the features on which the Crown relied to suggest that the court should regard the continuation of the claims as ordinary actions as an abuse of the process. So to do would be to subject the rights of an individual to a

discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of Community law. a

[51] I do not accept the submission that the actions of PPL lulled the Crown into a false sense of security or amounted to any sort of representation that it had abandoned any legal claim it might have. The position of PPL was quite clear throughout. It maintained consistently and with varying degrees of vigour that both ss 67 and 72 were inconsistent with arts 8(2) and 10 of the rental directive and should be repealed. PPL was so understood by the Crown. There is no evidence that the Crown modified its disagreement with the contentions of PPL or otherwise changed its position in reliance on any impression it received as to the attitude of PPL to the institution of proceedings. b

[52] The delay, the dilemma and consequential problems with regard to evidence of loss are neither more nor less than those faced by any defendant facing ordinary civil proceedings based on uncertain legal principles and brought late but within the relevant limitation period. I can see no reason why all or any such factors should lead to the conclusion that the Crown should be put in a privileged position or the rights of PPL frustrated or denied. For all these reasons I reject the submission that the pursuit of these claims are abuses of the process of the court. c  
d

#### CONCLUSION

[53] For all these reasons I answer the preliminary issues in each action in the negative. e

*Preliminary issues answered in the negative. Permission to appeal given.*

Celia Fox Barrister.



# NHS Trust v T (adult patient: refusal of medical treatment)

[2004] EWHC 1279 (Fam)

b FAMILY DIVISION

CHARLES J

20, 28 MAY 2004

*Medical treatment – Adult patient – Consent to treatment – Adult lacking capacity refusing treatment – Approach to grant of interim declaration – CPR 25.1(1)(b).*

T suffered from a borderline personality disorder and on a number of occasions she had harmed herself by cutting and blood-letting. The consequence of the blood-letting was that her haemoglobin level would fall to a life-threateningly low level such that she required blood transfusion on an emergency basis. She was admitted to the claimant hospital after having cut herself and losing a substantial amount of blood. She refused a blood transfusion and her condition deteriorated. The hospital applied to the duty judge who made an order providing, inter alia, for transfusion treatment to be administered to T, and directing the hospital to apply for directions. At the directions hearing the claimant sought, inter alia, an interim declaration authorising treatment of T if it were necessary to preserve her life or avoid imminent risk of serious injury to her health. T opposed the grant of such an interim declaration; the question of her capacity arose. The court considered authority of the Court of Appeal that an interim declaration was not something known to the law and not something that could be granted by the court. The Official Solicitor drew the attention of the court to CPR 25.1(1)(b)<sup>a</sup>, which provided that the court could grant an interim declaration as an interim remedy.

**Held** – The introduction by the CPR of the power to grant an interim declaration meant that such relief could no longer be said to be ‘unknown to the law’ and ‘a contradiction in terms’ although conceptual difficulties remained. However, the approach taken by the court when faced with an emergency founded a final and effective declaration in respect of identified treatment which the court considered on the available evidence to be in the best interests of the person whom it was proposed should be treated, and it followed that such an approach would also enable the court to make a valid interim declaration. In the instant case, on the existing evidence, T lacked capacity and the balance of the competing factors came down heavily in favour of her having the treatment to save her life. The lack of uncertainty relating to T’s capacity and to her medical condition, and the recurring nature of the problem relating to her need for a transfusion provided strong support for the view that the court should make an interim declaration rather than refuse it on the basis that treatment was not yet needed and might not be needed before the final hearing. The declaration sought would therefore be granted (see [36], [45]–[50], [62], [66], [68], [71], below).

a CPR 25.1, so far as material, is set out at [35], below

*St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, *Re B* (adult: refusal of medical treatment) [2002] 2 All ER 449 and *R v R* (interim declaration: residence) [2001] 1 FCR 94 considered.

## Notes

For orders for interim remedies, see 37 *Halsbury's Laws* (4th edn reissue) para 862.

## Cases referred to in judgment

- A* (medical treatment: male sterilisation), *Re* [2000] 1 FCR 193, CA.
- A London Borough v BS* (an adult by her litigation friend, the Official Solicitor) [2003] EWHC 1909 (Fam), (2003) 75 BMLR 185.
- A v A Health Authority, Re J* [2002] EWHC 18 (Fam/Admin), [2002] 1 FCR 481, [2002] Fam 213, [2002] 3 WLR 24.
- B* (adult: refusal of medical treatment), *Re* [2002] EWHC 429 (Fam), [2002] 2 All ER 449.
- Banks v Goodfellow* (1870) LR 5 QB 549, [1861–73] All ER Rep 47.
- C* (adult: refusal of treatment), *Re* [1994] 1 All ER 819, [1994] 1 WLR 290.
- F v Riverside Mental Health NHS Trust* [1994] 2 FCR 577, CA.
- F v West Berkshire Health Authority* (Mental Health Act Commission intervening) [1989] 2 All ER 545, sub nom *Re F* (mental patient: sterilisation) [1990] 2 AC 1, [1989] 2 WLR 1025, HL.
- Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, [1986] AC 112, [1985] 3 WLR 830, HL.
- International General Electric Co of New York Ltd v Customs and Excise Comrs* [1962] 2 All ER 398, [1962] Ch 784, [1962] 3 WLR 20, CA.
- M* (child: refusal of medical treatment), *Re* [1999] 2 FCR 577.
- MB* (an adult: medical treatment), *Re* [1997] 2 FCR 541, CA.
- New Brunswick Rly Co v British and French Trust Corp Ltd* [1938] 4 All ER 747, [1939] AC 1, HL.
- O* (a minor) (medical treatment), *Re* [1993] 1 FCR 925.
- R* (a minor), *Re* [1993] 2 FCR 544.
- R v R* (interim declaration: residence) [2001] 1 FCR 94.
- S* (adult: refusal of medical treatment), *Re* [1992] 4 All ER 671, [1993] Fam 123, [1992] 3 WLR 806.
- Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871, [1985] 2 WLR 480, HL.
- St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1998] 3 All ER 673, [1999] Fam 26, [1998] 3 WLR 936, CA.
- T* (adult: refusal of medical treatment), *Re* [1992] 4 All ER 649, [1992] 3 WLR 782, CA.
- Webster v Southwark London BC* [1983] QB 698, [1983] 2 WLR 217.

## Application

The claimant NHS trust applied for directions pursuant to an order made by Pauffley J on 9 April 2004 declaring, inter alia, that it was lawful for the claimant to administer a blood transfusion to T in spite of T not consenting, and for a declaration with effect until the substantive hearing of the matter authorising the treatment of T by way of blood transfusion if her haemoglobin level was such that such treatment was necessary to preserve her life or avoid imminent risk of serious injury to her health. The Official Solicitor appeared in the

- a capacities of the potential litigation friend of T, a friend of the court, or as a person who would be invited to make inquiries by the court. The facts are set out in the judgment.

*Bridget Dolan* (instructed by *Kennedys*, Newmarket) for the claimant.

*Kate Markus* (instructed by *Fosters*, Norwich) for Ms T.

- b *Edward Solomons*, Solicitor Advocate and Deputy Official Solicitor, for the Official Solicitor.

*Cur adv vult*

- c 28 May 2004. The following judgment was delivered.

## CHARLES J.

### INTRODUCTION

- d [1] This case concerns Ms T who is 37 years old. The claimant seeks declaratory relief concerning her medical treatment. The claimant is responsible for the medical care of Ms T, but it is not responsible for her psychiatric care and at present does not have her psychiatric records.

- e [2] At the hearing before me Ms T was represented by solicitors and counsel. I also heard submissions from the Official Solicitor and, of course, the claimant. The Official Solicitor was present and represented in one or more of the following capacities, namely, as the potential litigation friend of Ms T, as a friend of the court or as a person who would be invited to make inquiries by the court. His participation was extremely helpful. I pause to comment that it is well recognised that the participation of the Official Solicitor in cases of this type, which are difficult and sensitive, is helpful to the court and others who are f involved in them.

- g [3] I was told that the solicitors acting for Ms T have experienced difficulties in obtaining public funding. To my mind this is surprising and unfortunate. The judge who deals with this case at final hearing may wish to return to this point, however I record at this stage, that in cases of this type it is important that all practical efforts are made to enable the person who is, or may be, refusing treatment to be properly heard (see the guidelines in reported cases referred to below). An important aspect of that is the funding of his or her legal representation.

### BACKGROUND

- h [4] It was common ground before me that Ms T suffers from a borderline personality disorder and that she has had a long history of psychiatric contact with relevant services.

- j [5] Ms T has on a number of occasions over the years self-harmed by cutting herself and blood-letting. The consequence of this blood-letting is that her haemoglobin level falls to a life-threateningly low level such that she requires blood transfusion on an emergency basis. My references to blood transfusion should be read as including iron supplements and other necessary treatment in respect of her dangerously low haemoglobin. This emergency situation can arise on or very shortly after her presentation at, and admission to, hospital. The high risk that exists at these times of chronic anaemia is that in the absence

of a blood transfusion sufficient oxygen will not be transferred to her body tissues and Ms T will die. a

[6] Over the years Ms T has been given blood transfusions on a number of occasions in such emergency situations by the claimant and although her initial stance has been to refuse such transfusions she has been persuaded by clinicians, or has decided to, accept them.

[7] Such an incident occurred in the autumn of 2001 and it generated some medical opinions which are before me. I shall return to these medical opinions. b

[8] On 28 January 2004 Ms T signed an advance directive which contains the following passages:

'You are advised to read the guidance note before completing this document. c

This is the advance directive of [Ms T].

If at any time in the future I experience a mental health crisis, I direct that the following instructions are complied with. In particular, I refuse treatment which is contrary to that stipulated in this document. Where I have objected to a specific form of treatment this shall be legally binding on those treating me, unless I am subject to compulsory treatment under the Mental Health Act 1983 [Ms T's signature follows this passage]. d

I confirm that I believe the above named [Ms T] has freely stated her directions in this document. It is my understanding and belief that she has the mental capacity to understand the nature and consequences of these directions. e

[This passage is signed by (I think) the person named later in the document as Ms T's advocate.]

#### MY WISHES REGARDING MEDICATION AND TREATMENT

Should my blood volume or HB level fall low, I do not wish to be given a blood transfusion or iron.

#### REASONS FOR MY DECISION f

I make this decision for two reasons. First because I am caught in a vicious circle/set of circumstances too difficult for me to continue enduring. I am not aware of when I am cutting myself, and therefore cannot prevent my HB dropping very low periodically. Having a transfusion does not resolve this problem in the long term, only causes stress to myself. g

Secondly I believe my blood is evil, carrying evil around my body. Although the blood given in transfusions is perfectly healthy/clean once given to me it mixes with my own and also becomes evil. Contaminated by my own. Therefore the volume of evil blood in my body will have increased and likewise the danger of my committing acts of evil. h

#### UNDERSTANDING THE NATURE OF THIS DIRECTIVE AND THE EFFECT IT WILL HAVE

I am fully aware that in refusing a blood transfusion I may die.

At the time of writing this I have capacity and am mentally competent.

I attach a letter confirming my understanding of this directive from my GP [who is named]. j

It is my wish that the following people be told immediately should I be admitted to hospital [an advocate and a social worker are named].

MY CHOICE OF MENTAL HEALTH LAWYER IS [the lawyer is named].



a IN THE EVENT THAT I LACK CAPACITY TO MAKE A DECISION FOR MYSELF, I WOULD LIKE THE FOLLOWING PERSON TO BE CONTACTED AND CONSULTED [the person named as the advocate is named].

I confirm that this person knows and understands the terms of this directive, and that they have given them permission to be contacted and

b will speak for me in a crisis.  
[The document is then signed by Ms T.]

[9] The letter from the GP that is referred to in the advance directive is signed by the GP and Ms T. It is addressed 'To whom it may concern' and states as follows:

c 'Ms T would like it noted that she is making a directive via a solicitor and that she would like a discussion with staff responsible for instituting treatment, i.e. blood transfusion, before it is forced upon her and she understands the implications of not undergoing treatment when her anaemia is severe and she is being advised to have a transfusion. Ms T

d understands that this decision may result in her death.'

[10] On 22 March 2004 Ms T was seen by the claimant's treating psychiatrist (Dr C) who reported his views in a letter dated 24 March 2004 which includes the following:

e 'Diagnosis: emotionally unstable / borderline personality disorder  
Current medication: I believe unaltered compared with 30 January 2004  
Current condition

f Ms T came to outpatient clinic after her advocate (the advocate named in the advance directive). The purpose of this meeting was to discuss the matter of her longstanding unwillingness to accept future blood transfusions and specifically the advance directive which she has produced—issue no 2 dated 28 January 2004.

Having reviewed her case notes and interviewed her on this occasion, I concluded that I did not think she had capacity to refuse treatment, specifically blood transfusions or iron supplements.

g I base this decision on the following:

h Her present state of mind is not substantially different to that which pertained some years ago nor is likely to exist in the future. She is in a continuous state of disordered thinking brought about by her mental disorder, namely borderline personality disorder. She does not appear to be making an advanced directive to manage a mental disorder which may occur at a future time; it is present now and is now likely to remain with her for the foreseeable future.

i I would emphasise that I do not think Ms T has a psychosis but one of her reasons for declining blood transfusion is that her blood is "evil, carrying evil ..." I believe that in itself represents disordered thinking and borderline personality disorder.

j I am aware that my opinion is shared by some psychiatrists but not by others who have pronounced on Ms T's circumstances. I do not think it will be possible for clinicians alone to reach a conclusion as to what should happen when, inevitably, she requires further blood transfusions in the future. Ms T led me to understand that there have already been some

discussions between [the mental health care trust and the claimant] and I shall make contact with [the mental health care trust] to clarify the position. a

Ms T tells me that today in other respects she remains reasonably well and led me to understand cutting had been rather less in recent months since the last transfusion in October 2003. She felt it however, likely, that she would become liable to need a transfusion over the next few months, although she emphasises she would not wish to accept it ...' b

[11] This letter was copied to Ms T's social worker.

[12] The prediction contained in that letter that Ms T would need a blood transfusion was proved to be correct in early April 2004 and this need led to an out-of-hours application to the duty judge, Pauffley J, on Friday 9 April 2004. She made the following order: c

'Upon hearing Mr Robert Francis QC on behalf of the claimant  
IT IS ORDERED THAT

1. It is declared that in spite of the defendant not consenting in the present circumstances it is lawful for the claimant's servants or agents who are attending on and treating the defendant, to administer a blood transfusion and such other treatment as may be necessary to stabilise her condition. d

2. It is further declared for the purpose of administering the treatment referred to above it is lawful for the claimant's servants or agents to use such minimum force as may be reasonably necessary for that purpose. e

3. The claimant shall, as soon as may be possible following the commencement of the next legal term, apply for directions for the determination of the lawfulness of such treatment referred to above as may be required in the future.' f

[13] The background to the making of that order was briefly that Ms T had been admitted to hospital on the night of Thursday 8 April 2004 having been found in a collapsed state as a result of cutting herself and losing a substantial amount of blood. She was refusing a blood transfusion and the hospital was aware of (a) the advance directive, the accompanying letter from the GP, and the letter from Dr C (the treating psychiatrist) which I have referred to earlier and (b) the medical opinions relating to a similar incident in the autumn of 2001 which I refer to later. g

[14] By the evening of Friday 9 April 2004 it was apparent that Ms T's condition had deteriorated further with her losing the ability to communicate and requiring oxygen. The treating consultant advised that Ms T was at imminent risk of cardiac arrest with uncertain prospects of resuscitation. In those circumstances the matter was treated by the claimant as an emergency and an application was made to the duty judge. h

[15] During Friday 9 April 2004 there had been telephone communication concerning the developing situation relating to Ms T between the claimant and the Official Solicitor. I understand that following the making of the order Ms T received a blood transfusion. I am unclear whether by that stage she was able to object but I understand that the transfusion was given without physical or verbal resistance from Ms T. She has recovered well and was discharged home on 13 April 2004. j

a [16] On 16 April 2004 her solicitors wrote to the claimant stating that Ms T stood by her advance directive and wished to oppose further treatment by blood transfusion. On 4 May 2004 Dr C wrote a further letter saying inter alia:

b 'I have been Ms T's consultant psychiatrist since the end of the year 2003. I had prior acquaintance with her in the year 2001 when I saw her for a "second opinion" while she was under the care of Dr Cr, consultant psychiatrist, H hospital ...

c My point in drawing your attention to that existing discussion is that Ms T's condition in the broadest sense has pertained for some years and, in my opinion, will do so for the foreseeable future, i.e. a matter of years if not for ever. Her condition and attitudes, albeit given my limited personal knowledge, do not appear to fluctuate over weeks and months. For the sake of the record, I will restate my opinion.

Based on my last meeting with her on 22 March 2004 and I have not seen her since, I would say that;

d The diagnosis is that of an emotionally unstable borderline personality disorder.

I understand that because of self-cutting and letting of blood she becomes severely anaemic.

e She has for some while now been pursuing the matter of an advance directive which she hopes would allow her to refuse blood transfusion to save her life.

In my opinion she does not have the capacity to refuse treatment, specifically blood transfusions or iron supplements.

f I say she does not have the capacity because she is affected by personality disorder as described above. She is in a continuous state of disordered thinking brought about by the mental disorder and it is very likely that that disorder will persist for the foreseeable future.

g I believe she is attempting to making (sic) a valid advance directive to manage any consequences of her mental disorder, namely severe anaemia but that mental disorder is present now and will be for the foreseeable future. It is not the case that she has a mental disorder or illness which is now present and not affecting her so that she is able to consider her actions and responses unaffected by the disorder.

Given the present level of understanding in psychiatry, there has not yet been identified a validated means of treating her mental disorder, namely emotionally unstable personality disorder.

h It is very likely that recent circumstances will recur in that because of Ms T's self-cutting she will become anaemic and require a life saving transfusion. Unless she changes her mind, I think it is equally likely that she will continue to pursue the means, legal or otherwise, to allow her to refuse blood transfusions.

j It is very likely, therefore, when I do see her again I will reach the same conclusions as I have earlier.'

#### THE ISSUES IN THE PRESENT PROCEEDINGS

[17] These flow from the points that: an adult of sound mind (ie with capacity) is entitled to refuse medical treatment even if his or her life depends

upon such treatment (see, for example, *St George's Healthcare NHS Trust v S*, *R v Collins, ex p S* [1998] 3 All ER 673, [1999] Fam 26 (*S's case*)), whereas in contrast if an adult does not have capacity the court can authorise his or her medical treatment in his or her best interests. a

[18] The legal method by which the court has given such authorisation has been by the grant of a declaration (see, again, for example *S's case*).

[19] It follows that the trigger issues in these proceedings relate to whether *b* Ms T had capacity when she entered into the advance directive, and whether she has capacity now and at the final hearing.

[20] Further, in my view, there is an issue as to the effect of the advance directive having regard to its terms when read alone or together with the letter from Ms T's GP which is referred to in the advance directive. The point that is not clear to me is whether the true interpretation of the advance directive is that: (i) in the absence of Ms T being subject to treatment under the Mental Health Act 1983 it is to be treated as a binding assertion of her wishes which must be respected by those responsible for her medical treatment; or (ii) it is a declaration that Ms T wishes to be consulted, or for her advocate and further or alternatively her social worker to be consulted, if and when the question of her having a blood transfusion arises. c

[21] The common position before me was that if (i), above is the correct interpretation of the advance directive it means that if Ms T had capacity at the time she entered into it then, unless she becomes subject to compulsory treatment under the 1983 Act, in a situation that is the same as or similar to those which have arisen in the past when she has been given a blood transfusion she could not be given a blood transfusion and she would thus be at high risk of dying (see for example para (iii) of the guidelines in *S's case* [1998] 3 All ER 673 at 703, [1999] Fam 26 at 63). e

[22] If it is found that Ms T lacked capacity at the time she entered into the advance directive, or that on its true construction it is not determinative of her wishes for the future (or naturally if the advance directive was to be validly revoked) the issue of Ms T's capacity would still have to be considered by the court before it could give a declaration authorising treatment by blood transfusion that was against the expressed wishes of Ms T now, or at the time the treating doctors recommended such treatment. f

[23] This gives rise to the point whether a declaration can be made, or should as a matter of discretion be made, in advance of the time that such treatment is recommended. g

[24] Further before any declaration authorising treatment of Ms T by blood transfusion is made the court will have to consider whether or not such treatment is in her overall best interests. h

#### THE POSITION BEFORE ME

[25] The proceedings came before me in the applications list for directions. In addition to directions the claimant sought (in broad terms) an interim declaration authorising the treatment of Ms T by way of blood transfusion if her haemoglobin level is such that such treatment is necessary to preserve her life or avoid imminent risk of serious injury to her health. j

[26] Directions were agreed but the grant of such an interim declaration was disputed.



## THE POSSIBILITY OF A RELEVANT CHANGE OF CIRCUMSTANCES

a [27] It seems to me that in some cases the grant of a declaration (whether interim or final) in respect of treatment in the future of a person alleged to lack capacity could not, or would not as a matter of discretion, be granted because of the possibility of changes in either or both of: (i) the capacity of the relevant person before the proposed treatment became necessary; and (ii) the state of health of that person and the reasons for and effect of the proposed treatment.

b [28] It was not argued before me that this was a case in which the possibility of change and thus uncertainties as to the future would warrant the refusal of an interim declaration on the basis that it was premature to make one. In my view the parties were correct not to make such an assertion because: (i) the information presently available to the parties and the court indicates that there has been no material change concerning Ms T's capacity between the times that she entered into the advance directive and now and that it is not likely that there will be such a material change before the final hearing; and (ii) Ms T's history and the present medical information available to the parties and before the court demonstrate that the circumstances and events leading up to the situation that existed on 9 April 2004, when Ms T was given her last blood transfusion, are likely to be repeated with no material differences. (This is why I say at [31], below 'as and when' rather than 'if and when' such a situation occurs in the future.) As to both these points see the citations in this judgment from the views of psychiatrists in 2001 and now.

d [29] Further, the medical information presently available to the parties and the court indicates that in such a situation if Ms T is not given a blood transfusion there is a high risk that she would die.

e [30] The above lack of uncertainty relating to changes in Ms T's capacity and further, or alternatively, her medical condition and recommended life-saving treatment may distinguish this case from others. Also the point that in Ms T's case the pressing need for a blood transfusion arises from time to time and once it has been administered Ms T recovers fairly quickly and is discharged from hospital may be a distinguishing feature of this case.

## PRAGMATISM

f [31] Given the recurring nature of the problem relating to Ms T's need for a blood transfusion to my mind there is obvious pragmatic force in seeking relief from the court which can be implemented as and when in the future an emergency arises in respect of Ms T which is the same, or essentially similar, to those that have arisen in the past. Not least this enables the issues to be considered without the added pressures created by a background emergency.

h [32] In this context I comment that potentially different considerations arise in respect of an interim declaration and a final declaration not least because the former is limited in time by reference to the proceedings and during that period an emergency situation such as those that have occurred in the past may or may not occur. At the final hearing if history is a guide a similar need for life-saving treatment will arise in the future but the time frame is potentially open-ended.

## JURISDICTION TO GRANT AN INTERIM DECLARATION

j [33] The judgment of the Court of Appeal in S's case makes it very clear that as the law then stood an interim declaration was not something known to the

law and was not something that could be granted by the court: see, in particular [1998] 3 All ER 673 at 700, [1999] Fam 26 at 59–60 where the court said:

‘Because a declaratory order does have effect, between the parties to the proceedings in which it was made, as a conclusive definition of their legal rights, it should only be made as a final order. The notion of an interim declaration is (as Diplock LJ said in *International General Electric Co of New York Ltd v Customs and Excise Comrs* [1962] 2 All ER 398 at 401, [1962] Ch 784 at 790) a contradiction in terms. That was recognised by this court, in the context of authority for medical intervention, in (*F v Riverside Mental Health NHS Trust* [1994] 2 FCR 577).’

[34] In *F v Riverside Mental Health NHS Trust* referred to in that passage the declaratory order had been made ex parte and authorised feeding under sedation. The order provided that the matter should be heard inter partes at a later date and it was held that this provision made it an interim declaration and thus an order that the judge had had no jurisdiction to make.

[35] When I raised the issue of jurisdiction to make an interim declaration the solicitor advocate for the Official Solicitor drew my attention to CPR 25.1(1)(b) which is in the following terms:

**‘Orders for interim remedies**

The court may grant the following interim remedies—(a) an interim injunction; (b) an interim declaration ...’

[36] It follows from the introduction by the CPR of the power to grant an interim declaration that such relief can no longer be said to be ‘unknown to the law’ and can no longer be said to be ‘a contradiction in terms’. That said, a number of the conceptual difficulties referred to in the earlier authorities and which found the conclusions reached therein on the approach to the grant of, and the effect of, declarations remain.

[37] It was however common ground before me that I had jurisdiction to make an interim declaration along the lines sought by the claimant pursuant to the power granted by CPR Pt 25.

[38] I agree. Although the notes to Pt 25 make clear that this form of relief was recommended by the Law Commission in the context of proceedings for judicial review the power has not been so limited by Pt 25 and therefore in my view in these Pt 8 proceedings I have the power to make an interim declaration.

**MY APPROACH TO THE GRANT OF AN INTERIM DECLARATION**

[39] In addition to the notes to Pt 25 I was referred to a textbook passage concerning judicial review which understandably was directed to proceedings of a different type to those before me. I was also referred to *A London Borough v BS (an adult by her litigation friend, the Official Solicitor)* [2003] EWHC 1909 (Fam), (2003) 75 BMLR 185 where the report shows that interim declarations were granted by both Johnson and Hughes JJ. However the report before me contains no reference to the approach or test they took in granting those interim declarations.

[40] The upshot was that I was not referred to authority which gave any real assistance as to the approach or test I should adopt. Further (and necessarily given the time constraints of the applications court) the argument I heard on the test or approach to be adopted was limited. I hasten to add that in mentioning

a this I make no criticism of any of the parties or their representatives and I make the point to indicate that (a) as this jurisdiction develops further arguments may be put to, or occur to, the court, and (b) there would be advantages in considering the jurisdiction when more time is available.

[41] In considering my approach I return to the judgment of the Court of Appeal in S's case, the problems facing those concerned with cases of this type  
b on an emergency basis and the approach taken to them prior to the introduction of Pt 25. In S's case [1998] 3 All ER 673 at 700, [1999] Fam 26 at 60 (following the quotation set out above) the court said:

c 'Since a declaration ought not to be made on an interim basis, or without adequate investigation of the evidence put forward by either side, it follows that a declaration (especially one affecting an individual's personal autonomy) ought not to be made on an ex parte basis. Apart from injustice and other more obvious objections, it will simply be ineffective to achieve its purpose, that is (in Lord Brandon's words in *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at  
d 552, [1990] 2 AC 1 at 56) "to protect the doctor or doctors who perform the operation, and any others who may be concerned in it, from subsequent adverse criticisms and claims". Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v Southwark London BC*  
e [1983] QB 698, [1983] 2 WLR 217. Apart from that rare exception, it operates solely by creating an estoppel per rem judicatam between the parties and their privies (see *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 557, [1990] 2 AC 1 at 64). No estoppel can be created by a judgment pronounced in a party's  
f absence without that party having been given notice of the proceedings or any opportunity to be heard. There is authority (*New Brunswick Rly Co v British and French Trust Corp Ltd* [1938] 4 All ER 747, [1939] AC 1) that an estoppel per rem judicatam may arise on a default judgment, but in that case the default judgment was regularly obtained. No estoppel can arise  
g from an order which the defendant could not oppose, and which was made in proceedings (or proposed proceedings) of which he or she knew nothing.'

Later, the court said ([1998] 3 All ER 673 at 702, [1999] Fam 26 at 61–62):

h 'In this case the judge made a declaratory order (i) on an ex parte application in proceedings which had not then been (and at the start of the hearing of this appeal still had not been) instituted by the issue of a summons; (ii) without S's knowledge, or even any attempt to inform her or her solicitor of the application; (iii) without any evidence, oral or by  
j affidavit; and (iv) without any provision for S to apply to vary or discharge the order. The order declared that St George's could subject S to invasive surgery. It is inappropriate (for the reasons given by Lord Diplock) to describe such an order as void, or made without jurisdiction. But it is an order which S is entitled to have set aside ex debito justitiae. That may involve some unfairness to the doctors and nurses at St George's who were all conscientiously, and in very anxious circumstances, seeking to do the

right thing. But the unfairness (indeed, injustice) to S would be much greater if the order were not set aside.' a

The court gave the following guidelines ([1998] 3 All ER 673 at 703, [1999] Fam 26 at 63–65):

*'Guidelines ...*

The case highlighted some major problems which could arise for hospital authorities when a pregnant woman presented at hospital, the possible need for Caesarean surgery was diagnosed, and there was serious doubt about the patient's capacity to accept or decline treatment. To avoid any recurrence of the unsatisfactory events recorded in this judgment, and after consultations with the President of the Family Division and the Official Solicitor, and in the light of the written submissions from Mr Havers [counsel for the NHS trusts] and Mr Gordon [counsel for S], we shall attempt to repeat and expand the advice given in (*Re MB (an adult: medical treatment)* [1997] 2 FCR 541). This advice also applies to any cases involving capacity when surgical or invasive treatment may be needed by a patient, whether female or male. References to "she" and "her" should be read accordingly. It also extends, where relevant, to medical practitioners and health professionals generally as well as to hospital authorities. b c d

The guidelines depend on basic legal principles, which we summarise.

(i) They have no application where the patient is competent to accept or refuse treatment. In principle a patient may remain competent notwithstanding detention under the Mental Health Act. e

(ii) If the patient is competent and refuses consent to the treatment, an application to the High Court for a declaration would be pointless. In this situation the advice given to the patient should be recorded. For their own protection hospital authorities should seek unequivocal assurances from the patient (to be recorded in writing) that the refusal represents an informed decision: that is that she understands the nature of and reasons for the proposed treatment, and the risks and likely prognosis involved in the decision to refuse or accept it. If the patient is unwilling to sign a written indication of this refusal, this too should be noted in writing. Such a written indication is merely a record for evidential purposes. It should not be confused with or regarded as a disclaimer. f g

(iii) If the patient is incapable of giving or refusing consent, either in the long term or temporarily (e.g. due to unconsciousness), the patient must be cared for according to the authority's judgment of the patient's best interests. Where the patient has given an advance directive, before becoming incapable, treatment and care should normally be subject to the advance directive. However if there is reason to doubt the reliability of the advance directive (e.g. it may sensibly be thought not to apply to the circumstances which have arisen), then an application for a declaration may be made. h

*Concern over capacity* j

(iv) The authority should identify as soon as possible whether there is concern about a patient's competence to consent to or refuse treatment.

(v) If the capacity of the patient is seriously in doubt it should be assessed as a matter of priority. In many such cases the patient's general



- a practitioner or other responsible doctor may be sufficiently qualified to make the necessary assessment, but in serious or complex cases involving difficult issues about the future health and well-being or even the life of the patient, the issue of capacity should be examined by an independent psychiatrist, ideally one approved under s 12(2) of the Mental Health Act.
- b If following this assessment there remains a serious doubt about the patient's competence, and the seriousness or complexity of the issues in the particular case may require the involvement of the court, the psychiatrist should further consider whether the patient is incapable by reason of mental disorder of managing her property or affairs. If so the patient may be unable to instruct a solicitor and will require a guardian ad litem in any court proceedings. The authority should seek legal advice as quickly as possible.
- c If a declaration is to be sought, the patient's solicitors should be informed immediately and if practicable they should have a proper opportunity to take instructions and apply for legal aid where necessary. Potential witnesses for the authority should be made aware of the criteria laid down in *Re MB* and this case, together with any guidance issued by the Department of Health, and the British Medical Association.
- d

- (vi) If the patient is unable to instruct solicitors, or is believed to be incapable of doing so, the authority or its legal advisers must notify the Official Solicitor and invite him to act as guardian ad litem. If the Official Solicitor agrees he will no doubt wish, if possible, to arrange for the patient to be interviewed to ascertain her wishes and to explore the reasons for any refusal of treatment. The Official Solicitor can be contacted through the Urgent Court Business Officer out of office hours on 0171 936 6000 [now 020 7947 6000].
- e

*The hearing*

- (vii) The hearing before the judge should be inter partes. As the order made in her absence will not be binding on the patient unless she is represented either by a guardian ad litem (if incapable of giving instructions) or (if capable) by counsel or solicitor, a declaration granted ex parte is of no assistance to the authority. Although the Official Solicitor will not act for a patient if she is capable of instructing a solicitor, the court may in any event call on the Official Solicitor (who has considerable expertise in these matters) to assist as an amicus curiae.
- f
- g

- (viii) It is axiomatic that the judge must be provided with accurate and all the relevant information. This should include the reasons for the proposed treatment, the risks involved in the proposed treatment, and in not proceeding with it, whether any alternative treatment exists, and the reason, if ascertainable, why the patient is refusing the proposed treatment. The judge will need sufficient information to reach an informed conclusion about the patient's capacity, and, where it arises, the issue of best interest.
- h

- (ix) The precise terms of any order should be recorded and approved by the judge before its terms are transmitted to the authority. The patient should be accurately informed of the precise terms.
- j

(x) Applicants for emergency orders from the High Court made without first issuing and serving the relevant applications and evidence in support have a duty to comply with the procedural requirements (and pay the court fees) as soon as possible after the urgency hearing.

*Conclusion*

There may be occasions when, assuming a serious question arises about the competence of the patient, the situation facing the authority may be so urgent and the consequences so desperate that it is impracticable to attempt to comply with these guidelines. The guidelines should be approached for what they are, that is guidelines. Where delay may itself cause serious damage to the patient's health or put her life at risk then formulaic compliance with these guidelines would be inappropriate.'

[42] In *Re B (adult: refusal of medical treatment)* [2002] EWHC 429 (Fam), [2002] 2 All ER 449 Dame Elizabeth Butler-Sloss P dealt under the following self-explanatory headings with 'the principle of autonomy', 'the sanctity of life', 'the presumption of mental capacity' 'assessing capacity' and 'ambivalence' and therefore covered many of the legal issues that arise in this (and similar) cases. At the end of her judgment she gave further guidance in the following terms:

## 'GUIDANCE

[100] Guidance has already been given by the Court of Appeal in *St George's Healthcare NHS Trust v S* [1998] 3 All ER 673 at 703, [1999] Fam 26 at 63. The circumstances of the present case are however very different from the facts of that case. It might therefore be helpful if I restate some basic principles and offer additional guidelines in case a situation similar to the present should arise again.

(i) There is a presumption that a patient has the mental capacity to make decisions whether to consent to or refuse medical or surgical treatment offered to him/her.

(ii) If mental capacity is not in issue and the patient, having been given the relevant information and offered the available options, chooses to refuse the treatment, that decision has to be respected by the doctors. Considerations that the best interests of the patient would indicate that the decision should be to consent to treatment are irrelevant.

(iii) If there is concern or doubt about the mental capacity of the patient, that doubt should be resolved as soon as possible, by doctors within the hospital or NHS trust or by other normal medical procedures.

(iv) In the meantime, while the question of capacity is being resolved, the patient must, of course, be cared for in accordance with the judgment of the doctors as to the patient's best interests.

(v) If there are difficulties in deciding whether the patient has sufficient mental capacity, particularly if the refusal may have grave consequences for the patient, it is most important that those considering the issue should not confuse the question of mental capacity with the nature of the decision made by the patient, however grave the consequences. The view of the patient may reflect a difference in values rather than an absence of competence and the assessment of capacity should be approached with this firmly in mind. The doctors must not allow their emotional reaction to or strong disagreement with the decision of the patient to cloud their judgment in answering the primary question whether the patient has the mental capacity to make the decision.

(vi) In the rare case where disagreement still exists about competence, it is of the utmost importance that the patient is fully informed of the steps being taken and made a part of the process. If the option of enlisting

- a independent outside expertise is being considered, the doctor should discuss this with the patient so that any referral to a doctor outside the hospital would be, if possible, on a joint basis with the aim of helping both sides to resolve the disagreement. It may be crucial to the prospects of a good outcome that the patient is involved before the referral is made and feels equally engaged in the process.
- b (vii) If the hospital is faced with a dilemma which the doctors do not know how to resolve, it must be recognised and further steps taken as a matter of priority. Those in charge must not allow a situation of deadlock or drift to occur.
- (viii) If there is no disagreement about competence but the doctors are for any reason unable to carry out the wishes of the patient, their duty is to find other doctors who will do so.
- c (ix) If all appropriate steps to seek independent assistance from medical experts outside the hospital have failed, the NHS hospital trust should not hesitate to make an application to the High Court or seek the advice of the Official Solicitor.
- d (x) The treating clinicians and the hospital should always have in mind that a seriously physically-disabled patient who is mentally competent has the same right to personal autonomy and to make decisions as any other person with mental capacity.'

[43] The last paragraph in the guidance in S's case [1998] 3 All ER 673 at 704, e [1999] Fam 26 at 64-65 reflects the problems that can arise in an emergency. However the problems which arise from the nature of a declaration and the point that it operates by way of an estoppel and are reflected in the passages I have cited from S's case remain. As all who have been involved in out-of-hours and emergency applications are aware these problems are considerable when f the emergency involves decisions relating to life-saving treatment of an adult which is in the view of the relevant doctors needed urgently but there are doubts as to the capacity of that adult.

[44] I add that in my view the nature of the relief sought in respect of medical treatment of an adult who lacks capacity means that: (i) the declaratory relief can relate to a particular type or session of treatment without being an interim g declaration, and indeed in many cases the relevant treatment is a one-off (eg a caesarean or an amputation). Once such treatment is carried out that is an end of the matter and the relevant crisis, and thus of the effectiveness of the declaration which is (or is effectively) a final declaration; and (ii) a declaration in respect of treatment and the estoppel based thereon is founded on a h particular set of circumstances and facts. From which it follows that as with an advance directive (see the guidance in S's case [1998] 3 All ER 673 at 703, [1999] Fam 26 at 63 (para (iii))) it would no longer be determinative (or found the relevant estoppel) if there was a material change in those circumstances and facts. Thus, in my view, a material change in circumstances can found a reconsideration of issues relating to conclusions on both capacity and best j interests on which a final (or an interim) declaration was based.

[45] As I understand it when the court is faced with an emergency and thus for example an application for a declaration in respect of treatment that cannot be delayed by reason of there being an imminent high risk to life, an approach that has been taken in the light of the conceptual difficulties identified in S's case and the guidance given therein is: (i) to make every effort to ensure that

the person who it is proposed should be treated in reliance on any declaration has an opportunity to make representations (either directly or indirectly) to the court (and thus in cases of emergencies out of hours to the duty judge) before any declaration is made; and (ii) for the judge to decide on capacity and then if appropriate on best interests by applying the normal civil standard on the best evidence then available.

[46] In my view, applying that approach so long as the person who it is proposed should be treated has had an opportunity to make some representations directly or through others the court can make a final and effective declaration in respect of identified treatment which it considers on the available evidence to be in the best interests of that person for example to avoid his or her life being put at high risk because of delay in treatment, or to avert serious damage to his or her health. In making that declaration the court has to reach conclusions firstly on capacity and then on best interests based on the available evidence.

[47] In my judgment if, as in my view is the case, such an approach founds an effective final declaration (albeit perhaps a declaration directed to only a particular and emergency session of treatment) it follows that such an approach would also enable the court to make a valid interim declaration.

[48] I add that in my view this approach accords with that of Bracewell J in *R v R (interim declaration: residence)* [2001] 1 FCR 94 in which after referring to the presumption of capacity and the point that it can only be displaced by clear evidence she went on to refuse to make an interim declaration on the basis that the application for it was premature saying (at 96):

'I have no doubt in this case that the application for an interim declaration is premature because the legal foundation for such an application has not yet been established. There is a presumption that Junior [a child with severe learning disabilities] has full capacity. It has not yet been displaced. I do not know one way or the other whether the evidence will displace that presumption. It appears to me that only if and when that evidence is available before the court that he does lack capacity, would it be appropriate to consider whether an interim declaration should be granted. I refuse the application at this stage and it will therefore be necessary to timetable the hearing of the issues so that the matter can be heard on its merits as soon as possible.'

That passage envisages that an interim declaration could be made on some evidence provided that it was sufficient to rebut the presumption.

[49] I have therefore applied this approach.

[50] As appears below I have concluded that this approach founds the grant of an interim declaration in this case and it was therefore unnecessary for me to go on to consider the validity of possible alternative approaches based perhaps on para (iv) of the guidance in *Re B* [2002] 2 All ER 449 at [100] together with the last paragraph of the guidelines in *S's* case. I return to this in the tailpiece to this judgment.

#### THE APPLICATION OF THE ABOVE APPROACH

[51] Firstly I record that I recognise that further information should be obtained and put before the court to enable it to reach a decision on capacity and best interests which would have regard to all relevant evidence that can



a reasonably be obtained over the next few weeks. This is demonstrated by the agreed directions by which for example it is recognised that expert evidence should be obtained from an independent consultant psychiatrist and an independent consultant physician.

[52] It follows that I recognise that I am considering the issues of capacity and best interests on what is at present incomplete information and that further evidence (and in particular expert evidence) may lead to different conclusions.

#### CAPACITY

[53] I was referred to and have applied guidance in *Re MB (an adult: medical treatment)* [1997] 2 FCR 541 at 553–554. It is as follows:

##### *‘Conclusions on capacity to decide*

c All the decisions made in the Caesarian section cases to which we have referred arose in circumstances of urgency or extreme urgency. The evidence was in general limited in scope and the mother was not always represented as a party. With the exception of (*Re S (adult: refusal of medical treatment)* [1992] 4 All ER 671, [1993] Fam 123), in all the cases the court decided that the mother did not have the capacity to make the decision. In these extremely worrying situations, it is important to keep in mind the basic principles we have outlined, and the court should approach the crucial question of competence bearing the following considerations in mind. They are not intended to be determinative in every case, for the decision must inevitably depend upon the particular facts before the court.

e 1. Every person is presumed to have the capacity to consent to or to refuse medical treatment unless and until that presumption is rebutted.

f 2. A competent woman who has the capacity to decide may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death. In that event the courts do not have the jurisdiction to declare medical intervention lawful and the question of her own best interests, objectively considered, does not arise.

g 3. Irrationality is here used to connote a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. As Kennedy and Grubb *Medical Law*, 2nd. edn, 1994, point out, it might be otherwise if a decision is based on a misperception of reality (e.g. the blood is poisoned because it is red). Such a misperception will be more readily accepted to be a disorder of the mind. Although it might be thought that irrationality sits uneasily with competence to decide, panic, indecisiveness and irrationality in themselves do not as such amount to incompetence, but they may be symptoms or evidence of incompetence. The graver the consequences of the decision, the commensurately greater the level of competence is required to take the decision: (*Re T (adult: refusal of medical treatment)* [1992] 4 All ER 649, [1992] 3 WLR 782, *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871; and *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 at 409, 421–422, [1986] AC 112 at 169, 186).

j 4. A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to

consent to or to refuse treatment. That inability to make a decision will occur when (a) The patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question. (b) The patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision. If, as Thorpe, J. observed in *Re C (adult: refusal of treatment)* [1994] 1 All ER 819, [1994] 1 WLR 290), a compulsive disorder or phobia from which the patient suffers stifles belief in the information presented to her, then the decision may not be a true one. As Lord Cockburn, C.J. put it in *Banks v. Goodfellow* (1870) LR 5 QB 549 at 569, [1861–73] All ER Rep 47 at 58: "... one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration."

5. The "temporary factors" mentioned by Lord Donaldson M.R. in *Re T* (above) (confusion, shock, fatigue, pain or drugs) may completely erode capacity but those concerned must be satisfied that such factors are operating to such a degree that the ability to decide is absent.

6. Another such influence may be panic induced by fear. Again, careful scrutiny of the evidence is necessary because fear of an operation may be a rational reason for refusal to undergo it. Fear may also, however, paralyse the will and thus destroy the capacity to make a decision.'

Earlier it was stated ([1997] 2 FCR 541 at 549):

*'Capacity to decide*

Problems can arise on the issue of capacity to consent to or refuse treatment. The starting point for consideration of the test to be applied is the decision of this court in *Re T* (above). The patient who was pregnant had been involved in a car accident and during hospital treatment required a blood transfusion. Lord Donaldson M.R. reviewed the relevant authorities and said ([1992] 4 All ER 649 at 661–662, [1992] 3 WLR 782 at 796):

*"Capacity to decide*

The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned. However a small minority of the population lack the necessary mental capacity due to mental illness or retarded development (see, for example, *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, [1990] 2 AC 1). This is a permanent or at least a long-term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors, such as unconsciousness or confusion or other effects of shock, severe fatigue, pain or drugs being used in their treatment. Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made. It may not be the simple case of the patient having no capacity because, for example, at that time he had hallucinations. It may be the more difficult case of a temporarily reduced capacity at the time when his decision was made. What matters is that the doctors should consider whether at that

a time he had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required. If the patient had the requisite capacity, they are bound by his decision. If not, they are free to treat him in what they believe to be his best interests.”

b Thorpe J, in *Re C (adult: refusal of treatment)* [1994] 1 All ER 819, [1994] 1 WLR 290 formulated the test to be applied where the issue arose as to capacity to refuse treatment. In that case a man of 68 suffering from chronic paranoid schizophrenia refused to have an amputation of his leg. Thorpe J said ([1994] 1 All ER 819 at 824, [1994] 1 WLR 290 at 295):

c ‘I consider helpful Dr Eastman’s analysis of the decision-making process into three stages: first, comprehending and retaining treatment information, second, believing it and, third, weighing it in the balance to arrive at choice. The Law Commission has proposed a similar approach in para 2.20 of its consultation paper 129, *Mentally Handicapped Adults and Decision-Making*.’

d I add that I have also had regard to the points made on capacity in *Re B* under the headings ‘the presumption of mental capacity’ and ‘assessing capacity’.

e [54] Counsel for Ms T took me to earlier views of psychiatrists who had seen Ms T in the autumn of 2001. As I (and the parties understand it) Dr C was referring to these views when he acknowledged in the letters I have cited that his views were not shared by other psychiatrists. In particular counsel for Ms T referred me to the views of the two consultant psychiatrists namely: (i) Dr F in a report dated 28 August 2001 and (ii) Dr J in a letter dated 7 September 2001 addressed to a further consultant psychiatrist Dr Cr (who was employed by the claimant) and had expressed the view (in a letter dated 16 May 2001) that Ms T did not have capacity in relation to her refusal in an advance directive dated 14 May 2001 ‘for treatment of low haemoglobin to a low or life threatening level causing loss of consciousness or heart failure and refusing blood transfusion or intravenous iron’.

f [55] In his report Dr F said under the heading ‘Opinion’ inter alia the following:

g ‘However, I am of the opinion that whilst she may be dissociating when she cuts herself deeply and when she produces a knife to threaten others, at the time when she is given a blood transfusion, it is likely that she is capable of consenting or withdrawing her consent to such treatment. There was nothing in the interview which I conducted to suggest that she did not have the capacity to consent or withdraw her consent to physical treatment.

h Nevertheless this is a very complex case which understandably arouses many emotions in those caring for her. I can fully understand why it is that Dr Cr feels that she should be treated with blood transfusions. Indeed it seems unnecessarily destructive to place responsibility on the staff to carry out Ms T’s wishes when she herself is giving a very mixed message. She could surely kill herself quite cleanly if she genuinely intended that. Without detailing appropriate parts of her anatomy, it is quite easy to kill oneself if one’s haemoglobin is as low as Ms T’s by a simple incision in an

j

artery at various points. Ms T has chosen not to do that. I therefore doubt the genuineness of her suicidal impulses.' a

[56] Dr J states in his letter, *inter alia*, as follows:

'Some of her self harming behaviour seems to have taken place in a disassociative state, and this may have been the more serious episodes. However, she also clearly described cutting herself in clear consciousness, and as a deliberate action. She described this partly as attempts to kill herself, but also said that "the less blood I've got the less evil there is in me" a somewhat odd statement which suggests that she might have some delusional belief about this. She was adamant she does not wish to have blood transfusions, and that she stood by the declaration she made earlier this year refusing such treatment. I know that you have stated that she is not competent to make this decision, and that she is taking further legal advice about this situation. b

In the second opinion Dr C advised caution in prescribing medication, in view of her physical condition and I can understand the concerns. Even so there seems to be evidence of some continuing psychotic symptoms, with Ms T describing auditory hallucinations, and possibly some delusional ideas regarding "evil" in her blood. Although cold caution is certainly appropriate it seems it will be important to treat mental state if at all possible. c

Finally, I feel I should make some comment about the issue of her consent to medical treatment. I was able to discuss her attitude to blood transfusions with her in some detail, and although some of her ideas were slightly odd, it seemed clear to me that she fully understood the nature of the proposed treatment (ie the blood transfusion), the possible risks and benefits of the treatment and the possible consequences of refusing the treatment. She has clearly been able to understand and retain any information given to her about this, and has reached a judgment as to whether or not she wishes to accept the treatment. My understanding of the common law situation, following the case of *R v C* is that this is sufficient that she has capacity to refuse treatment.' d

[57] Another consultant psychiatrist, Dr O, was also involved in 2001 and in a letter dated 25 October 2001 stated *inter alia*: e

'I was imagining on my way to see her that I would have to address the problems of competence, capacity and such like in respect of her refusal to accept necessary medical treatment, but as it turned out, we had a frank heart to heart and she was rapidly persuaded as to what was in her best interest and she went on to have a further blood transfusion, sufficient for her to be discharged the following day. f

To deal adequately with the subject would require a dissertation and there is no call for that at present. It is worth noting, however, that if she had refused transfusion and I thought she was in imminent danger of dying, I should probably have drawn the conclusion on balance of probabilities, that there was a temporary lack of competence and capacity because of her unsound mind, such that she could have been treated against her will.' g

Dr O went on to discuss the decision of the Court of Appeal in *S's* case. h



a [58] It can be seen from these quotations that a similar situation to that which existed in April of this year (and exists now) also existed in 2001.

b [59] Additionally, in respect of Ms T's understanding at the time she signed the advance directive in January 2004 that her refusal of a blood transfusion could lead to her death counsel for Ms T referred me to the advance directive itself and the letter from her GP which is referred to in it. Counsel for Ms T also pointed out that the psychiatrists who had concluded that Ms T lacked capacity had not referred to the relevant test whereas Dr J had referred to *Re C* (which is cited in *Re MB*).

c [60] In particular I remind myself of the presumption that Ms T has capacity and of the points made by the President in para (v) of the guidance in *Re B* [2002] 2 All ER 449 at [100]. Further I accept that difficulties arise in assessing the effect and impact of the points made on irrationality and capacity in paras (2), (3) and (4) of the 'conclusions on capacity' in *Re MB* [1997] 2 FCR 541 at 553–554.

d [61] However it seems to me that Ms T's references to her blood being evil equate to the example given that 'the blood is poisoned because it is red' in para (3). From that it seems to me that this assertion and belief of Ms T is a misconception of reality which can more readily be accepted to be, and on the present evidence should be accepted to be, a disorder of the mind and further or alternatively symptoms or evidence of incompetence.

e [62] On the existing evidence and applying the tests referred to above I prefer the conclusion of Dr C (and those who agree with him) and find that Ms T lacks capacity and lacked capacity when she signed the advance directive. In particular I accept the following comments and conclusions in Dr C's letters, namely:

f 'Her present state of mind is not substantially different to that which pertained some years ago nor is likely to exist in the future. She is in a continuous state of disordered thinking brought about by her mental disorder, namely borderline personality disorder. She does not appear to be making an advanced directive to manage a mental disorder which may occur at a future time; it is present now and is now likely to remain with her for the foreseeable future.

g I would emphasise that I do not think Ms T has a psychosis but one of her reasons for declining blood transfusion is that her blood is "evil, carrying evil ..." I believe that in itself represents disordered thinking and borderline personality disorder. [March letter.]

h I say she does not have the capacity because she is affected by personality disorder as described above. She is in a continuous state of disordered thinking brought about by the mental disorder and it is very likely that that disorder will persist for the foreseeable future.

j I believe she is attempting to making (sic) a valid advance directive to manage any consequences of her mental disorder, namely severe anaemia but that mental disorder is present now and will be for the foreseeable future. It is not the case that she has a mental disorder or illness which is now present and not affecting her so that she is able to consider her actions and responses unaffected by the disorder. [May letter.]

[63] Returning to the test in my view these comments and conclusions reflect the points made in [61], above by reference to para (3) of the

'conclusions on capacity' in *Re MB* [1997] 2 FCR 541 at 553 and found the conclusion on the present evidence that (a) Ms T is unable to use and weigh the relevant information and thus the competing factors in the process of arriving at her decision to refuse a blood transfusion, and lacks capacity to refuse a blood transfusion, and (b) the position was the same when she signed the advance directive. It follows that on the present evidence I do not agree with Dr J's application of *Re C*.

#### BEST INTERESTS

[64] The best interests test arises if the adult in question is found to lack capacity.

[65] In *A v A Health Authority* [2002] EWHC 18 (Fam/Admin) at [43], [2002] 1 FCR 481 at [43], [2002] Fam 213 Munby J points out that an adult's best interests involves a welfare appraisal in the widest sense taking into account, where appropriate, a wide range of ethical, social, moral, emotional, and welfare considerations. He refers to *Re A (medical treatment: male sterilisation)* [2000] 1 FCR 193, where the President confirmed that best interests encompasses medical, emotional and all other welfare issues and Thorpe LJ said (at 206):

'I turn from the outcome in the present case to some more general observations. There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal. The speeches in (*F v West Berkshire Health Authority (Mental Health Act Commission intervening)*) [1989] 2 All ER 545, [1990] 2 AC 1) read in their context can only bear this interpretation: see particularly the speech of Lord Goff ([1989] 2 All ER 545 at 567, [1990] 2 AC 1 at 77). Subsequently the Law Commission in their 1995 report on mental incapacity recommended an extensive evaluation of best interests: see para 3.28. The latest statement of government policy in *Making Decisions* shows that the government currently accepts the Law Commission's recommendation: see para 1.10. Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit. In the present case the instance would be the acquisition of foolproof contraception. Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant. An obvious instance in this case would be the apprehension, the risk and the discomfort inherent in the operation. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.'

[66] No argument was advanced before me that in the circumstances in which the suggested treatment would be administered it would not be in the best interests of Ms T to have the treatment. In my view the reason for this is that applying the above approach on the present evidence the balance of the

- a competing factors comes down heavily in favour of Ms T having the treatment to save her life. On the present evidence the reasons advanced against the giving of the treatment are found in the advance directive under the heading 'REASONS FOR MY DECISION'. To my mind the second reason based on Ms T's belief that her blood is evil carries no weight in the balancing exercise. The first reason relates to the vicious circle Ms T says she finds herself in but in my view
- b this does not have great weight. Further in my view it is to some extent undermined by the point that Ms T told Dr C that in other respects she remains reasonably well and led him to understand that cutting had been rather less frequent since October 2003 (see his March letter at [10], above). I say that even though I acknowledge that Dr C has also said that there has not yet been identified a validated means of treating her emotionally unstable personality
- c disorder.

#### INTERPRETATION OF THE ADVANCE DIRECTIVE

- [67] I add that in my view the opinions given in the autumn of 2001 and the history indicate that the background against which the advance directive was
- d signed in January 2004 contains a number of indications that Ms T is, or can be equivocal. I however add that I have not relied on this, or the point raised above as to the true meaning and effect of the advance directive, in reaching my decision.

#### DISCRETION

- e [68] In my view the points I have made earlier under the headings 'THE POSSIBILITY OF A RELEVANT CHANGE OF CIRCUMSTANCES' and 'PRAGMATISM' provide strong support for the view that I should make an interim declaration now rather than refuse it on the basis that treatment is not needed now and may not be needed before the final hearing.
- f [69] However to guard against a relevant change in circumstances the claimant was quite content to give through counsel an undertaking to the court to inform both Ms T's solicitors and the Official Solicitor of each of the following events as soon as is practical after they occur, namely: (a) the admission of Ms T to hospital; and (b) the making of a decision to give Ms T the treatment referred to in the declaration.

- g [70] In my view that additional safeguard supports the view I have reached that having regard to the conclusions I have reached on capacity and best interests as a matter of discretion I should make an interim declaration.

#### THE INTERIM DECLARATION

- h [71] I make the following declaration:
- It is declared that, with effect until the substantive hearing of this matter or further order:
- (a) the defendant (Ms T) lacks capacity to make medical treatment decisions relating to any need she may have for the treatment referred to in sub-para (b)
- j below and lacked such capacity when she signed her advance directive on 28 January 2004; and
- (b) it is lawful for the claimant its servants or agents to administer a blood transfusion and any other treatment necessary to stabilise her condition, using such minimum force as may be necessary, if the claimant is medically advised that her haemoglobin level is such that such transfusion or treatment is

necessary to preserve the defendant's life or avoid imminent risk of serious injury to her health. a

#### TAILPIECE

[72] In my view correctly no one suggested that the order of Pauffley J was determinative of issues relating to capacity or any other issues before me. The fact of the application before her out of hours on an emergency basis, and the issues before me, demonstrate that there are difficult human and legal problems in respect of emergencies relating to the authorisation of treatment of an adult who is thought to lack capacity, or who it is thought may lack capacity. Put another way in my view there are problems concerning the approach that should be adopted by the judge and others involved in the middle of the night when the medical opinion is that unless treatment is administered immediately the patient will die and in the case of an adult there are uncertainties relating to his or her capacity to give or refuse consent or the validity or effect of an advance directive. Similar problems exist in the case of a child when those with parental responsibility cannot be found or are not giving consent and when the child is *Gillick* competent and is objecting to treatment. b  
c  
d

[73] I respectfully suggest that point (iv) in the guidance in *Re B* [2002] 2 All ER 449 at [100] reflects the natural instinct of many (if not most) people but to my mind the decision and guidance in *S's* case and the finding of unlawful treatment in *Re B* (albeit that in that case the patient was treated as competent over the relevant period) give rise to issues as to whether a court can assist by authorising treatment, or by otherwise protecting the doctors from being successfully sued, in the circumstances referred to in point (iv), particularly if the patient is not heard before relief is granted. e

[74] In my view the earlier guidance, such problems and the approach to be taken should be reconsidered having regard to the introduction of the power to grant an interim declaration and preferably this should be done when there is time available to consider the points that arise. It may be that at the final hearing of this case such points could be dealt with. It seems to me that included among them are: (a) whether the court can grant an interim declaration without the patient being heard, (b) whether interim relief can be granted on the basis that there is doubt as to the capacity of an adult and thus by reference to best interests whilst such doubts remain and, if so, what tests should be applied in measuring the doubt that would trigger that approach and in assessing best interests, (c) whether interim relief other than an interim declaration could be granted in effect to suspend the effect of a refusal of treatment or an advance directive (and thus the autonomy of an adult who was found after full investigation to have capacity) and thereby enable the court to authorise treatment on a best interests approach until doubts as to capacity were resolved and (d) the extent to which a different approach can be taken with children having regard to the inherent jurisdiction in respect of children and the possibility of the court (i) overriding the wishes of a *Gillick* competent child and giving consent for the treatment of such a child or a younger child, or (ii) making a specific issue order in respect of the treatment of a child (see for example *Re R (a minor)* [1993] 2 FCR 544 at 547, *Re O (a minor) (medical treatment)* [1993] 1 FCR 925 and *Re M (child: refusal of medical treatment)* [1999] 2 FCR 577). f  
g  
h  
j



- a* [75] The following may be relevant to such points, namely: (a) the nature of an interim declaration and its legal effect, (b) the effect of point (iv) in the guidance in *Re B* and the last paragraph in the guidelines in *S's* case in respect of the lawfulness of treatment of an adult while the issue of his or her capacity is being resolved (for example in the face of an objection to the proposed treatment) and in respect of the grant of relief by the court including an authority to use reasonable force, (c) the relevance of the tests developed over the years in respect of interim injunctions having regard amongst other things to the point that if the potential patient sought relief it would probably be by way of injunction, and (d) the distinctions between the powers and approach of the court in respect of adults who lack capacity and children and in particular the importance of the autonomy of an adult of sound mind (see, for example, *S's* case [1998] 2 FCR 685 at 698).
- c*

*Order accordingly.*

Pamela Hardisty Barrister (NZ).

# Jeyapragash v Secretary of State for the Home Department a

[2004] EWCA Civ 1260

COURT OF APPEAL, CIVIL DIVISION b

BROOKE, POTTER AND CLARKE LJ

21 SEPTEMBER 2004

*Court of Appeal – Practice – New practice and procedure – CPR PD 52, para 15. c*

The new Practice Direction of the Court of Appeal (CPR PD 52) which has been in effect since 1 July 2004 enables judges of the Court of Appeal to pre-read effectively in a way which was impossible previously. The time for the parties to prepare papers for the court is seven days before the hearing. The new Practice Direction enables everybody to know the stance of the respondent to an appeal; a respondent has to make its position clear as to whether it intends to resist the appeal on the grounds given by the tribunal below or whether it wishes to serve a notice of cross-appeal and file a skeleton argument. The time the respondent has to lodge a skeleton, supposing that it is content to defend the reasoning of the tribunal below, has been relaxed. The Court of Appeal requires the respondent's skeleton, at latest, to be lodged seven days before the hearing. It also requires an agreed bundle of authorities to be lodged at the same time. This new procedure in the Court of Appeal is in order that judges can use their time effectively. If an appeal settles, the court can, if possible list other appeals in its place. If the requirements of the Practice Direction are broken, leaving it impossible for the court either to prepare its pre-reading or replace the case in the list, the Court of Appeal will refuse to grant orders by consent administratively but will require the parties to attend to explain the breach of the Practice Direction. It is necessary for everybody who practises and appears before the Court of Appeal to understand the new regime and to make arrangements to ensure they comply with it (see [3]–[10], below). d  
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## Notes

For the civil procedure rules and practice directions, see 10 *Halsbury's Laws* (4th edn reissue) para 575. h

## Appeal

Jeganathan Jeyapragash appealed with permission of Sedley LJ given on 2 June 2004 from the decision of the Immigration Appeal Tribunal (Dr HH Storey) on 5 December 2003. Before the hearing of the appeal the Secretary of State for the Home Department and the appellant agreed that the decision of the tribunal should be quashed and the matter remitted for consideration before a differently-constituted tribunal. The parties sought a consent order on those terms. The Court of Appeal required the parties to attend a hearing. The facts are set out in the judgment of Brooke LJ. The court disappplied the restrictions on citation contained in *Practice Note* [2001] 2 All ER 510 (para 6.1). j

a Shivani Jegarajah (instructed by M K Sri & Co, Harrow) for the appellant.  
Parishil Patel (instructed by *The Treasury Solicitor*) for the Secretary of State.

**BROOKE LJ.**

[1]. This is a matter in which Sedley LJ granted permission to appeal to the Court of Appeal as long ago as 2 June 2004. The matter has been listed in this court for hearing with plenty of time for the parties to prepare the case properly and in accordance with the rules.

[2] The appeal turns on whether the Immigration Appeal Tribunal (IAT) ought to have made explicit findings of fact as to the nature of the torture that the appellant suffered in Sri Lanka before it determined that he was not at risk if he was returned. Very much at the twelfth hour, the parties have agreed that the decision of the IAT should be quashed, the appeal remitted for consideration by a differently constituted tribunal and that there be no order as to costs save for assessment of the appellant's costs under the Legal Service (Costs) Regulations 2000, SI 2000/441. We make that order by consent.

[3] We have required, unusually, a hearing in this case because the new Practice Direction of the Court of Appeal has now been in effect since 30 June 2004 (nearly three months). This is the second case in which I have been concerned during the vacation in which the Home Office have given instructions to the Treasury Solicitor at a late stage, leaving it quite impossible for the court either to prepare its pre-reading or to replace cases in the list when a case settles.

[4] The message of the amended Practice Direction is that, instead of regarding one minute before the Court of Appeal sits as the time up to which parties in a leisurely way can prepare the papers for the court, the new time is seven days before a hearing. There is also provision in the new Practice Direction that a respondent to an appeal must make its position clear as to whether it simply intends to resist the appeal on the grounds given by the tribunal, or whether it wishes to serve a notice of cross-appeal and file a skeleton. That enables everybody to know the stance of the respondent. (See CPR PD 52, para 15.6.)

[5] Under the new procedure, the time the respondent has to lodge a skeleton argument, supposing that it is merely content to defend the reasoning of the tribunal below, has been relaxed. Instead of being much earlier in the pre-hearing process, at a time which was much more honoured in the breach than the observance, the Court of Appeal now requires the respondent's skeleton, at latest, to be lodged seven days before the hearing (para 15.11B). It also requires an agreed bundle of authorities to be lodged at the same time, each party putting its mind as to what is required for the effective hearing of the appeal (para 15.11(3)(a)). This enables judges of the Court of Appeal to pre-read effectively in a way which was quite impossible before the new reforms. Documents would come in in dribs and drabs, quite often after the judge had completed his or her pre-reading and sometimes not until the night before the hearing. That regime has now changed.

[6] I am told that the Treasury Solicitor is in consultation with the Home Office as to whether there are resource implications of the regime change. I want to make it crystal clear that this is a new procedure in the Court of Appeal so that judges in the Court of Appeal can use their time effectively. If an appeal is to settle, as in this case, we can, if possible, list other appeals in its place. I have been assured by Mr Patel, who speaks on instructions, that serious discussions are proceeding between the Treasury Solicitor and the Home Office in relation to this issue. I look forward to hearing the positive outcome of those discussions.

[7] I would wish to make it completely clear that the Court of Appeal will continue to take the steps taken in this case, and in the earlier case in our list today, and refuse to grant orders by consent administratively if the requirements of the Practice Direction are broken. The court will require the parties to attend to explain any breach of the Practice Direction and why it happened. I draw the attention of those concerned in these matters to the new power of the presiding Lord Justice to require a lawyer for the parties to come and explain what is or is not going on in the week before the hearing (see for example para 15.11B(2)). There are also the new rules as to the costs consequences of non-compliance (see, for example, paras 5.10(6) and 15.4(1)). That is sufficient to say on this occasion.

[8] This is a judgment which can be removed from the normal rules on restriction of citation. It is necessary for everybody who practises and appears before the Court of Appeal to understand the new regime and to make arrangements to ensure they comply with it.

**POTTER LJ.**

[9] I agree.

**CLARKE LJ.**

[10] I also agree.

*Decision of the Immigration Appeal Tribunal quashed and appeal remitted for consideration by a differently-constituted tribunal.*

Kate O'Hanlon Barrister.



# Harding v Wealands

[2004] EWCA Civ 1735

COURT OF APPEAL, CIVIL DIVISION

WALLER LJ, ARDEN LJ AND SIR WILLIAM ALDOUS

5, 8 NOVEMBER, 17 DECEMBER 2004

*Conflict of laws – Tort – Proper law of tort – Factors connecting a tort with a country – International Law (Miscellaneous Provisions) Act 1995, ss 11, 12.*

*Conflict of laws – Tort – Damages – Assessment – Proper law of tort law of New South Wales – Whether provisions of New South Wales statute restricting allowable damages applicable – Whether statutory provisions substantive – International Law (Miscellaneous Provisions) Act 1995, s 14(3).*

The claimant was English. The defendant was an Australian national who had lived in New South Wales until she left Australia to join the claimant in London where they enjoyed a settled relationship. On a holiday in New South Wales the following year the claimant was rendered a tetraplegic in an accident in which the defendant was driving her car and he was a passenger. Proceedings were issued and served on the defendant in England. Issues of liability were conceded and trial of a preliminary issue was ordered relating to the law to be applied in relation to the assessment of damages. Section 11<sup>a</sup> of the Private International Law (Miscellaneous Provisions) Act 1995 provided, inter alia, that where elements of events constituting a tort or delict occurred in different countries the applicable law under that general rule (which was that the applicable law was the law of the country in which the events occurred) was to be taken as being, for a cause of action in respect of personal injury to an individual, the law of the country where the individual was when he sustained the injury. Section 12(1)<sup>b</sup> of the 1995 Act provided that if it appeared from a comparison of the significance of the factors which would connect a tort or delict with the country whose law would be the applicable law under the general rule, and the significance of any factors connecting the tort or delict with another country, that it was substantially more appropriate for the applicable law to be the law of the other country, the general rule was displaced. Under s 12(2) the factors that might be taken into account included factors relating to the parties, to any of the events which constituted the tort or delict, or to any of the circumstances or consequences of those events. The defendant submitted: (i) that s 11 of the 1995 Act applied so as to make the law of New South Wales the applicable law; and (ii) relied on certain provisions of the Motor Accidents Compensation Act 1999 of New South Wales (the MACA) relating to the quantification of damages. The relevant provisions of the MACA were less generous in terms of allowable damages than would have been the case under English law. The judge identified the facts that connected the tort with England and those that connected the tort with New South Wales and ruled:

a Section 11, so far as material, is set out at [7], below

b Section 12, so far as material, is set out at [7], below

(i) that although in accordance with the general rule the applicable law would be the law of New South Wales, under s 12 of the 1995 Act it was substantially more appropriate that the law of England should apply to the assessment of damages, having regard to the settled relationship of the claimant and the defendant and to the fact that the strongest factor favouring New South Wales was that the defendant was insured there; and (ii) that if he were wrong, the relevant provisions of the MACA were procedural and not substantive so that the effect of s 14(3)<sup>c</sup> of the 1995 Act was that the English court would not in any event apply them. Section 14(3) provided that nothing in the relevant part of the 1995 Act affected any rule of evidence, pleading or practice or authorised questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum. The defendant appealed.

**Held** – (1) Where the general law, by virtue of s 11 of the 1995 Act, was also the national law of one of the parties, it would be very difficult to envisage circumstances that would render it ‘substantially’ more appropriate that any issue could be tried by reference to some other law. In the instant case, all that the judge had relied on was the settled relationship of the parties, but however settled that relationship had been, the defendant had left her car in New South Wales, was still a citizen of Australia driving on a New South Wales driving licence, and the accident had occurred in New South Wales. Accordingly, even though an appellate court should be very cautious in differing from the evaluation of the judge, the judge had erred in holding that the application of the general rule should be disappplied (see [20], [21], [45], [76], below).

(2) (Waller LJ dissenting) The restrictions in the MACA at issue in the instant case were substantive law. (Per Arden LJ) It was unnecessary to decide on a comprehensive meaning of procedure which had to be elucidated on a case by case basis. In any particular case the first step in ascertaining the distinction between substance and procedure was to have regard to the context. In the context of s 14 of the 1995 Act the court had to start from the position that it had already decided that the proper law of the tort was not the law of the forum. On that basis, a reference to the law of the forum had to be the exception, and had to be justified by some imperative, which relative to the imperative of applying the proper law, had priority, such as where the court could not put itself into the shoes of the foreign court. In the instant case, when the court sought to ascertain whether a matter was one of substance or procedure, it had to ask whether the restrictions imposed by the provisions of MACA at issue were restrictions on the right to recover damages conferred by the proper law of the tort. Applying that test, the restrictions at issue were questions of substance (see [52], [54], [55], [61], [70], below). (Per Sir William Aldous) The word ‘procedure’ in the 1995 Act should be given its natural meaning, namely the mode or rules used to govern and regulate the conduct of the court’s proceedings. An English court would apply its procedure when determining a case according to New South Wales law, but that did not mean that it should disregard the substantive law of New South Wales contained in the MACA unless to do so would require it to depart from its rules which regulated the mode and conduct of its proceedings. In the instant case, no such departure would be required. The restrictions on damages imposed by New South Wales statutes were, according to Australian law, substantive not

<sup>c</sup> Section 14, so far as material, is set out at [7], below

- a procedural, and the same conclusion should be reached under English law. The restrictions affecting the amount of damages were not part of the rules governing or regulating the mode or conduct of the court when assessing the damages. Accordingly, the appeal would be allowed (see [81], [86], [95], [105]–[107], below).  
*Chaplin v Boys* [1969] 2 All ER 1085, *Stevens v Head* (1993) 112 ALR 7, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 considered.
- b *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961 distinguished.

### Notes

For the law covering procedural matters: damages, the general choice of law rule, the displacement of the general rule, and issues still governed by English law, see

- c 8(3) *Halsbury's Laws* (4th edn reissue) paras 22, 369–371.

For the Private International Law (Miscellaneous Provisions) Act 1995, ss 11, 12, 14, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 1854, 1855, 1856

### Cases referred to in judgments

- d *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577.  
*Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17.  
*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, [1955] AC 370, [1955] 2 WLR 418, HL.
- e *Biogen Inc v Medeva plc* (1996) 38 BMLR 149, HL.  
*Breavington v Godleman* (1988) 169 CLR 41, Aus HC.  
*Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356, [1969] 3 WLR 322, HL; *affg* [1968] 1 All ER 283, [1968] 2 QB 1, [1968] 2 WLR 328, CA.
- f *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286.  
*Cope v Doherty* (1858) 4 K & J 367, 70 ER 154; *affd* (1858) 2 De G & J 614, 44 ER 1127, CA.  
*Don v Lippmann* (1837) Cl & Fin 1, 7 ER 303, HL.  
*Edmunds v Simmonds* [2001] 1 WLR 1003.
- g *Huber v Steiner* (1835) 2 Bing NC 202, [1835–1842] All ER Rep 159, 132 ER 80, Ct of CP.  
*John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, Aus HC.  
*Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 WLR 1269.
- h *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271, CA.  
*McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, Aus HC.  
*Norowzian v Arks Ltd (No 2)* [1999] IP & T 223, CA.  
*Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, CA.  
*Phillips v Eyre* (1870) LR 6 QB 1, Ex Ch.
- j *Regie National des Usines Renault SA v Zhang* [2002] 5 LRC 96, (2002) 187 ALR 1, Aus HC.  
*Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304.  
*Stevens v Head* (1993) 112 ALR 7, Aus HC.  
*Tolofson v Jensen* (1994) 4 LRC 437, (1994) 120 DLR (4th) 289, Can SC.

**Cases referred to in skeleton arguments**

- Abidin Daver*, *The* [1984] 1 All ER 470, [1984] AC 398, [1984] 2 WLR 196, HL  
*Ali (Abdullah) Almunajem Sons Co v Recourse Shipping Co Ltd, The Reefer Creole* [1994] 1 Lloyd's Rep 584.  
*Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416, HL.  
*Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042, [1983] 1 AC 191, [1982] 2 WLR 322, HL.  
*Hulse v Chambers* [2001] All ER (Comm) 812, [2001] 1 WLR 2386.  
*Jacobs v LCC* [1950] 1 All ER 737, [1950] AC 361, HL.  
*Marc Rich & Co AG v Societa Italiana Impianti PA, The Atlantic Emperor* [1989] 1 Lloyd's Rep 548, CA.  
*Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460, [1986] 3 WLR 972, HL.  
*Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] AC 345, [1998] 3 WLR 329, HL.

**Appeal**

The defendant Tania Wealands appealed with permission of Clarke LJ from the decision of Elias J on 27 May 2004 ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)) on a preliminary issue relating to the applicable law to be applied in relation to the assessment of damages in an action for damages for personal injury brought by Giles Harding against the defendant. The facts are set out in the judgment of Waller LJ.

*Howard Palmer QC and Charles Dougherty* (instructed by *Kennedys*) for Ms Wealands.

*Charles Haddon-Cave QC and Michael McParland* (instructed by *Stewarts*) for Mr Harding.

*Cur adv vult*

17 December 2004. The following judgments were delivered.

**WALLER LJ.**

[1] On 3 February 2003 Mr Harding was rendered a tetraplegic as a result of an accident in a vehicle being driven by Ms Wealands. The accident occurred in New South Wales and Ms Wealands is an Australian national. Proceedings were issued and served on Ms Wealands in England who at that time worked at 141 Castle Street Salisbury, on Wednesday 18 September 2002. An application was made on behalf of Ms Wealands to stay the proceedings on the grounds that New South Wales was the more appropriate forum for the trial of the action. That application was dismissed on 10 July 2003 by Master Foster. There was no appeal from that decision. On 11 August 2003 Ms Wealands filed a defence denying liability and pleading that the applicable law governing both the issue of liability and that of damages was the law of New South Wales. In her defence reliance was placed on s 11 of the Private International Law (Miscellaneous Provisions) Act 1995, which, if it applied, made New South Wales the applicable law being the place where the alleged tort was committed. The defence further averred that, for the avoidance of doubt, New South Wales law was alleged to



a govern 'all substantive issues including the assessment and/or recoverability of damages'.

[2] The defence at this stage put in issue liability and in the alternative relied upon a provision under the Motor Accidents Compensation Act 1999 (MACA) of New South Wales, which it was suggested disentitled Mr Harding from commencing court proceedings against the defendant, on the basis that the principal claims assessor had not issued a certificate in respect of the claim under s 92 of MACA. No more need be said about these aspects, since after the order of the trial of preliminary issues, to which I am about to refer, liability was admitted and reliance on s 92 was disavowed.

[3] In addition, the defence pleaded seven matters in reliance on the provisions of MACA relating to quantification of damage. It pleaded:

c 'Under the law of New South Wales and the Motor Accidents Compensation Act 1999 ("MACA") of New South Wales in particular ...

(5b) The maximum amount that may be awarded to the claimant for non-economic loss is presently AUS\$309,000 (s 134 MACA).

d (5c) In assessing loss of earnings, the court must disregard the amount by which the claimant's net weekly earnings exceeded AUS\$2,500 (s 125 MACA).

(5d) There is no award for the first 5 days loss of earning capacity (s 124 MACA).

e (5e) No award may be made in respect of gratuitous care if such care does not exceed 6 hours a week and is for less than 6 months (s 128 MACA). In so far as the gratuitous care provided exceeds this, the amount that can be recovered is limited to the sums set out in s 128 MACA.

f (5f) The discount rate in respect of future economic loss is prescribed at 5% (s 127 MACA).

(5g) No interest is payable on damages for gratuitous care or non-economic loss. Interest is only payable in respect of other heads of damages in so far as the conditions set out in s 137 MACA are satisfied and at the rate prescribed in that section for the time being.

g (5h) The claimant must give credit for any payments made to or on behalf of the claimant by an insurer in relation to a claim made by the claimant (s 130 MACA).'

h [4] By order dated 31 October 2003 Master Foster ordered the trial of three preliminary issues, two relating to liability, but the third relating to the question as to which was the applicable law to be applied in relation to the assessment of damages. The issues of liability were conceded on behalf of Ms Wealands and that left the third issue to be resolved.

j [5] The trial of that issue came on before Elias J, and he ruled on two bases that the applicable law was English law ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)). First he ruled that although by s 11 of the 1995 Act in accordance with the general rule the law applicable to the alleged tort would be the law of New South Wales, under s 12 it was substantially more appropriate that the law of England should apply to the assessment of damages. In the alternative, if he were wrong about that, his decision was that, in relation to the provisions of MACA relied on in the defence, those provisions were procedural and not substantive.

On that alternative basis he held that the English court would not in any event apply them. This is an appeal from that judgment.

[6] Mr Howard Palmer QC, for Ms Wealands, attacks the judge's findings on both issues, as indeed he must if he is to succeed in establishing that at the trial on damages the provisions of MACA should be applied by the English court. Mr Charles Haddon-Cave QC seeks to uphold the judge's judgment on both points. As regards the judge's finding that English law was substantially the more appropriate law, pursuant to an indication given by Clarke LJ, who gave permission to appeal, he seeks to confine the role of an appellate court. He submits that the appellate court should be cautious before interfering with the assessment of a judge on this issue. In relation to the judge's conclusion that in any event the issues raised by MACA were procedural rather than substantive, Mr Haddon-Cave submits that the matter has been resolved in his favour by the Court of Appeal decision in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304. That is a decision of the Court of Appeal post the 1995 Act, which Mr Haddon-Cave submits applies what might be termed the traditional view as to the dividing line between procedural and substantive, and Mr Haddon-Cave submits that we are bound by that decision.

#### THE 1995 ACT

[7] It is convenient to set out the key provisions of the 1995 Act:

'9. *Purpose of Part III.*—... (2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum ...

(4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred.

(5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.

(6) For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.

10. *Abolition of certain common law rules.*—The rules of the common law, in so far as they—(a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or (b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question, are hereby abolished so far as they apply to any claim in tort or delict which is not excluded from the operation of this Part by section 13 below.

11. *Choice of applicable law: the general rule.*—(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury; (b) for a cause of action in respect of

a damage to property, the law of the country where the property was when it was damaged; and (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

b 12. *Choice of applicable law: displacement of general rule.*—(1) If it appears, in all the circumstances, from a comparison of—(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

c (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events ...

d 14. *Transitional provision and savings.*—... (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.

e (3) Without prejudice to the generality of subsection (2) above, nothing in this Part—(a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—(i) would conflict with principles of public policy; or (ii) would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum; or (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

f [8] I would make the following comments at this stage. First, it is clear the Act abolishes the double actionability rule and abolishes such exception as there was to that rule as applied in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356. Second, the Act provides by s 11 that the general rule is that the law of the country where the events occurred will decide all issues. Third, s 12 allows for that general rule to be displaced in relation to '[all] issues ... or any ... issue' in a case where it is substantially more appropriate for the law of another country to apply. Fourth, s 14(2) makes clear that no other rules other than the double actionability rule and the exception as established in *Chaplin v Boys* have been abolished. In particular, s 14(3) makes clear that nothing authorises questions of procedure to be determined otherwise than in accordance with the law of the forum, and the subsection contemplates that 'procedure' is something wider than 'rules of evidence, pleading or practice'.

j THE FIRST ISSUE: WAS THE JUDGE RIGHT TO DISPLACE THE GENERAL RULE IN THIS CASE?

[9] By s 11 of the 1995 Act the general rule would have established the law of New South Wales as the applicable law relating to all issues, that being the law where the events constituting the tort in this case occurred.

[10] Neither Mr Howard Palmer nor Mr Haddon-Cave sought to suggest that the approach to s 12, which I sought to articulate as the proper approach in *Roerig's* case [2002] 1 All ER 961, [2002] 1 WLR 2304, was other than accurate. What s 12 requires is first an identification of the issue in relation to which it might be suggested that the general rule should not be applicable. I pointed out, and I repeat, that there is at this stage some inter-connection between the arguments relating to whether the sections in MACA are procedural or substantive and this issue as to whether a law other than New South Wales is the law to be applied. The point I made is that by s 12 the law of the forum is not an option. It follows that if an issue is one that must be decided by the law of the forum, then it cannot be an issue to which s 12 would apply. I re-emphasise this point simply because the Act contemplates that issues which by the common law would have been issues to be decided by the law of the forum are issues which the Act recognises as being 'substantially more appropriate to be tried by the law of the forum'. That is the Act's basic position and in one sense (as the judge also thought) the second point on the appeal as to whether the provisions of MACA are procedural or substantive should be considered first. But they were not in argument and have not been by the judge and thus I proceed with consideration of s 12.

[11] Since in this case the law of the forum is also the only other possible law apart from the law of New South Wales, it is possible to consider this aspect without refining the issue further than as an issue of quantum.

[12] The next task is to identify the factors that connect the tort with England and those that connect the tort with New South Wales. As I stressed in *Roerig's* case, and as the judge appreciated, the identification is of factors that connect the tort with the respective countries, not the issue or issues with the respective countries. No one criticised the judge's approach, which was in accordance with my suggested approach in *Roerig's* case. He assessed the factors in the following way:

[25] In this case the factors connecting the tort with New South Wales are that the accident occurred there, the defendant is an Australian national from New South Wales; she was driving on a New South Wales driving licence with New South Wales insurance; and the injuries were suffered there. By contrast, the factors connecting the tort with England are that the claimant was British, he had always lived and worked in England, he was domiciled in England at the relevant time, he and the defendant were both resident in England and living together in a settled manner; and they were only in Australia for the purposes of a holiday. The consequences of the injury would be suffered by the claimant in England and the cost of dealing with the cost of special care required in the future would have to be borne in England.'

[13] It is right to put a little more flesh on the above bare bones. In seeking to establish English law as the substantially more appropriate law, it could only be 'factors relating to the parties' which could connect the tort to England. What lay behind the above summary by the judge were the following details. Ms Wealands was an Australian national who lived in New South Wales in Australia up until the time she left to live with Mr Harding in June 2001. Mr Harding met Ms Wealands for the first time at the wedding of his friend,



a Kevin Ruston, and Ms Wealands' sister in Australia in about March 2001. They had already been in communication and their relationship developed. Mr Harding returned to England after the wedding and about three months later, in June 2001, Ms Wealands left Australia to join the claimant in his flat in London and they formed a settled relationship. That relationship was such as to lead to Ms Wealands describing herself at the time of the accident as the 'de facto' wife of Mr Harding. Ms Wealands was in the United Kingdom on a working holiday visa, which would have expired in May 2003.

b [14] Ms Wealands returned to Australia on 14 January 2002 to stay with her parents in New South Wales for her father's 60th birthday, and she was intending to stay for five weeks on holiday. On 29 January 2002 Mr Harding arrived in New South Wales, his holiday being limited to three weeks, and he intended to remain with Ms Wealands until they both returned to the flat in London. When Ms Wealands arrived in Australia in January 2002 she took back her Suzuki motor car, which she had lent to her brother-in-law, Kevin Ruston, during her absence; the car having been purchased by her in New South Wales in 2000. Ms Wealands had a New South Wales driving licence and was compulsorily insured with NRMA, an Australian insurance company. The accident in which Mr Harding was so seriously injured occurred on 3 February 2002 on a dirt track in New South Wales, when Ms Wealands lost control of the car and it rolled over. The only witnesses were the passengers in the car who were, apart from Mr Harding and Ms Wealands, Ms Wealands' sister and brother-in-law, Kevin Ruston, who were living in New South Wales at the time. Mr Harding suffered fractures involving cervical vertebrae C4, 5 and 6 and was rendered tetraplegic from C5 downwards in the course of the accident. He was treated in hospital initially in New South Wales until he was repatriated to the United Kingdom on 26 March 2002 for continuing treatment and rehabilitation. While in the hospital in New South Wales Ms Wealands and Mr Harding decided to get married and Ms Wealands accompanied Mr Harding back to England when he returned in March 2002. Sadly, after they had been back for a month, their relationship fell apart. Ms Wealands remained in England for another six months and it was in those circumstances that she could be served personally with these proceedings in Salisbury on 18 September 2002.

e [15] The judge recognised that his task was to compare the significance of the English factors with the significance of the New South Wales factors in order to decide whether it was substantially more appropriate that the law of England should determine the issues relating to quantum in this case. He said (at [24]):

h 'Waller LJ [in *Roerig's* case] emphasised that it was not intended that the general rule should be dislodged easily. Proper recognition has to be given to the word "substantially". At the same time, however, it is not a requirement that the connection with the country whose law would be the appropriate law under the general rule should be insubstantial or insignificant. The question is whether the connecting factors with another country are sufficient to make it substantially more appropriate for that law to be applied.'

j [16] Mr Howard Palmer made no criticism of that passage and rightly. The reference to the fact that it was not a requirement that the connection with that law which would be the appropriate law under the general rule should be

insubstantial or insignificant, is to the proposal as it was first made by the Law Commission in their working paper in 1984. Their original recommendation was that the factors connecting the tort with the law which would otherwise be more appropriate should be 'insubstantial or insignificant'. But their final proposal was that—

'the threshold be lowered by concentrating less on the insignificance of the connection of the tort or delict with the system of law indicated by the general rules, and more on how substantial is the connection of the tort or delict with the system of law of another country.'

[17] The judge then considered certain of the authorities, eg *Edmunds v Simmonds* [2001] 1 WLR 1003, and the basis on which Garland J had in that case disapplied Spanish law under s 12. He further considered the facts in *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, [2002] 1 WLR 2304 and my reasoning for not disapplying the general law of England in favour of Dutch law. The judge then concluded his judgment on this issue in the following terms:

'[32] In my judgment, the factors connecting the tort with England here are sufficiently strong to make it substantially more appropriate to displace the law of New South Wales as the applicable law on these substantive matters (as they are assumed to be for the purposes of this argument) in favour of English law. Whilst the case is not on all fours with *Edmunds v Simmonds* since the defendant in this case was driving in her home state, there are significant similarities with that decision. Both claimant and defendant were living together in a settled relationship and resident in England at the relevant time. That, in my view, clearly distinguishes the case from *Roerig's* case.

[33] In the context of considering factors relating to the parties, as s 12(2) requires me to do, the defendant's link at the material time with England and with the claimant are far more significant than her Australian connection. The latter, of course, explains why they chose Australia for their holiday, but in my judgment, that is not a significant factor connecting the tort with New South Wales. Perhaps the strongest factor favouring New South Wales is the fact that the defendant was insured there. I do not discount that factor, as the claimant would have me do, but nor will I give it very much weight, in part for the reasons urged upon me by the claimant.

[34] I consider that many contrary factors connecting the tort to England make the application of English law substantially more appropriate. In particular, the fact that the consequences of the accident will be felt in England, although not of itself sufficient to displace the general rule, is in my opinion, a factor that should be given significant weight when making the relevant comparison, particularly given that the issue under consideration relates to the calculation of damages. The objective is to do justice, and the fact that the costs of alleviating the consequences of the accident will be borne in a particular country will usually at least be a point in favour of the application of that law, even although not of itself sufficient to displace the general rule.'

[18] Two things immediately strike me about that passage. First, can it really be right to say that Ms Wealands' link at the material time with England and with

a Mr Harding was far more significant than her Australian connection? Can it possibly be right to suggest that the strongest factor in favouring New South Wales was the fact that the defendant was insured there as opposed to, for example, the fact she was Australian, driving her motor car in Australia, with the accident happening on the dirt road of New South Wales?

b APPROACH OF THE APPELLATE COURT

[19] I am not sure ultimately there was much between Mr Haddon-Cave and Mr Howard Palmer as to the correct approach of an appellate court considering the judge's ruling as to whether England was 'substantially' the more appropriate law. In the judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642 at [18], [19], [2003] 1 All ER (Comm) 140 at [18], [19], [2003] 1 WLR 577 Clarke LJ cites certain important passages in previous judgments, which reflect what should be the approach of an appellate court. First a passage in a previous judgment of Buxton LJ in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 612 referred to again by him in *Norowzian v Arks Ltd (No 2)* [1999] IP & T 223 at 231, where Buxton LJ said:

d 'On the other hand the standards applied by the law in different context vary a great deal in precision and generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether the standards have been met, the more reluctant an appellant court will be to interfere with the trial judge's decision.'

e Then Clarke LJ quoted (at [19]) the well-known passage from the speech of Lord Hoffmann in *Biogen Inc v Medeva plc* (1996) 38 BMLR 149 at 165–166, where Lord Hoffmann said:

f 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* [(*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, [1955] AC 370)] as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

j [20] I accept, accordingly, that this court should be very cautious in differing from the judge's evaluation made in this case. But even acting cautiously I simply cannot accept a conclusion that the defendant's link at the material time with England and with Mr Harding was far more significant than her Australian connection, or that the strongest factor favouring New South Wales was the fact that Ms Wealands was insured there. I would fully understand, having regard to

the settled relationship, that Mr Harding and Ms Wealands were in, that if they had been on holiday in France when this accident occurred England might have been found to be substantially more appropriate and to have displaced French law. But where the general law, by virtue of s 11 being the law where the tort occurred, is also the national law of one of the parties, it will, I suggest, be very difficult to envisage circumstances that will render it *substantially* more appropriate than any issue could be tried by reference to some other law. In this case all that the judge relied on, as Mr Haddon-Cave emphasised, was the parties' 'settled relationship', but however settled that relationship, Ms Wealands had left her car in New South Wales, was still a citizen of Australia driving on a New South Wales driving licence, and the accident occurred in New South Wales.

[21] Thus, even though I recognise the need for caution, I am simply unable to accept the judge's holding that in this case the application of the general rule should be disappplied.

#### PROCEDURAL OR SUBSTANTIVE

[22] I start by re-emphasising that the Private International Law (Miscellaneous Provisions) Act 1995 abolished only two rules of common law and expressly preserved all others. Furthermore, it is important to stress that s 14(3)(b) makes clear that nothing in this part 'affects any rules of evidence, pleading or practice'—or 'authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum'. That makes it clear that 'questions of procedure' went beyond evidence, pleading or practice.

[23] No one disputes the general proposition that questions of substance were thus intended to be for the law as identified by ss 11 or 12, and questions of procedure were intended to be for the law of the forum. No one, I think, would also quarrel with the proposition that the law of damages is partly substantive and partly procedural. Indeed, it is possible to go further and say that no-one would now quarrel with the proposition, that the question whether or not a head of damage was recoverable would be a substantive question. Equally, no one would quarrel with the fact that at some stage quantification becomes a matter for the forum.

[24] In *Roerig's* case [2002] 1 All ER 961, [2002] 1 WLR 2304 I took the view, a view with which other members of the court agreed, that the position taken by the majority in *Stevens v Head* (1993) 112 ALR 7, a decision of the High Court of Australia on appeal from the Supreme Court of Queensland, reflected the accurate position at common law. We were not in *Roerig's* case referred to a more recent decision of that court in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; although that decision was referred to in all supplements to the 13th edition of *Dicey and Morris* from the 1st Supplement of January 2001, so should have been discussed by counsel and, I admit, by me. In *Stevens's* case the majority were of the view that, in relation to quantification of damage, anything beyond the ascertainment of the heads of liability was procedural and thus said (at 25), referring to a New South Wales statute:

'... s 79 is plainly a provision which affects the measure of damages but does not touch the heads of liability in respect of which damages might be awarded. It is simply a law relating to the quantification of damages and that, as we have seen, is a matter governed solely by the *lex fori*.'



a The provision or the subsection of s 79 to which that dictum was addressed included s 79(3), which limited the maximum sum which could be awarded for damages for non-economic loss by the Motor Accidents Act 1988 of New South Wales. That seems to be a predecessor of and to bear a similarity to certain of the provisions of MACA which we have to consider in this case.

b [25] The majority in the *John Pfeiffer* case stressed that they were concerned only with the federal context and not the international context and were putting issues that might arise in the international context entirely on one side. It was in that context they expressed the view that it was appropriate to adopt a formulation put forward by Mason CJ ((2000) 203 CLR 503 at 543–544), who was in the minority in *Stevens's* case, which was to the following effect:

c ‘... “rules which are directed to governing or regulating the mode or conduct of court proceedings” are procedural and all other provisions or rules are to be classified as substantive.’

The majority continued on the same page to say:

d ‘... all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.’

e [26] The decision in the *John Pfeiffer* case has been considered in the High Court of Australia in the international context in *Regie National des Usines Renault SA v Zhang* [2002] 5 LRC 96, (2002) 187 ALR 1, and I simply record that the above view in relation to all questions about the kinds of damage was commented on in these terms:

f ‘We would reserve for further consideration, as the occasion arises, whether that ... proposition should be applied in cases of foreign tort.’ (See [2002] 5 LRC 96 at 126, (2002) 187 ALR 1 at 21 (para 76).)

g [27] I doubt in the interests of certainty whether there is room for any intermediate position and the real question is which of the above views should be accepted as representing the common law. Should procedure be confined in the very narrow way that Mason CJ has suggested? Should all questions that arise in relation to damages be substantive? Or, should the position be that once heads of damage have been established, all questions going to the assessment of those damages thereafter will be procedural? There is a suggestion in the Law Commissions’ report (*Private International Law: Choice of Law in Tort* (Law Com No 193), (Scot Law Com No 129)) that statutory limitations on damages should be substantive, even though damages otherwise should be a matter for the *lex fori*. Paragraphs 3.38 and 3.39 of that report say:

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‘Damages

3.38 The Consultation Paper provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort or delict determines the question of the availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori*. Furthermore, we do not think that express guidance need be given

in any implementing legislation on how damages should be quantified in a case where a court in the United Kingdom is faced with assessing the quantum of damages under a head of damage unknown to our law. We expect the question to arise infrequently and to attempt to solve the problem in advance may be less satisfactory than leaving the court to resolve the question on the particular facts of the dispute before it.

### *Limitations on recovery*

3.39 We agree with the view taken by all consultants who commented on this matter, that a statutory ceiling on damages is a substantive issue for the applicable law in tort or delict rather than a procedural issue for the *lex fori*. We do not think that there is a need for this matter to be included in implementing legislation, since it is connected with the question of damages generally, on which we are making no proposals for a change in the law.

[28] The view expressed in para 3.39 seems to be inconsistent with the view in para 3.38. It does however have support from a dictum in *Cope v Doherty* (1858) 4 K & J 367, 70 ER 154 by Page Wood V-C and the comment of Turner LJ in the same case when in the Court of Appeal ((1858) 2 De G & J 614, 44 ER 1127) relied on by Mason CJ in his dissenting judgment in *Stevens v Head* (1993) 112 ALR 7 at 16. In *Dicey and Morris on the Conflict of Laws* (2000, 13th edn) p 171 (para 7-038) it is said 'statutory provisions limiting a defendant's liability are *prima facie* substantive', and questions the approach in *Stevens v Head* (p 172 (para 7-039)). Indeed the editors (p 1533 (para 35-055)) are more positive, suggesting that 'the existence and extent of financial ceilings on recoverable damages' are questions of substantive law, and by a footnote suggest that *Stevens v Head* should not be followed, relying, it is right to say, on the above para 3.39 in the Law Commissions' report.

[29] I have difficulty in singling out ceilings on damages in this way. One of the provisions of MACA, with which we are concerned in this very case, certainly contains an express limitation on recoverability of damages for non-pecuniary loss, but the other provisions could be argued to be at least in their effect 'limitations' on damages. Furthermore, there does not seem to me to be any logical distinction between producing a case from the *lex loci delicti*, which establishes that by the proper law damages are awarded at that lower level, and producing a statute which places a cap on the amount of damages recoverable. Mr Howard Palmer in his submissions recognised this latter point because he, without hesitation, submitted that it would not simply be a foreign statute such as MACA to which reference would be made if New South Wales law was the appropriate law; authorities from that jurisdiction assessing damages at a lower (or presumably higher) level could also be referred to.

[30] It would also seem to me very unsatisfactory to contemplate that an English court might view some aspects of MACA as procedural and some as substantive. MACA is clearly a package of measures directing the court of New South Wales to act in a certain way. When applied by the court in New South Wales each provision will have in one sense a 'substantive' effect on the damages recoverable. It would not in my view be right for the English court to contemplate there being a different answer depending on whether it is the discount provision which is being considered, or the cap on damages for non-economic loss.

a [31] For that reason I am also disinclined to take one provision and examine it and allow that to influence the overall view. For example, Mr Howard Palmer would prefer to start with the provision placing a cap on non-economic loss. He would then refer to *Cope v Doherty* (1858) 4 K & J 367, 70 ER 154, where, as I have said, Page Wood V-C suggested ((1858) 4 K & J 367 at 384, 70 ER 154 at 160–161) that a statute which limited the damage for which a shipowner was liable would  
b be dealing 'with the substance and not the form of the procedure'. That case primarily held that the statute did not apply to foreigners and therefore had no application to the case and the remark was accordingly obiter. But that said, it supports the argument that a limit on damages should be held to be substantive, and that has the other support I have indicated.

c [32] On the other hand, Mr Haddon-Cave would start with the provision which suggests that the discount rate in respect of future economic loss is prescribed by s 127 of MACA at 5%. He would draw attention to the fact that such a provision seems inconsistent with the rate of 2.5%, provided for by the Damages (Personal Injury) Order 2001, SI 2001/2301, made pursuant to s 1 of the Damages Act 1996, the subject of the Lord Chancellor's statement of 27 July 2001.  
d Mr Haddon-Cave would say a discount provision is clearly procedural.

[33] As I have said, these provisions of MACA constitute a package and the answer ought to be the same for all. Thus it is my view that the contest ought to lie between the common law being as suggested by the majority in *Stevens v Head* or in the form suggested by Mason CJ in his minority judgment.

e [34] I took the view in *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, [2002] 1 WLR 2304, and after further consideration still adhere to the view, that the majority in *Stevens v Head* were expressing accurately the traditional position at common law as approved by the House of Lords in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356. The powerful dissenting judgment of Mason CJ (particularly at 16–19) would seek to suggest otherwise. In some of its reasoning  
f however that judgment relies on cases in contract where the position, I accept, is different. Otherwise it relies on non-binding dicta, which in my view do not reflect the main body of opinion. I also suggest that reliance on Lord Wilberforce's view that provisions of the *lex loci delicti*—

g 'denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to'

—is misplaced (see [1969] 2 All ER 1085 at 1102, [1971] AC 356 at 389). By putting  
h the words *denying, limiting or qualifying* in italics, Mason CJ seeks to suggest that Lord Wilberforce would have supported the view that a limitation on damages would be something for the substantive law. In my view, as the full quotation demonstrates, the dictum simply supports Lord Wilberforce's view that heads of damage would be for the substantive law, and the quotation simply does not support the concept of a cap placed by a local law in relation to the quantification  
j of damage being substantive.

[35] In *Roerig's* case, which was concerned with deductions of benefits, I said that that kind of issue is very much tied up with policy issues relevant to the local court. The same seems to me to be true of the provisions in MACA. MACA clearly reflects New South Wales policy and would be applied by that court whatever that court took as to the appropriate substantive law (see *Stevens v Head*

(1993) 112 ALR 7 at 21–22). Although it is for the English court to characterise law, it is, it seems to me, relevant that it is clear from the terms of that local law that it will be applied by the local court whatever the substantive law may be. That points to that law being procedural in my view. a

[36] I did not actually understand Mr Howard Palmer to be arguing that the majority view in *Stevens v Head* did not accurately reflect the traditional position at common law. His submission was that that traditional view was expressed in the context of the application of the double actionability rule, but his argument was once the double actionability rule is abolished, then the common law should be free to develop so as to take the narrow view of procedure, supported by Mason CJ. b

[37] Mr Howard Palmer's submission suffers, in my view, from the following weakness. It was certainly true that while the double actionability rule was in place there was a view that, once that rule had established the English court's jurisdiction, then the English court could and should deal with everything by its own law. Alternatively, the view was that even if liability might be a matter for the foreign law, damages would be a remedy given by the English court and thus a matter for the English court, even so far as heads of damage was concerned. This latter view was the view of Lord Upjohn in the Court of Appeal in *Chaplin v Boys* [1968] 1 All ER 283 at 290, [1968] 2 QB 1 at 26 onwards. It is indeed of interest how the Court of Appeal decided *Chaplin v Boys* because that gives an understanding of the reasoning in the House of Lords. Lord Denning would have decided the case in favour of applying English law to the assessment of damage by applying the 'proper law of the tort' as applied in some states of the United States. Lord Upjohn would have decided that the appropriate law was English law for the assessment of damages, on the basis I have just outlined. It was the dissenting judgment of Diplock LJ which suggested that the correct rule in relation to substance and procedure was that actionability included the 'heads of damage' as distinct from the 'quantification of damages' sustained under those heads (see [1968] 1 All ER 283 at 301, [1968] 2 QB 1 at 43). c  
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[38] In the House of Lords, Lord Hodson accepted that heads of damage were substantive, but clearly did not contemplate that anything beyond that would be substantive and then seemed to take the view that the proper law of the tort of that issue should be applied (see [1969] 2 All ER 1085 at 1094, [1971] AC 356 at 380). Lord Guest was of the view that it was not right to apply the proper law of the tort, but he was of the view that pain and suffering was not a head of damage but merely an element in the quantification, and on that basis he would have applied the lex fori of England (see [1969] 2 All ER 1085 at 1096, [1971] AC 356 at 382). Lord Donovan agreed with Lord Upjohn's approach. Lord Pearson thought that it would not be right to call heads of damage procedural. He thought they must be substantive, but was of the view that once England has jurisdiction it would simply apply its own law whether heads of damage were substantive or not. Lord Wilberforce was of the view that, since pain and suffering was not recoverable under the proper law, it would not and should not in normal circumstances be recoverable (see [1969] 2 All ER 1085 at 1104, [1971] AC 356 at 392). He thought it was appropriate to have some exception so that in certain circumstances that issue could be decided by English law (see [1969] 2 All ER 1085 at 1104, [1971] AC 356 at 392). But his closing remarks are of interest in that he was of the view that, if necessary, he would classify pain and suffering as procedural. g  
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a [39] The important point to make is that on no view did any of their Lordships suggest that any aspect of the quantification of damage apart from the decision as to whether a head of damage was recoverable could be substantive. There is no doubt that the common law had developed over the years. Mr Haddon-Cave referred us to two authorities, *Huber v Steiner* (1835) 2 Bing NC 202, [1835–1842] All ER Rep 159 and *Don v Lippmann* (1837) Cl & Fin 1, 7 ER 303, seeking to support an argument that quantification of damage as a matter for the *lex fori* was of some antiquity. As Mr Palmer and Mr Dougherty point out in their note, there is no discussion in these cases of quantification of damage in tort. The cases merely exemplify the stage of the common law relevant to the period, showing that 'remedies' were considered at that time for the *lex fori*. As it seems to me, this all has very little to do with the double actionability rule or its influence. Certainly, the view that remedies were for the English court was the view of Lord Upjohn, Lord Guest and Lord Donovan, but it was not the view of the majority in *Chaplin v Boys*. The view of Diplock LJ in the Court of Appeal, supported as the general rule by the majority in *Chaplin v Boys* that 'heads of damage' was substantive and 'assessment' or 'quantification of damage' is for the *lex fori* is not founded on the fact that there is a double actionability rule, it simply reflected a development in the common law. For that reason in *Roerig's case* [2002] 1 All ER 961, [2002] 1 WLR 2304 I took the view that the majority in *Stevens v Head* correctly reflected the view of the House of Lords in *Chaplin v Boys*, when I said:

e '[25] The passages in the speeches of the majority in *Chaplin v Boys* relied on are at [1969] 2 All ER 1085 at 1093, 1095, 1105, [1971] AC 356 at 378–379, 381–382, 393 per Lords Hodson, Guest and Wilberforce respectively (see (1993) 176 CLR 433 at 457, footnote 94). The passages referred to support the view that so far as damages are concerned it is a question for the substantive law whether a head of damage is recoverable, but quantification of the actual head is procedural. If one poses the question whether the issue in this case is about the right to recover certain benefits or whether it is about the quantification of the damages for loss of dependency the answer seems to me to be that it is about the quantification of damages. The concern of the court in considering a tortious claim should be as to liability including liability for particular heads of damage without the existence of which liability might not be complete. The question whether deductions should be made for benefits is not a question which goes to liability; it is a question going to assessment.

h [26] It also seems to me that there is good reason why once it is established that a particular head of damage is recoverable by whatever is the appropriate law, the assessment of the appropriate figure for that head of damage should be for the forum, including in particular what deductions should be made according to the public policy of the forum. As *Dicey and Morris* (vol 1, para 7–004) says: "The primary object of this Rule [ie that procedure should be governed by the *lex fori*] is to obviate the inconvenience of conducting the trial of a case concerning foreign elements in a manner with which the court is unfamiliar". They add (I accept) that "If, therefore, it is possible to apply a foreign rule ... without causing any such inconvenience, those rules should not necessarily ... be classified as procedural". In my view the question whether deductions of benefits should be made is likely to be bound up both with policy considerations and with

the way in which damages under the particular head are to be assessed overall.'

[40] On this appeal (I accept) Mr Howard Palmer has argued a point that was not argued in *Roerig's* case, which is that, with the disappearance of the double actionability rule, the basis on which the traditional view was formed has fallen away. As I have indicated I do not accept that view. The rules of common law on assessing damages were not dependent upon the existence of a double actionability rule. It therefore does not seem to me that, when the 1995 Act abolished the double actionability rule, it at the same time intended to vary the common law so far as quantification and assessment of damages was concerned. Section 14(3)(b) and its wording seems to me to confirm that position.

[41] Accordingly, whether or not strictly we are bound by the judgments in *Roerig's* case, I adhere to the view there expressed. It is unnecessary accordingly to consider whether what I said on this issue in that case was strictly obiter or not.

[42] I would accordingly dismiss the appeal on this aspect of the judge's judgment.

### ARDEN LJ.

[43] I gratefully adopt the statement of facts in the judgment of Waller LJ. I refer to the law, which, under the general rule in s 11 of the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act), is the applicable law as the *lex loci delicti*. I use the expression 'MACA' to refer to the provisions of the Motor Accidents Compensation Act 1999 relied on by the appellant in this action and summarised in para [3] of the judgment of Waller LJ.

[44] In my judgment, it is logical to decide the issue of proper law first because the resolution of the question whether the issues as to damages in this case are ones of substance or procedure involves an iterative process between the law governing the tort and the law of the forum (English law).

### PROPER LAW

[45] I agree with the judgment of Waller LJ on this. I would add that, while s 12 permits different laws to be applied to individual issues, it would not in my judgment be appropriate to conclude, in reliance on that provision, that damages should be governed by English law. In this case, damages are to be awarded for the injury caused by the respondent's negligence. That injury is an essential ingredient of the tort and cannot be separated out from the negligence, which occurred in Australia. It might be different if, for instance, there was a claim for wrongful interference of goods and there was an issue as to whether the defendant had authority from the claimant conferred by a written instrument governed by a law which was neither the law of the forum or the *lex loci delicti*.

[46] I would also like to add one further reason to those given by Waller LJ why this court must be cautious in setting aside the evaluation of the trial judge ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)). The question of the proper scope of the appellate function depends not only on the factors described by Lord Hoffmann in *Biogen Inc v Medeva plc* (1996) 38 BMLR 149, but also on considerations of legal policy. If an appeal could be more freely brought against a trial judge's evaluation of facts, there would be many more appeals. This would lead to additional costs, delay and uncertainty as to the effect of the trial judge's reasoning. Unless there is a good reason, a trial should generally lead to finality. Moreover, unless this court takes a cautious approach to a judge's evaluation of

a fact, the improvements brought about by the Civil Procedure Rules adopted in 1998 would be severely undermined. It is not in the public interest that the appellate process in this type of situation should be opened wider than that envisaged in the authorities cited by Waller LJ.

#### SUBSTANCE OR PROCEDURE?

b [47] The issue here is whether the restrictions on damages imposed by MACA are rules of substantive law or rules of procedure. If those restrictions are rules of substantive law, they will apply even in proceedings brought in this court because the proper law of the tort is that of New South Wales. If, however, the restrictions are rules of procedure, English law will apply as the law of the forum. As Waller LJ has explained, the distinction between matters of substance and c procedure is preserved by s 14(3)(b) of the 1995 Act. By implication, the characterisation of a question as one of procedure is a matter for English law.

[48] The first question is whether this court is bound by the holding in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304 that matters concerning the quantification of damages are matters of procedure d whereas matters relating to heads of damages are matters of substance. For convenience, I refer to this below as 'the damages principle'. In my judgment, this court is not bound by that part of the decision because the court had already decided that English law was the proper law of tort, and decided the substance/procedure issue only in case it was wrong on the proper law issue. Since e English law was also the law of the forum, it made no difference to the decision of the court whether the applicable rule was one of substance or procedure. In so far as resolution of the substance/procedure issue formed an alternative ratio, that issue was decided not on the basis of the damages principle but on the basis that, irrespective of the substance/procedure question, the relevant issue was governed by s 4 of the Fatal Accidents Act 1976, which was a mandatory rule which an English f court had to apply. On the other hand, clearly the decision, which is a very recent one, is entitled to the highest respect.

[49] The issue, therefore, is whether the damages principle represents the law and, accordingly, whether all matters relating to heads of damage are matters of substantive law whereas all matters as to the assessment of damages (including g caps) are questions of procedure. There is the further issue as to what constitutes a head of damage or a matter relating to the assessment of damages for this purpose. All these questions are intertwined, and I start with an examination of the substance/procedure issue relative to damages. This question has been considered in a number of recent authorities in Australia, which are persuasive authority only. In *Stevens v Head* (1993) 112 ALR 7, the High Court of Australia h (by a majority, Mason CJ and Deane J, Gaudron J dissenting) took the view that the damages principle was good law in Australia and held that caps and floors on damages for non-economic loss were accordingly procedural. In *Roerig's* case, the court agreed with the view of the majority in *Stevens v Head*. In the subsequent decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the High i Court adopted the view of the minority in *Stevens v Head*, ie they applied a very restrictive meaning of procedure, but this was in the context of a choice between the laws of different states of the Commonwealth of Australia. Under the constitution of Australia, full faith and credit had to be given to the laws of each state, and thus the extent of liability in tort should not depend on whether the victim was or was not resident in the state in which the tort occurred. The High

Court accordingly held that caps on damages in that context were matters of substantive law. In a yet later case, *Regie National des Usines Renault SA v Zhang* [2002] 5 LRC 96, (2002) 187 ALR 1, the High Court left open the question which approach to matters of substance and procedure would be applied in the case of a foreign tort. Accordingly, that issue has not been settled in Australia. On the other hand, these cases contain useful (albeit for our purposes inconclusive) discussion of the problems on this aspect of this appeal.

[50] The holding in *Roerig's* case on the substance/procedure issue involves the proposition that there is a bright line to be drawn between matters of assessment and heads of damage. Waller LJ has set out in detail the relevant parts of the decision of the House of Lords in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356. This case concerned the doctrine of double actionability. It was this doctrine which was abolished by s 10 of the 1995 Act. Certainly, the House of Lords in *Chaplin v Boys* proceeded on the basis that there was a distinction between 'heads of damage' and the 'assessment of damages', and that the former were matters of substance whereas the latter was procedural. However, the House did not have to, and did not, define those terms. The application of a cap is not a head of damage in the sense of legal category of damages. Nor does it involve in any real sense an 'assessment' of damages, since no evaluation of damages is involved: the application of a cap is a mechanical exercise. Moreover, the statutory question posed by the 1995 Act is: are the provisions of MACA questions of procedure or substance? In my judgment, the answer to that question has to be found by examining the nature of those concepts, relative to damages, rather than simply through the prism of heads and measurement of damages.

[51] In my judgment, the speeches of the members of the House of Lords in *Boys v Chaplin* show clearly that there is no bright line between questions of procedure and questions of substance in relation to damages. The majority decided that the question whether damages should be recoverable for pain and suffering was a question of substance. But the other two members of the House held that the matter was one of procedure. As I read the judgments, characterisation was, as the 1995 Act now in effect provides, effected under the law of the forum. Waller LJ examines the individual speeches in [38], above. I take the view that Lord Wilberforce considered that the question whether damages were recoverable for pain and suffering in that case was a question of substance, and not (as stated by Waller LJ) of procedure. Lord Wilberforce recognised that it was something of an 'artifice' to treat the recoverability of damages for pain and suffering as a matter of 'procedure' (see [1969] 2 All ER 1085 at 1105, [1971] AC 356 at 393). He took the view that the matter was one of substance because the policy of the local rule in Malta did not extend to the circumstances of the case under consideration (see [1969] 2 All ER 1085 at 1104, [1971] AC 356 at 392). His reasoning, therefore, was quite different from that of the other members of the majority, namely Lord Hodson and Lord Pearson. In their case, the conclusion that English law applied depended on damages for pain and suffering being a separate head of damage. To Lord Guest, a head of damage in the circumstances of *Boys v Chaplin* meant all the damages recoverable for the personal injury that had occurred. In these circumstances, I conclude that the damages principle is one of uncertain meaning and application.

[52] How then is the distinction between substance and procedure to be ascertained in any particular case? In my judgment, the first step is to have regard to the context. The meaning of substance and procedure for the purposes of s 14 of



a the 1995 Act must be sought in the context of the 1995 Act and not, for instance, in those cases where the matter has arisen for other purposes, for instance, for determining whether the presumption against retrospectivity in legislation applies. In the context of s 14, a principled approach requires the court to start from the position that it has already decided that the proper law of the tort is not the law of the forum, ie that some other law applies to the tort, either because it is the *lex loci delicti* or because it is substantially more appropriate than the *lex loci delicti*. On this basis, a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority. It may, for instance, be appropriate to apply the law of the forum where the court cannot put itself into the shoes of the foreign court. This would arise where it has no power to award damages on a structured basis, even though such a power exists in the court of the jurisdiction which is the proper law. It would also arise where the court cannot put itself into the shoes of the foreign court of the *lex loci delicti* in the sense that it cannot do justice unless it applies its own law. As I see it, this is the reason for treating the assessment of damages as a matter for the law of the forum.

d [53] Another relevant factor informing my approach to the substance/procedure issue is that of logic. There is no authority in English law on the question whether a cap on damages imposed by a foreign proper law is a question of procedure or substance, other than *Cope v Doherty* (referred to by Waller LJ) (1858) 4 K & J 367 at 383–384, 391, 70 ER 154 at 160–161 per Page Wood V-C, obiter, and on appeal (1858) 2 De G & J 614 at 626, 44 ER 1127 at 1132 per Turner LJ, obiter, (which dicta treat the question as one of substance), and *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286. In the latter case, it was common ground that a provision of Singapore law giving a shipowner the right to limit his liability for damage resulting from a collision in Singapore was procedural. There was a similar (though higher) provision in England. Clarke J held that this was procedural, or at least not substantive. This case does not directly assist on this appeal as it concerned a limit contained in a very different statutory scheme derived from an international convention. However, Clarke J accepted that *prima facie* a statute imposing a limitation on a person's liability for damages was substantive, unless the particular statute required the provision to be regarded as procedural. On examination of the statutory scheme, and the way it had to operate in practice, g Clarke J concluded that the limitation in question did not qualify the right of the claimants and could not be regarded as a matter of substantive law for the purposes of the conflicts of laws. The approach in the *Caltex* case would thus not necessitate the conclusion that the limits on damages in this case are procedural.

h [54] In my judgment, when the court seeks to ascertain whether a matter is one of substance or procedure, it has to ask whether the restrictions imposed by MACA are restrictions on the right to recover damages conferred by the foreign law. This test is in line with the second of the guiding principles identified by the majority in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543–544 (para 99), which is set out in para [90] of the judgment of Sir William Aldous. That guiding principle led the majority in the *Pfeiffer* case (at 544 (para 102)) to conclude that j 'laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws'.

[55] Applying the test that I have identified at the start of the previous paragraph, it is, in my judgment, clear that the overall limit on the recovery of

damages for pain and suffering imposed by MACA and the disregard of the first five days' loss of earning capacity and loss of earnings in excess of AU \$2,500 must necessarily be restrictions on the right to recover damages at all under the foreign law and thus be questions of substance. The limit on recovery for gratuitous care in MACA, and the requirement to bring insurance recoveries into account, may not be in point, but, if they are, they seem to me to be restrictions of the same nature and to be matters of substantive law accordingly. The more difficult question is the proper classification of the discount rate and provisions as to interest. I note that in *Chaplin v Boys* [1969] 2 All ER 1085 at 1105, [1971] AC 356 at 393, Lord Wilberforce considered that provision for future losses would be a matter for the law of the forum. However, Lord Wilberforce does not explicitly state how he has reached this conclusion and it may well be that he had in mind a situation where the foreign law gave no specific guidance as to how damages for loss of earnings in the future was to be calculated, and left the matter to the discretion of the judges, as in English law prior to the Damages Act 1996. One can well understand the reluctance of a judge in one forum to try to place himself in the position of a judge in the *lex loci delicti* if the latter had a discretion to fix discount rates according to rates of return likely to be obtained on investments in practice in that other jurisdiction over the period for which the award of damages was being made. (This might well be all the more so if that court was not a common law court.) In such a case, therefore, it may well, exceptionally, be more conducive to the ends of justice to apply the more familiar rules as to discount rates used in the law of the forum. Given the precision of the directions in MACA, however, I am content to reach the conclusion that the discount rate in MACA must also be a limitation on the substantive right to recover damages under the proper law. The methodology in Australia would be familiar to any judge in England and Wales. No element of discretion for the trial judge in England is involved. By the same reasoning, with necessary modifications, I conclude that the interest rate imposed by MACA on damages for non-economic loss must likewise be treated as matters of substantive law. (This court left open the question whether the power to award interest on damages was procedural or substantive in *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at 342–344 (paras 204–208).) In so far as MACA makes provision as to when interest is payable and for the periods and rates at which it is payable, it seems to me that the English court should give effect to these provisions as part of the respondent's rights under New South Wales law. Neither justice nor convenience nor necessity justify the law of the forum applying its own rules to these matters.

[56] I note in passing that it is generally accepted that questions as to the remoteness of damage are questions for the proper law of the tort (see, for example, *Dicey and Morris on The Conflict of Laws* (2000, 13th edn) p 1533 (para 35-055) set out in para [88] of the judgment of Sir William Aldous). Rules as to remoteness are restrictions imposed on the damages which a claimant may recover. The statutory caps imposed by MACA seem to me to be closer in character to rules of remoteness than to rules as to the assessment of damages. This reasoning supports the conclusion that I have reached as to the characterisation of MACA as questions of substance.

[57] The particular restrictions in MACA are quite different from such matters as whether damages can be paid by instalments, and whether subsequent damages for the same injury can be claimed in a fresh action, and the question of converting the domestic unit of account into foreign currency. While these matters do not

a arise in this case, it seems to me (provisionally) that those matters are likely to be matters of procedure. Likewise, the question whether a matter has to be dealt with by a judge alone or by a judge with a jury must be a matter of procedure.

b [58] Part of the problem in English law may be that all questions as to the measure of damages, causation and remoteness of damage were originally matters for the jury (see generally *A Historical Introduction to the Law of Obligations* by Professor David Ibbetson (Oxford) (1999)). In addition, there would have been difficulties in leading expert evidence at trial. These factors would have made it difficult for questions, for instance, as to the measure of damages to be determined according to foreign law. These factors may also help explain why, counter-intuitively to modern eyes, the damages principle came to be accepted without elaboration or explanation. Damages are not naturally regarded as procedure. In the field of damages, the substance/procedure issue really refers to a legal policy issue, such as those of justice, convenience and necessity. Questions as to the form of the remedy, which it is well-established are governed by the law of the forum, are more obviously questions of procedure.

d [59] Be the historical explanation as it may, with the exception of *Cope v Doherty* (1858) 2 De G & J 614, 44 ER 1127 and the *Caltex* case [1996] 1 Lloyd's Rep 286 referred to above, and the dicta of Lord Wilberforce in *Chaplin v Boys*, the substance/procedure distinction has never been the subject of analysis in the context of caps or other restrictions of the type to be found in MACA. Thus it falls to this court to perform that analysis in order to identify the true basis and extent of the principle, and to apply it in the modern context where judges no longer sit with juries to determine awards of damages. A more detailed analysis of the damages principle was unnecessary in *Chaplin v Boys* because the item of damages in question in that case, namely damages for pain and suffering, was recoverable only under English law. If recoverability was a question of substantive law, English law applied under the rule as to double actionability. If e it was a question of procedure, again English law applied as the law of the forum. Accordingly, once it was decided that double actionability applied, it was unnecessary to pursue a detailed analysis of the substance/procedure issue. There was no question of the English court having to apply the foreign law as that law did not recognise any claim for damages for pain and suffering.

g [60] In my judgment, when, in the context of conflicts of laws, the court says that a particular issue is one of procedure rather than substance (and under s 14 it is a question for the court), the court is really saying that it cannot, for whatever reason, apply the relevant foreign law to that issue.

h [61] In my judgment, the drafting of s 14 is of importance. It supports my approach. The section itemises evidence, pleadings, practice and procedure in that order. Evidence, pleadings and practice are self-explanatory. Procedure is at the end of the list. The context of s 14 suggests that the approach of Mason CJ in *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 that procedure covers matters as to the mode and conduct of trial is the basic approach of s 14. It is, however, in my judgment, unnecessary to decide on the comprehensive meaning of 'procedure' in this case. In my judgment, the meaning of procedure in this j context must be elucidated on a case by case basis.

#### AN ANALOGY

[62] The law of damages is not the only area of conflicts of law where it may be impossible to draw bright lines between substance and procedure. In

derivative actions, brought by minority shareholders on behalf of their companies, for instance, it has been held that the entitlement to bring a derivative action in the English courts is governed by the law of the place of incorporation of the company in question (see *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 WLR 1269). However, there may be matters in respect of such actions, for instance, compliance with CPR 19.9 which are matters of procedure and are thus governed by English law (see *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17). (An interesting question may arise whether, in the event of a breach of duty by a director of a foreign company, which is governed by the law of the place of incorporation, damages would in a derivative action brought in England be curtailed by principles of English law as to reflective loss.) The example of derivative actions demonstrates the proposition, already demonstrated by *Chaplin v Boys*, that, in relation to the substance/procedure distinction, much turns on the context. In my judgment, a more nuanced approach is required than simply a rule that, for instance, questions as to heads of damages, or a rule that questions as to the right to bring a derivative action, are matters of substance.

#### JUDGMENT OF WALLER LJ

[63] I now turn to particular points dealt with in the judgment of Waller LJ.

[64] Like Waller LJ I do not accept the argument of Mr Howard Palmer QC, for the appellant, that the decision as to what is procedural must now be viewed differently in the light of the abolition of the double actionability rule from the way in which it was seen in *Chaplin v Boys*. My rejection of this argument, however, does not mean that I reject the appellant's case.

[65] As to the argument of Waller LJ in [29], above, I do not consider that it would follow from a decision that the relevant provisions of MACA are matters of substance that other aspects of damages would necessarily be subject to New South Wales law. In this judgment, I am dealing only with the specified restrictions in MACA.

[66] In [30], above, Waller LJ holds that it would be unsatisfactory to contemplate that an English court might view some aspects of MACA as procedural and some as substantive. For my own part, I do not see this as a question of difficulty. There may well be rules in MACA which do not go to determine the right of the claimant under the law of New South Wales. However, I consider that there is a guiding principle to be applied here. I have already indicated the nature of that principle above. Once the court has decided that the law of New South Wales is the proper law of the tort, it is logical, so far as possible, to apply the law of New South Wales throughout. However, there may be reasons why the law of New South Wales cannot be applied, for instance, because the issue is a matter of procedure in the sense of mode of conducting the case, and so English law must be applied. I do not see any reason why there has to be the same answer to every aspect of New South Wales law.

[67] As to [34], above, I, for my part, do not consider that reliance on the passage cited from the speech of Lord Wilberforce is misplaced. Lord Wilberforce in effect equated a head of damage with a restriction on the recovery of damages. Accordingly, in my judgment, the interpretation placed on this passage by Mason CJ in *Stevens v Head* (1993) 112 ALR 7 was correct. It also follows, in my judgment, that the view expressed by the Law Commissions in para 3.39 of their report, *Private International Law: Choice of Law in Tort and Delict*



a (Law Com No 193; Scot Law Com No 129) (1990), was correct. I need not set that passage out as it appears in [104], below.

[68] Waller LJ is concerned that the particular rules in MACA constitute mandatory rules which the courts of New South Wales are bound to apply irrespective of the proper law. Even if that is so, it cannot affect the question whether English law should apply. The only question for resolution under s 14 b of the 1995 Act is whether the particular provisions of MACA constitute substance or procedure for the purposes of English law.

[69] In my judgment, the conclusion which I have reached, which is also the conclusion of Sir William Aldous, will discourage forum shopping. The view expressed by Waller LJ, on the other hand, is likely to encourage forum shopping.

c DISPOSITION

[70] For the above reasons, in my judgment, the judge was wrong to apply English law in preference to the restrictions in MACA. Accordingly, the appeal must be allowed. My judgment is, however, limited to the application of MACA d (as I have defined it above). There may be other matters arising with respect to the assessment of the damages in this case which must be dealt with in accordance with English law.

POSTSCRIPT

[71] Sir William Aldous has expressed sympathy for the respondent. I concur. e Naturally, I too am very sorry on a personal level that this tragic accident occurred. But it may be that some of the restrictions in MACA apply not to a claimant with severe injuries, like Mr Harding, but to claimants with less serious, and more short-lived injuries. Moreover, this is an unusual case in that the appellant, an Australian national, was personally served with these proceedings f within the jurisdiction.

SIR WILLIAM ALDOUS.

[72] On 3 February 2002 Miss Tania Wealands, an Australian, was driving her Suzuki vehicle along a dirt road in New South Wales, Australia. Beside her was her settled boyfriend, Mr Giles Harding. Miss Wealands lost control of the vehicle which rolled over. Unfortunately Mr Harding suffered devastating spinal injuries and is now a tetraplegic. g

[73] In September 2002 Mr Harding started in England proceedings for damages in negligence. Liability was at first disputed, but has now been admitted and it is agreed that Mr Harding is entitled to substantial damages under the law. h The issue that came before Elias J ([2004] EWHC 1957 (QB), [2004] All ER (D) 428 (May)) and before this court is—which law? Is it the law of New South Wales or England? The answer is of real importance to Mr Harding who will need care and support for the rest of his life as under the law of New South Wales his recovery will be substantially less than under English law.

j [74] Upon reading the papers, I was struck by the plight of Mr Harding. This was brought home to me when I saw him in court in his wheelchair. Any judge would wish to award full compensation, but the issues before us are issues of law and any decision could have lasting consequences in a society where the compensation culture has become or is becoming endemic and there is a tendency for forum shopping.

[75] The Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act) governs the two issues that need to be determined when deciding which law is applicable. Section 11 of that Act provides that the general rule to be applied is that the law is to be the law of the country in which the event constituting the tort occurred. Therefore the parties agree that, under the general rule, New South Wales law should be applied. However, s 12 allows the general rule to be overridden if, in all the circumstances, it appears on a comparison of the significance of factors that it is substantially more appropriate for the law of another country to be applied.

[76] Both before the judge and this court, counsel for Mr Harding submitted that the general rule should be overridden. The judge accepted that submission. Thus the first issue before this court was whether the judge was right. For the reasons given in the judgment of Waller LJ, I have come to the conclusion that the general rule in s 11 should not be overridden pursuant to the jurisdiction provided by s 12. It follows that the second issue needs to be decided.

[77] The second issue turns upon the true construction of s 14 of the 1995 Act and the effect of the law of New South Wales as contained in the Motor Accidents Compensation Act 1999 (the 1999 Act).

[78] Section 14 of the 1995 Act provides:

*'Transitional provision and savings.—... (2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by s 10 above.*

(3) Without prejudice to the generality of subsection (2) above, nothing in this Part—(a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so—(i) would conflict with principles of public policy; or (ii) would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum; or (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.

(4) This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable.'

[79] Section 10(a) abolished the double actionability rule which was applied in such cases as *Phillips v Eyre* (1870) LR 6 QB 1 and s 10(b) the rule outlined in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356.

[80] The judge held ([2004] All ER (D) 428 (May) at [62]) that 'all aspects of assessment [of damages] are procedural' and that the restrictions imposed by the 1999 Act were part of that assessment. They were therefore procedural. He went on to conclude that even if he had been wrong on the s 12 issue, English law applied to the assessment of Mr Harding's damages. Thus restrictions imposed by the 1999 Act did not apply.

[81] With reluctance, I am unable to agree with the conclusion reached by the judge and Waller LJ. Waller LJ has set out in full the submissions of the parties. I will therefore concentrate on the reasons as to why I would allow the appeal and declare that the restrictions on damages in the 1999 Act must be applied when the English court makes an award of damages.

a [82] We are not concerned with whether the damages that Mr Harding will recover could be affected by any English rule of pleading or practice. The submission was that even if the English court was applying New South Wales law, the assessment of the amount was a procedural matter and therefore to be determined according to English law. Thus the restrictions on damages in the 1999 Act would be irrelevant.

b [83] The judge in a passage, not criticised by either party, described the seven restrictions on damages imposed by the 1999 Act in this way:

[7] Seven such restrictions all deriving from the Motor Accidents Compensation Act 1999 have been identified in this case and each of them was pleaded in the defence. Essentially they are as follows: (1) The

c maximum amount that may be awarded to the claimant for non-economic loss is presently AUS\$309,000 (s 134). (2) In assessing loss of earnings, the court must disregard the amount by which the claimant's net weekly earnings exceed AUS\$2,500 (s 125). This amount is indexed to C s 146. (3) There is no award for the first five days' loss of earning capacity (s 124).

d (4) No award may be made in respect of gratuitous care if such care does not exceed six hours a week and is for less than six months (s 128). In so far as the gratuitous care exceeds this amount, the amount that can be recovered is limited to certain sums identified in s 128: "(5) The discount rate in respect of future economic loss is prescribed at 5% or as stipulated in regulations (s 127)." No regulations have as yet been enacted: "(6) No interest is payable

e on damages for gratuitous care or non-economic loss (s 137)." That provision also specifies that interest in respect of other heads of damage is only payable in so far as conditions set in s 137 are certified. These conditions impose certain procedural steps which the parties are required to take: "(7) The claimant must give credit to any payments made to or on behalf of the claimant by amongst others an insurer in relation to the claim made by

f the claimant" (s 130).

[84] The judge went on:

[8] The first two of these limitations can be considered as imposing different forms of a cap on damages. The third and fourth exclude damages altogether for particular identified losses. The other three are separate and independent rules of a different nature. Section 5 of the Act sets out the objects of the legislation. One of them is to 'keep premiums affordable'.

g [9] Two of these provisions in particular will adversely affect the claimant, namely the limitation on damages for non-economic loss, essentially equivalent to the damages for pain and suffering and the discount rate fixed

h at 5%. That is double the current rate applicable in England.'

[85] Despite the submissions of counsel, I believe it right to take the seven pleaded restrictions as a package. I can see no good reason for splitting them up so that one or more might be categorised as substantive and the others as

j procedural.

[86] In my view the restrictions in the 1999 Act are substantive law. The word 'procedure' in the 1995 Act should be given its natural meaning namely, the mode or rules used to govern and regulate the conduct of the court's proceedings. To do so, gives effect to the views expressed in *Dicey and Morris on the Conflict of Laws* (2000, 13th edn) and the Law Commissions' report (*Private*

*International Law: Choice of Law in Tort and Delict* (Law Com No 193; Scot Law Com No 129) (1990)). It is also supported by persuasive authority. Further there is no authority which binds this court to conclude that the restrictions are procedural. It also avoids forum shopping, an aim of the 1995 Act. That being so, I can see no reason why the restrictions cannot be applied by an English court adopting its normal procedure.

[87] I start with *Dicey and Morris*. Rule 17 states: 'All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).' Paragraph 7-003 (p 157) of *Dicey and Morris* states:

'While procedure is governed by the *lex fori*, matters of substance are governed by the law to which the court is directed by its choice of law rule (*lex causae*). Dicey wrote that English lawyers gave "the widest possible extension to the meaning of the term "procedure." As a matter of history, this is true; and a court may, even today, be tempted to extend the meaning of "procedure" in order to evade an unsatisfactory choice of law rule. But in general the attitude expressed by Dicey has fallen into disfavour precisely because it tends to frustrate the purposes of choice of law rules. Thus some questions which were at one time thought of wholly in terms of procedure are now considered to be procedural in some of their aspects only. The development of the law as to damages illustrates this process. The difficulty in applying this Rule lies in discriminating between rules of procedure and rules of substance. The distinction is by no means clear-cut.'

[88] *Dicey and Morris* states in Ch 13, the chapter which relates to torts (pp 1532-1533):

'35-053 The quantification or assessment of damages were, at common law, a matter for *lex fori* and will continue to be so in cases falling within Part III of the 1995 Act. Thus even where according to a foreign law applicable under the Act damages for personal injuries can be re-assessed in the light of changed circumstances the English court will assess them "once and for all". The English court will, whatever the foreign applicable law may say, assess general damages in accordance with its own domestic law. It has also been said that whether social security benefits are deductible from an award of general damages is a rule for the quantification of damages and not a rule dealing with a head of damage. The question will, accordingly, be referred to English law.

35-054 Difficulties may arise, however, in a situation where the applicable law provides a head of damages which is unknown to the law of the forum or provides a cause of action, creating a liability in damages, which is unknown to English law. For then there may be no appropriate rules of quantification available in the forum's law. According to the Law Commission the question was expected to "arise infrequently and to attempt to solve the problem in advance may be less satisfactory than leaving the court to resolve the question on the particular facts of the dispute before it". One possible solution would be to model the English assessment on that which obtains in the foreign applicable law, though, in effect, this would be to permit the applicable law to determine the question of quantification and, may, in any event, be a method which is not always possible in particular cases.



a 35-055 On the other hand, questions such as whether loss of earning capacity or pain and suffering or (in fatal accident claims) solatium or loss of society are admissible heads of damage, all questions of remoteness of damage, the existence and extent of the claimant's duty to mitigate damage, whether exemplary damages are recoverable, the existence and extent of financial ceilings on recoverable damages, and whether recovery can be had for any head of damage unknown to English law are questions of substantive law. As such, these questions will be governed by the law applicable to the tort determined in accordance with Rule 202 or Rule 203.'

c [89] The authority relied on for the conclusion that the existence and extent of financial ceilings on recoverable damages is a question of substantive law is *Stevens v Head* (1993) 112 ALR 7. The 4th cumulative supplement (March 1, 2004) adds as a reference *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

d [90] In the *Pfeiffer* case, the respondent Mr Rogerson suffered an accident in New South Wales while working for Pfeiffer which was a company which had its principal place of business in the Australian Capital Territory. The issue was whether damages should be assessed under New South Wales law or the law of the Capital Territory. The relevant Act of New South Wales, the Workers Compensation Act 1987, contained restrictions on recovery similar to but not the same as those contained in the 1999 Act. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ considered at length the difference between substance and procedure. They said (at 543-544):

e '99 Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum, (but does in the place where a wrong was committed) should be established to deal, in the forum with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.

h 100 These principles may require further elucidation in subsequent decisions but it should be noted that giving effect to them has significant consequences for the kinds of case in which the distinction between substance and procedure has previously been applied. First, the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the *lex loci delicti*. Secondly, all questions about kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*.

They went on to hold that the restrictions on damages in the 1987 Act were part of the substantive law. a

[91] In the *Pfeiffer* case Kirby J said that the common law rules had for too long been under the ghost of *Phillips v Eyre* (1870) LR 6 QB 1. He cited with approval the Canadian Supreme Court in *Tolofson v Jensen* (1994) 4 LRC 437, (1994) 120 DLR (4th) 289. He said (at 554):

‘133 The Canadian Supreme Court did not consider it necessary to await legislation to do away with this distinction in cases of such a kind. It explained that “the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.” This Court should adopt a similar principle whilst recognising that there is no bright line between “substance” and “procedure”. Doing so will, in turn, contribute to reducing the capacity of the parties to affect adversely the rights of others merely by electing to bring a claim in the courts of one law area of the nation rather than another.’ b  
c

[92] He went on (at 564) to say: d

‘164 In the present case, the foregoing meant the application of the common law of Australia as applicable in New South Wales, as modified in turn by any relevant statutory law of that State. The statutory modification applicable was that governing the recovery of damages in such claims. This was not a procedural law which could be ignored by the court of the forum because it was bound only by its own procedural rules. It was classified as a matter of substantive law. It was therefore to be applied by the court of the forum, that is, the Supreme Court. Once applied, it limited the recovery which the respondent might make in his proceedings in the Supreme Court. The limitation in question was the same whether the respondent brought those proceedings in a court in New South Wales, in the Australian Capital Territory or in any other court of Australia having jurisdiction in the case.’ e  
f

[93] The judgments in the *Pfeiffer* case are important both for their reasoning and the conclusion that the restrictions on damages were part of the substantive law of Australia; not procedural. It is important to note that the similarity between the restrictions considered in the *Pfeiffer* case and those contained in the 1999 Act are such that there can be no doubt that the restrictions in the 1999 Act do, following the *Pfeiffer* case, form part of the substantive law of New South Wales and are not procedural. g

[94] I realise that in the *Pfeiffer* case the court did not decide whether the New South Wales restrictions would be considered substantive in an international context. However the court’s reasoning would indicate that they would have and it would be illogical to come to a different conclusion. h

[95] In my view the approach of the High Court of Australia in the *Pfeiffer* case to the ambit of the word ‘procedure’ is consistent with the purpose of differentiating between substance and procedure. An English court would apply its procedure when determining a case according to New South Wales law, but that does not mean that it should disregard the substantive law of New South Wales contained in the 1999 Act, unless to do so would require it to depart from its rules which regulate the mode and conduct of its proceedings. No such departure would be required in this case. j

a [96] The judge considered that he was bound by the judgment of this court in *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961, [2002] 1 WLR 2304. He said ([2004] All ER (D) 428 (May)):

b [62] In any event, in my judgment, whatever the merits of the defendant's arguments on this point, I am bound by the decision of the Court of Appeal. The rationale of the decision is that all aspects of assessment are procedural and that seems to reflect the traditional view. More specifically, by adopting the reasoning of the majority in *Stevens v Head* in preference to the observations of the editors of *Dicey and Morris* who supported the contrary view, the court was plainly accepting the view that a rule imposing a ceiling on damages is procedural. Moreover, since in *Roerig's* case the court held that the question of deduction of benefits received elsewhere was procedural, it would be directly contrary to the ruling in that case to say that effect should be given to the New South Wales rule that credit should be given for insurance benefits.'

d [97] I will come to the judgments in *Roerig's* case, but turn first to consider *Stevens v Head* (1993) 112 ALR 7 which was relied on by Waller LJ in *Roerig's* case. It was a case dealing with New South Wales legislation substantially similar to the 1999 Act. It was decided by a four to three majority. As was pointed out by Callinan J in the *Pfeiffer* case (2000) 203 CLR 503 at 569–571:

e '181 Although [*McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1] and *Stevens* are recent cases, they have not proved to be of simple and easy application. They were decided by very narrow majorities. Furthermore, there are aspects of the reasoning of the majority in both cases that cannot be satisfactorily reconciled with quite a deal of the reasoning in [*Breavington v Godleman* (1988) 169 CLR 41] in which there were six different judgments delivered.

g 182 The correctness of *McKain* and *Stevens* has been subject to strong and persuasive criticism by a number of authors: Nygh, Morris, Pryles, Juenger, Hancock, Carter and the Australian Law Reform Commission. The principle for which the cases stand has been replaced and amended by legislation in the United Kingdom. There had been earlier attempts to ameliorate its consequences by the House of Lords and the Privy Council, and it has been overturned judicially in Canada. It does not represent the universal law of the United States.

h 183 The various matters to which I have referred provide compelling reasons why *McKain* and *Stevens* should be reconsidered.

j 184 The continued application of *McKain* and *Stevens* stands, as pointed out by Deane J in *Stevens*, as an open invitation to litigants to forum shop with consequences which could have a significant impact upon the economic, social and other policies of States which have legislated in respect of them differently from other States. This in turn could lead to diversity of judicial approach. It is undesirable that courts might be placed in a position which could lead to a perception, however unwarranted, that they are in competition with one another, or may be seeking to attract litigants from other courts. The present case is a clear example of forum shopping.'

[98] In my view the dissenting judgment of Mason CJ in *Stevens v Head* is consistent with the judgments of the *Pfeiffer* case and to be preferred to the judgment of the majority. He said ((1993) 112 ALR 7 at 13–14):

‘It is an accepted principle of private international law that matters of substantive law are to be determined by the law of the cause and matters of procedural or adjectival law by the law of the forum. If the relevant provisions of Pt 6 are classified as substantive, they will be applicable as part of the *lex loci*, according to the second condition of the choice of law rule. If, however, they are classified as procedural, they will not be applicable to the facts of this case, as all issues of procedure will be determined by the law of Queensland. As I observed in *McKain*, the simplicity of the proposition that matters of substance should be determined according to the law of the cause and matters of procedure according to the law of the forum belies the difficulty of identifying just what is procedural and what is substantive. In that case, I stated my reasons for rejecting the traditional equation drawn between matters relating to a remedy and matters of procedure and proposed a new criterion for the substance-procedure distinction which has its genesis in the principal reason for drawing the distinction at all. That criterion characterized as procedural “those rules which are directed to governing or regulating the mode or conduct of court proceedings”. All other provisions or rules are to be classified as substantive.’

[99] Although the *Pfeiffer* case was decided in 2000 it was not cited to the Court of Appeal in *Roerig’s* case. In that case a Dutch woman brought an action on behalf of herself and her children as dependents of a Dutchman who was killed while working in an English registered trawler owned by the defendants.

[100] The Court of Appeal upheld the judge’s decision, but the general rule that English law applied was not dislodged on the facts of that case. However Waller LJ, giving a judgment with which Sedley and Simon Brown LJJs agreed, concluded that when the damages were to be assessed under English law certain benefits payable under Dutch law were not to be deducted.

[101] I do not believe that the judge was bound by the judgments in *Roerig’s* case to conclude that the restrictions imposed by the 1999 Act were procedural. In *Roerig’s* case the court had decided that the applicable law was English law and it did not matter whether the question concerning benefits under Dutch law was procedural or substantive. In any case there appears to be a real difference between assessing loss taking into account or refusing to take into account benefits and arriving at an amount of damages in the light of restrictions imposed by the 1999 Act. The latter is by Australian law substantive whereas the former might be considered to be procedural according to the English or even Dutch law.

[102] Waller LJ said in para [24] of his judgment in *Roerig’s* case that he found the judgment of the majority in *Stevens v Head* compelling. In the light of the judgments in the *Pfeiffer* case, I cannot agree. In any case I believe that the judgments of the majority in *Stevens v Head* (1993) 112 ALR 7 were also concerned with the impact of the double actionability rule. They said (at 26):

‘Double actionability (in the sense explained in *McKain*) operates satisfactorily with respect to causes of action; with respect to the quantification of damages, no law other than the *lex fori* can work effectively.’



a [103] The first part of the sentence quoted above may well be right, but the second conflicts with the *Pfeiffer* case. In England the double actionability rule was swept away by s 10 of the 1995 Act and therefore care must be taken before adopting the reasoning in *Stevens v Head*. Even though s14(2) of the 1995 Act preserved the previous rules of common law there is, in my view, no reason to put a strained construction upon the word 'procedure' in the 1995 Act. The court should seek the intention of Parliament.

b [104] The 1995 Act was passed after publication of the Law Commissions' paper *Private International Law: Choice of Law in Tort and Delict*. It said:

c '3.38 The Consultation Paper provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort of delict determines the question of the availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori*. Furthermore, we do not think that express guidance need be given in any implementing legislation on how damages should be quantified in a case where a court in the United Kingdom is faced with assessing the quantum of damages under a head of damage unknown to our law. We expect the question to arise infrequently and to attempt to solve the problem in advance may be less satisfactory than leaving the court to resolve the question on the particular facts of the dispute before it.

d *Limitations on recovery*

e 3.39 We agree with the view taken by all consultants who commented on this matter, that a statutory ceiling on damages is a substantive issue for the applicable law in tort or delict rather than a procedural issue for the *lex fori*. We do not think that there is a need for this matter to be included in implementing legislation, since it is connected with the question of damages generally, on which we are making no proposals for a change in the law.'

f [105] It was submitted that there was an inconsistency between those two paragraphs. I disagree. Most if not all questions relating to damages are in one sense quantification in that the court is seeking to quantify the injured party's loss. But the Law Commissions drew a distinction between a statutory ceiling affecting quantum and the procedural steps taken to arrive at the appropriate figure. The Commissions' view expressed in 1990, is consistent with that of the High Court of Australia in the *Pfeiffer* case. The restrictions on damages imposed by New South Wales statutes are according to Australian law substantive not procedural. In my view the same conclusion should be reached under English law. To conclude otherwise would be to stretch the word 'procedure' to cover issues not truly procedural and would also encourage forum shopping which the 1995 Act sought to prevent.

g [106] In this court a considerable amount of effort was spent in analysing the speeches in *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356. That was a case decided before the double actionability rule was abolished. The result would I believe have been the same under the present law, but there would have been no need to apply what Lord Wilberforce ([1969] 2 All ER 1085 at 1105, 1106, [1971] AC 356 at 392, 393) recognised was an artificial distinction between procedure and substance. As Waller LJ pointed out in *Roerig's case* [2002] 1 All ER 961 at [25] there are passages in the speeches in *Chaplin v Boys* to support the view that, as far as damages are concerned, it is a question of substantive law whether a head of

damages was recoverable, but quantification of the actual head is procedural. But that does not answer the crucial question in this case namely whether the restrictions upon the amount of damages are procedural. No doubt such restrictions affect the amount of damages and are therefore part of the quantification, but they are not part of the rules governing or regulating the mode of conduct of the court when assessing the damages. The reasoning in *Chaplin v Boys* does not in my view require me to accept the submissions made on behalf of Mr Harding.

[107] In my view the English court should adopt its rules used to govern and regulate the mode and conduct of the proceedings, but should, when applying New South Wales law, give effect to the restrictions in the 1999 Act. I would grant a declaration to that effect and allow the appeal.

*Appeal allowed. Permission to appeal to the House of Lords granted.*

Dilys Tausz Barrister.

**R (on the application of Kent  
Pharmaceuticals Ltd) v Director of Serious  
Fraud Office (Secretary of State for the  
Home Department and another,  
interested parties)**

[2004] EWCA Civ 1494

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, CHADWICK AND DYSON LJJ

5 OCTOBER, 11 NOVEMBER 2004

*Serious Fraud Office – Investigation – Disclosure of documents – Right to respect for correspondence – Serious Fraud Office executing search warrants and obtaining documents – Director of Serious Fraud Office exercising discretion to disclose documents to government department – Whether breach of right to respect for correspondence – Whether Serious Fraud Office required to notify owner of documents before disclosure – Whether disclosure fair – Criminal Justice Act 1987, s 3(5)(a) – Human Rights Act 1998, Sch 1, Pt I, art 8(2).*

The Serious Fraud Office (the SFO) was in the process of investigating allegations that drug companies were selling generic drugs to the National Health Service at artificially sustained prices. It obtained search warrants under the Criminal Justice Act 1987 and seized documents from the claimant and others. Section 3(5)(a)<sup>a</sup> of the 1987 Act provided that information obtained by any person in his capacity as a member of the SFO 'may be disclosed' to any government department by any member of the SFO designated by the SFO's Director. The Secretary of State for Health sought urgent disclosure of certain of the documents in connection with civil proceedings. On Monday 13 January 2003, the SFO wrote to the claimant's solicitors informing them of the Secretary of State's requirement, and stating that it expected to send copies of the documents within the week. However on 16 January, the SFO wrote a further letter to the claimant's solicitors stating that the Director had exercised her discretion under s 3(5)(a) of the 1987 Act and that on 14 January copies of the documents had been supplied to the Department of Health. The claimant sought judicial review. The Divisional Court declined to grant relief but held, inter alia, that the disclosure was in accordance with the law for the purposes of the right to respect for correspondence contained in art 8<sup>b</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and that, while the SFO had acted unfairly by not allowing time for representations prior to disclosure, the claimant had suffered no prejudice. The claimant appealed. It contended that the Divisional Court had been wrong to hold that the SFO Director's exercise of her discretion under s 3(5)(a) of the 1987 Act was in accordance with the law as required by art 8(2) in that the convention required a formulation of sufficient precision to enable an

<sup>a</sup> Section 3, so far as material, is set out at [4], below

<sup>b</sup> Article 8, so far as material, is set out at [5], below

individual to know in what circumstances the discretion could be exercised, and for what purposes the government department could use the information disclosed. The SFO, the Secretary of State for Health, and the Secretary of State for the Home Department contended that the Divisional Court had reached the wrong conclusions in relation to the need for notice of intention to disclose and as to whether the SFO had acted unfairly.

**Held** – (1) The decision to disclose under the power conferred by s 3(5)(a) of the 1987 Act could not be impugned on the basis that it was not made in accordance with the law for the purposes of art 8(2) of the convention. The nominated representative of the SFO was granted a discretion to be exercised having regard to the purpose for which disclosure was sought, the policy and objects of the 1987 Act, and the way in which access to the documents had been obtained. Any attempt to give further guidance in s 3(5)(a) as to the circumstances in which the discretion to make further disclosure might be exercised would introduce undesirable rigidity. The power had always to be exercised reasonably, and in good faith. If a person affected learned of the disclosure he could challenge it in proceedings for judicial review. If material were used against him in criminal or civil proceedings he might also be able to challenge its use in the context of those proceedings, so if there were disclosure when there should not have been, a party would not normally be without redress. In the instant case, disclosure had clearly been appropriate. However restrictively s 3(5)(a) might be worded it would clearly allow the nominated representative of the SFO to disclose to a government department to assist that department to prosecute a civil action seeking to recover losses allegedly caused by the fraud under investigation (see [18], [20]–[22], [38], [44], below); *Sunday Times v UK* (1979) 2 EHRR 245, *Z v Finland* (1997) 45 BMLR 1, *MS v Sweden* (1997) 3 BHRC 248 and *Domenichini v Italy* (2001) 32 EHRR 68 considered.

(2) In normal circumstances where the SFO proposed to disclose documents pursuant to s 3(5)(a) it should give notice to the owner in sufficient time to enable him to raise any objection. In some cases it might not be appropriate or practicable to give notice either at all or in time to enable the owner of the documents to have an opportunity to respond. The documents might be urgently required elsewhere, or it might appear that disclosure would hamper investigations. In such a case the designated member of the SFO would not be acting unfairly if he decided to go ahead without giving the sort of notice which in other circumstances would be required. However, having disclosed the documents, he would then have to consider whether the owner of the documents should be told what had taken place. It might be that he should not be told in order to protect ongoing investigations, but the starting point should always be that the owner of the documents was entitled to be kept informed rather than the reverse. That was what fairness demanded, not only because the documents were the owner's, subject to his right to confidentiality save in so far as his rights had been curtailed by statute, but also because he could not exercise his remaining rights in any way unless he knew what was going on, (see [27], [29], [40], [44], below); *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, and *R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310 applied.

(3) (Kennedy LJ dissenting) In the instant case the SFO had acted unfairly. The purpose of the letter of 13 January had been to put the claimant on notice that the SFO was expecting to make disclosure to the Department of Health by the end of the week. The claimant had been entitled to think that it had a few days to make



a representations or seek an injunction. To pre-empt such representations, or an application for injunctive relief, by making disclosure on the following day, in the absence of some compelling reason, was unfair. However, the absence of any proper opportunity to make representations had not been the cause of any damage to the claimant. The appeal would therefore be dismissed (see [42]–[44], below).

b  
**Notes**

For disclosure of information by the Director of the Serious Fraud Office, and for the right to respect for correspondence, see, respectively, 11(1) *Halsbury's Laws* (4th edn reissue) para 655 and 8(2) *Halsbury's Laws* (4th edn reissue) paras 153, 154.

c For the Criminal Justice Act 1987, s 3, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 918.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

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**Cases referred to in judgments**

*Chorherr v Austria* (1993) 17 EHRR 358, [1993] ECHR 13308/87, ECt HR.

*Domenichini v Italy* (2001) 32 EHRR 68, [1996] ECHR 15943/90, ECt HR.

*Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

e *Golder v UK* (1975) 1 EHRR 524, [1975] ECHR 4451/70, ECt HR.

*H v Belgium* (1987) 10 EHRR 339, [1987] ECHR 8950/80, ECt HR.

*Herczegfalvy v Austria* (1992) 18 BMLR 48, ECt HR.

*Klass v Germany* (1978) 2 EHRR 214, [1978] ECHR 5029/71, ECt HR.

*Marcel v Comr of Police of the Metropolis* [1992] 1 All ER 72, [1992] Ch 225, [1992] 2 WLR 50, CA.

f *Morris v Director of Serious Fraud Office* [1993] 1 All ER 788, [1993] Ch 372, [1993] 3 WLR 1.

*MS v Sweden* (1997) 3 BHRC 248, ECt HR.

*Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL.

g *R v Brady* [2004] EWCA Crim 1763, [2004] 3 All ER 520.

*R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310, sub nom *R v Chief Constable of the North Wales Police, ex p Thorpe* [1999] QB 396, [1998] 3 WLR 57, CA.

h *Sunday Times v UK* (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

*Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393, ECt HR.

*Valenzuela Contreras v Spain* (1998) 28 EHRR 483, [1998] ECHR 27671/95, ECt HR.

*Wiseman v Borneman* [1969] 3 All ER 275, [1971] AC 297, [1969] 3 WLR 706, HL.

j *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, CA.

*Z v Finland* (1997) 45 BMLR 107, ECt HR.

**Cases referred to in skeleton arguments**

*Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept* [2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] QB 1124, [2004] 2 WLR 603.

*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 All ER 1213, [2004] 1 AC 546, [2003] 3 WLR 283. a

*Chorherr v Austria* (1993) 17 EHRR 358, ECt HR.

*Gaskin v UK* (1989) 12 EHRR 36, [1989] ECHR 10454/83, ECt HR.

*Office of Fair Trading v X* [2003] EWHC 1042 (Comm), [2003] 2 All ER (Comm) 183, [2004] ICR 105.

*R v Chesterfield Justices, ex p Bramley* [2000] 1 All ER 411, [2000] QB 576, [2000] 2 WLR 409, DC. b

*R v R (Rape: marital exemption)* [1991] 2 All ER 257, [1992] 1 AC 599, [1991] 2 WLR 1065, CA; *affd* [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL.

*R v Secretary of State for the Home Dept, ex p Fire Brigades Union* [1995] 2 All ER 244, [1995] 2 AC 513, [1995] 2 WLR 464, HL.

*R (on the application of Bono) v Harlow DC* [2002] EWHC 423 (Admin), [2002] 1 WLR 2475. c

*R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623.

*SW v UK* (1995) 21 EHRR 363, [1995] ECHR 20166/92, ECt HR. d

## Appeal

Kent Pharmaceuticals Ltd (KP) appealed from the decision of the Divisional Court (Maurice Kay and Mackay JJ) on 17 December 2003 ([2003] EWHC 3002 (Admin), [2003] All ER (D) 298 (Dec)) refusing relief in respect of the decision of the Director of the Serious Fraud Office (the SFO) to exercise her discretion under s 3(5) of the Criminal Justice Act 1987 to disclose to the Department of Health copies of documents seized by the SFO from KP under warrants obtained under s 2(4) of the 1987 Act. The Secretary of State for Health appeared as an interested party. The Secretary of State for the Home Department appeared in the Court of Appeal as an interested party. The facts are set out in the judgment of Kennedy LJ. e  
f

*Stuart Isaacs QC* and *Clive Lewis* (instructed by *Brachers*, Maidstone) for KP.

*David Perry*, *Mark Lucraft* and *Ben Hooper* (instructed by the *Treasury Solicitor*) for the SFO.

*David Perry* and *Ben Hooper* (instructed by the *Treasury Solicitor*) for the Secretary of State for the Home Department. g

*Philip Jones* (instructed by *Peters & Peters*) for the Secretary of State for Health.

*Cur adv vult*

11 November 2004. The following judgments were delivered. h

## KENNEDY LJ.

[1] This is an appeal from a decision of the Divisional Court (Maurice Kay and Mackay JJ) on 17 December 2003 ([2003] EWHC 3002 (Admin), [2003] All ER (D) 298 (Dec)) refusing to grant to the appellants, Kent Pharmaceuticals Ltd (KP), any relief in respect of the decision of the respondent, the Serious Fraud Office (the SFO), to disclose to the Department of Health copies of documents seized by the SFO from KP. In the Divisional Court the Secretary of State for Health appeared as an interested party. In this court the Secretary of State for the Home Department has also appeared in the same capacity because it has emerged that j

a one of the forms of relief claimed is a declaration of incompatibility in relation to primary legislation.

#### FACTS

b [2] The basic facts are not in dispute. Early in 2002 the SFO was investigating allegations that drug companies were selling generic drugs, including penicillin-based antibiotics and warfarin, to the National Health Service at artificially sustained prices. That investigation, we were told, is still in progress, but KP have not thus far been charged with any offence.

c [3] In order to further the investigation the SFO on 2 April 2002 obtained at Bow Street Magistrates' Court 31 search warrants, only four of which were in any way connected with KP. The warrants were obtained under s 2(4) of the Criminal Justice Act 1987, and they were executed on 10 April 2002. Thus the SFO obtained a substantial amount of documentation from KP and others. KP attempted to challenge in the Administrative Court the decisions to seek, grant and execute the warrants, but leave to seek judicial review was refused on paper on 25 July 2002 and, after an oral hearing, it was also refused by a constitution of the Divisional Court presided over by Lord Woolf CJ on 22 November 2002.

#### THE SFO'S POWER TO DISCLOSE

e [4] Part I of the 1987 Act deals with fraud, and in that Part s 2 deals with the investigatory powers of the Director of the SFO. They include the power to obtain documents by means of search warrants. Section 3 deals with disclosure of information which the SFO has obtained in the course of an investigation. So, where the SFO obtains information subject to a statutory obligation of secrecy that information may be used for a relevant prosecution but not otherwise (sub-ss (1)–(3)) and the director is empowered by sub-s (4) to agree to receive or supply information on the basis that it will only be used for a specified purpose.

f Then sub-s (5), so far as relevant, provides:

g '... information obtained by any person in his capacity as a member of the Serious Fraud Office may be disclosed by any member of that Office designated by the Director for the purposes of this subsection—(a) to any government department or Northern Ireland department or other authority or body discharging its functions on behalf of the Crown ... (b) to any competent authority; (c) for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere; and (d) for the purposes of assisting any public or other authority for the time being designated for the purposes of this paragraph by an order made by the Secretary of State to discharge any functions which are specified in the order.'

h

j Subsection (6) deals with who are competent authorities for the purposes of sub-s (5)(b). They include for example, an inspector appointed under Pt XIV of the Companies Act 1985, an Official Receiver and others charged with duties to investigate and regulate.

[5] So, in the present case, the Director of the SFO had express statutory powers to disclose the information obtained from KP to a government department. However any exercise of that power had to take into consideration the requirements of art 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). KP and the two individuals named in the four relevant

warrants enjoyed a right to respect for their correspondence, and art 8(2) provides:

'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.'

AFTER NOVEMBER 2002

[6] The Counter Fraud Service of the NHS had itself obtained evidence to suggest that anti-competitive arrangements in respect of warfarin had been put in place by pharmaceutical companies to take effect from January 1997 onwards, and the Secretary of State for Health was therefore anxious to start civil proceedings before it could be said that part of the claim was statute-barred. That was why on 20 December 2002 civil proceedings were commenced in relation to warfarin against three groups of companies. They did not include KP because at that stage the Secretary of State did not have sufficient evidence to justify joining KP as a defendant. The Secretary of State also sought from the SFO urgent disclosure of any warfarin-related documents obtained when the warrants had been executed in April 2002. On 13 January 2003 the SFO wrote to KP's solicitors saying:

'The Department of Health commenced proceedings in relation to some of the searchees in December 2002 in relation to warfarin and an urgent requirement for access to warfarin related documents has arisen. Immediate steps have been taken as a result of which we expect to send this week to the relevant parties copies of the warfarin documents which we have been able to identify.'

What was contemplated was, of course, an exercise of the power granted to certain members of the SFO by s 3(5)(a) of the 1987 Act, and on 16 January 2003 the SFO wrote a further letter to KP's solicitors saying:

'I can inform you that the Director received a request from the Department of Health that she exercise her discretion under section 3(5) Criminal Justice Act 1987 to provide disclosure of documents obtained on the searches. That request was carefully considered and the Director has exercised her discretion under section 3(5). Accordingly on 14th January 2003 copies of the enclosed documents obtained from your client's premises in April 2002 were supplied to the Department of Health.'

So KP was told precisely what had been disclosed, but they had been given only a minimal amount of time in which to consider the proposed disclosure and to take any steps to try to prevent it.

[7] Disclosure of the documentation enabled the Secretary of State to give further particulars in the proceedings already commenced, and to commence fresh proceedings on 11 February 2003 involving KP.



a [8] On 4 April 2003 KP commenced these proceedings in which they challenge the director's decision of 14 January 2003 to disclose to the Secretary of State documents seized from KP.

b [9] On 14 August 2003 the SFO disclosed six thousand more documents to the Secretary of State, and there are separate proceedings for judicial review in relation to that disclosure of which some warning was given to KP's solicitors in a letter, written to them by the Secretary of State on 22 July 2003.

#### IN THE DIVISIONAL COURT

c [10] In the Divisional Court the first ground on which relief was sought was that some of the documents disclosed in January 2003 had been unlawfully seized in April 2002. That ground failed, and it is not pursued in this court.

[11] The next unsuccessful ground was that the disclosure was not, for the purposes of art 8(2) 'in accordance with law', and Mr Stuart Isaacs QC for KP has renewed that submission before us.

d [12] Ground 3 in the Divisional Court was that in January 2003 the SFO acted unfairly by not allowing time for representations prior to disclosure. That submission was upheld by the Divisional Court, but it did not lead to the granting of any relief. The court was, in the words of Maurice Kay J 'wholly unconvinced that Kent Pharmaceuticals could have made any meaningful representations had they had an opportunity to do so'.

e [13] There was also a fourth ground argued in the Divisional Court, namely that after the SFO has made a disclosure to a government department or other authorised recipient under s 3(5) it is obliged to inform the owner of the disclosed information. I have some difficulty in understanding how that could be said to arise in relation to the January 2003 disclosure because KP was told promptly what had been disclosed, but as to the fourth ground Maurice Kay J, giving the judgment of the court, said (at [36]):

f 'On the facts of the present case, if (as we have held) it was incumbent upon the SFO to give KP advance notice of the intended disclosure to [the Department of Health], with a reasonable time allowed for KP to make representations or (if so advised) to apply to the court, it follows that, in the absence of such advance notice, it is incumbent upon the SFO to give notice  
g as soon as possible after the disclosure for the same purposes.'

As I have already indicated, no relief was granted.

#### g GROUNDS OF APPEAL

h [14] Before us Mr Isaacs submits that the Divisional Court was wrong to hold that the Director's exercise of her discretion under s 3(5)(a) of the 1987 Act to disclose documents on 14 January 2003 was in accordance with law as required by art 8(2) of the convention. Unless that is substantiated KP cannot obtain any relief, because there is no challenge to the conclusion reached by the Divisional  
j Court in relation to relief if its conclusions in relation to the four grounds are allowed to stand.

[15] Nevertheless Mr David Perry, for the SFO and for the Secretary of State for the Home Department, and Mr Philip Jones for the Secretary of State for Health, submit that the Divisional Court reached the wrong conclusions in relation to grounds 3 and 4 as to the need for notice, and as to whether the SFO did act unfairly in this case. An appropriate respondent's notice has been served.

## IN ACCORDANCE WITH LAW

[16] Mr Isaacs drew our attention to the decision of the European Court of Human Rights in *Sunday Times v UK* (1979) 2 EHRR 245 at 270, 271 (paras 47, 49). The court made it clear that ‘prescribed by law’, (which for present purposes, is the same as ‘in accordance with law’) covers not only statute but also unwritten law. Then para 49 states:

‘In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.’

Mr Isaacs submits that the wording of s 3(5)(a) of the 1987 Act does not meet the requirements of precision. It does not enable the individual—

‘(1) To know how or in what circumstances the discretion may be exercised by the SFO;

(2) To know for what purpose or purposes the government department may use the information disclosed; and

(3) It imposes no restrictions on the disclosure or the use that may be made of the documents and provides no safeguards thereto.’

[17] As an example of how the Court of Human Rights applies the principles set out in the *Sunday Times* case Mr Isaacs drew our attention to *Domenichini v Italy* (2001) 32 EHRR 68 which was concerned with an Italian law which permitted censorship of a prisoner’s correspondence when that course was ordered by a judge. The court said (at 82 (para 32)):

‘The Court reiterates that while a law which confers a discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, and the likely outcome of any search for certainty would be excessive rigidity. In this instance, however, Law No. 354 leaves the authorities too much latitude. In particular, it goes no further than identifying the category of persons whose correspondence may be censored and the competent court, without saying anything about the length of the measure or the reasons that may warrant it.’

Mr Isaacs submitted that the present case is stronger than *Domenichini*’s case because in that case the discretion was exercised by a judge who could be expected to give reasons, but of course knowing who takes the decision and that he will give reasons does not assist the affected individual to know in advance what the decision will be, and that was what was at the heart of the *Sunday Times*

a decision. So the law needs to be formulated with sufficient precision to enable the citizen to regulate his conduct. In *Domenichini* there does not seem to have been any formulation at all, and certainly, for example, there was no provision to exclude from censorship correspondence with lawyers.

b [18] Mr Perry submits that persons in the position of KP can know how the power granted to the SFO by s 3(5)(a) will be exercised. It is not an unfettered discretion, as can be seen from the statutory provisions which (1) limit those by whom it may be exercised. It must be a person designated by the Director for the purposes of the subsection; (2) preserve obligations of secrecy imposed by statute or agreed to by the Director; and (3) restrict those to whom disclosure can be made. The identification of the bodies makes it clear that in almost every case disclosure will be sought or granted to assist in an investigation or a prosecution, but it may, as in this case, be sought for some allied purpose, which falls within the range of activities properly undertaken by a government department. It would not, Mr Perry submits, be practicable in legislation to spell out such purposes because they are so many and varied, but it is noteworthy that the nominated representative of the SFO is not required to disclose. He is granted a discretion, to be exercised having regard to the purpose for which disclosure is sought, the policy and objects of the 1987 Act (cf *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 at 699, [1968] AC 997 at 1030) and the way in which access to the documents has been obtained. So, as it seems to me, the representative would refuse to disclose if disclosure were sought simply to give the requesting government department a commercial advantage when negotiating with a third party, but that is not this case.

g [19] There are decisions of the Court of Human Rights which at first sight seem to require legislation permitting infringement of the rights enshrined in art 8 to be tightly worded. In *Klass v Germany* (1978) 2 EHRR 214 at 232–233 (para 50) the court said: ‘The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse.’ In *Herczegfalvy v Austria* (1992) 18 BMLR 48, 15 EHRR 437 one of the complaints of a psychiatric patient related to interference with his correspondence, and the Court of Human Rights said ((1992) 18 BMLR 48 at 68–69 (para 91)):

h ‘These very vaguely worded provisions do not specify the scope or conditions of exercise of the discretionary power which was at the origin of the measures complained of. But such specifications appear all the more necessary in the field of detention in psychiatric institutions in that the persons concerned are frequently at the mercy of the medical authorities, so that their correspondence is their only contact with the outside world. Admittedly, as the court has previously stated, it would scarcely be possible to formulate a law to cover every eventuality ... For all that, in the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review, the above provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society. According to the information provided to the court, there has been no case law to remedy this state of affairs. There has therefore been a violation of art 8 of the Convention.’

The decision was obviously related to its own facts, but the reasoning indicates what the court considered that the domestic legislation could try to achieve. Then, in *Valenzuela Contreras v Spain* (1998) 28 EHRR 483, which concerned the monitoring of a telephone line, the court (at 503 (para 46)), spelled out the sort of safeguards required in domestic law. But, as Mr Perry submitted, interceptions of telephone communications are rather a special case, in relation to which the Court of Human Rights has called for a degree of precision of permissive legislation not encountered elsewhere, and in *Chorherr v Austria* (1993) 17 EHRR 358 at 375 (para 26) the court said:

‘... the level of precision required of the domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument considered, the field it is designed to cover and the number and status of those to whom it is addressed.’

[20] Mr Perry submits that any attempt to give further guidance in s 3(5)(a) as to the circumstances in which the discretion to make further disclosure may be exercised would introduce undesirable rigidity. I agree. It must always be exercised reasonably, and in good faith, and decisions of the Court of Human Rights such as *Z v Finland* (1997) 45 BMLR 107 and *MS v Sweden* (1997) 3 BHRC 248, both of which dealt with disclosure of medical records, show that the Court of Human Rights recognises the need for provisions sanctioning disclosure often to be worded in wide terms, even when dealing with material as sensitive as medical records.

[21] As was pointed out in the Divisional Court, if the person affected learns of the disclosure he can challenge it in proceedings for judicial review on traditional public law grounds, and he may also be able to raise the issue of proportionality. If the material is used against him in criminal or civil proceedings he may also be able to challenge its use in the context of those proceedings, so if there is disclosure when there should not have been he will not normally be without redress. In the context of the present case disclosure was clearly appropriate, and Mr Isaacs does not argue otherwise. However restrictively s 3(5)(a) might be worded it would clearly allow the nominated representative of the SFO to disclose to a government department to assist that department to prosecute a civil action seeking to recover losses allegedly caused by the fraud under investigation.

[22] So, in my judgment, the Divisional Court was right to conclude that the decision to disclose made on 14 January 2003 cannot be impugned on the basis that it was not made in accordance with law, and I would therefore dismiss KP’s appeal.

#### FAIRNESS

[23] I turn now to the respondent’s notice. The statute does not require the SFO or anyone else to inform the owner of documents seized by the SFO that their documents are about to be or have been further disclosed, and Mr Perry submits that the omission is deliberate because informing the owner should be the exception rather than the rule. Mr Jones even went so far as to submit that the owner should never be informed.

[24] The Divisional Court when dealing with this issue referred to three decisions: *Woolgar v Chief Constable of Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, *R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310,



- a sub nom *R v Chief Constable of the North Wales Police, ex p Thorpe* [1999] QB 396 and *Marcel v Comr of Police of the Metropolis* [1992] 1 All ER 72, [1992] Ch 225.

[25] In *Marcel's* case a subpoena duces tecum had been issued requiring the production by the police for use in civil proceedings of documents seized during a criminal investigation, and the court clearly envisaged the owner of the documents being informed and given the opportunity to intervene. Dillon LJ said ([1992] 1 All ER 72 at 83, [1992] Ch 225 at 259):

c 'Even where a subpoena has been served the police should not disclose seized documents to the advisers of a party to civil proceedings in advance of the attendance at court required by the subpoena unless at the least the police have first given to the true owner of the documents notice of the service of the subpoena and of the wish of the police to produce the documents in advance of the attendance at court required by the subpoena and have given the true owner a reasonable opportunity to state his objections, if any, to that course.'

d Nolan LJ and Sir Christopher Slade both expressly agreed, and that was applied to the Director of the SFO by Nicholls V-C in *Morris v Director of Serious Fraud Office* [1993] 1 All ER 788, [1993] Ch 372, but not in relation to disclosure pursuant to s 3(5)(a). The disclosure was sought under s 236 of the Insolvency Act 1986.

e [26] In *Dood v Secretary of State for the Home Dept* [1993] 3 All ER 92, [1994] 1 AC 531 the House of Lords was considering what a prisoner sentenced to a life sentence should be told about the judicial view as to the appropriate tariff, and the reasons of the Secretary of State for the tariff chosen. Lord Mustill said ([1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560):

f 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following.

g (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account

h in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf

j either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'

*Ex p AB* concerned the disclosure by the police to a caravan site owner of the paedophile convictions of offenders who had served their sentences. Lord Woolf MR said ([1998] 3 All ER 310 at 320, [1999] QB 396 at 428):

‘Disclosure should only be made when there is a pressing need for that disclosure. Before reaching their decision as to whether to disclose the police require as much information as can reasonably practicably be obtained in the circumstances. In the majority of the situations which can be anticipated, it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk.’

So disclosure to the person affected was clearly envisaged, and Lord Woolf MR continued: ‘The applicants might have had information which would have caused the sergeant to re-assess the degree of risk.’

[27] In *Woolgar’s* case the police had obtained a statement from a nurse when investigating a death at a nursing home, and wanted to pass that statement to her professional regulatory body. I said ([1999] 3 All ER 604 at 615, [2000] 1 WLR 25 at 36):

‘... where a regulatory body such as the [United Kingdom Central Council for Nursing, Midwifery and Health Visiting], operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of an inquiry being conducted by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that save in so far as may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material will be maintained.’

Mr Perry does not take issue with that line of authority, but he submits that it does not apply where, as in the present case, there is a statute dealing directly with disclosure and providing its own statutory gateway. In such a situation he submits that the starting point should be *Wiseman v Borneman* [1969] 3 All ER 275, [1971] AC 297, which concerned a taxpayer’s application to be heard by a tribunal. Lord Reid said ([1969] 3 All ER 275 at 277, [1971] AC 297 at 308):

‘Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.’

In the present case Mr Perry, supported by Mr Jones, submits that it is far from clear that the statutory procedure is insufficient to achieve justice, and that to require additional steps might well frustrate the apparent purpose of the legislation. He invited our attention to the decision of the Court of Appeal, Criminal Division in *R v Brady* [2004] EWCA Crim 1763, [2004] 3 All ER 520 where it was held to be unobjectionable for one prosecuting authority to pass to

a another such authority information which it had obtained by the use of compulsory powers without notice to the person who has provided the material. Tuckey LJ said (at [27]):

b 'It is self-evidently in the public interest that the appropriate prosecuting authority should have such material to aid its investigation which might well be considerably hampered by any requirement to obtain court approval or to give notice to the person who had provided the material.'

c That, as it seems to me, illustrates what is common ground, namely that the Director of the SFO should decide on a case-by-case basis, whether or not to advise the owner of documents which have been seized by SFO that the SFO proposes to disclose some or all of the documents pursuant to s 3(5)(a) of the 1987 Act. In some cases it will be inappropriate to say anything to the owner of the documents because they are simply being passed to another investigating or prosecuting authority, or are required for investigation which may be hampered if the owner knows that the documents have been further disclosed. But in other cases, like the present, nothing will be lost by telling the owner of the documents d (and in this case we are not concerned with anyone else) what is happening to his confidential material. It may be that he will want to raise some objection. For example, he might want to have one or two documents containing commercially sensitive information retained by the SFO on the basis that they can be of no interest to the proposed recipient but could cause serious damage to the document owner's legitimate business if they fell into the hands of competitors. e So I would expect the SFO in normal circumstances to give notice of impending disclosure in sufficient time to enable the document owner to raise an objection of that kind. But that is not to say that the SFO should allow itself to become drawn into satellite litigation.

f [28] During the course of the submissions made to us we were reminded of the volume of material likely to be involved, and I am conscious of that. In his skeleton argument Mr Perry submitted that: 'the legitimate aim served by the disclosure regime would be severely undermined if consideration had to be given in every case to whether or not disclosure should be on notice.' But in any given case the SFO would have come into possession of the material as a result of the execution of a warrant, so it must be presumed to be already satisfied that all of the material falls within the terms of the warrant, and if the designated member g of the SFO is to exercise properly the discretion entrusted to him by s 3(5)(a) he must have some knowledge of what he is deciding to disclose, and of the purpose for which it is required.

h [29]. In some cases it may not be appropriate or practicable to give notice of proposed disclosure either at all or in time to enable the owner of the documents to have an opportunity to respond. The documents may be urgently required elsewhere, or it may appear that disclosure would hamper investigations. In such a case the designated member of the SFO would not, in my judgment, be acting unfairly if he decided to go ahead without giving the sort of notice which in other j circumstances would be required. But, having disclosed the documents, he would then have to consider whether the owner of the documents should be told what had taken place. It may be that he should not be told in order to protect ongoing investigations, but in my judgment the starting point should always be that the owner of the documents is entitled to be kept informed rather than the reverse. That is what, as it seems to me, fairness demands, not only because the documents are his, subject to his right to confidentiality save in so far as his rights

have been curtailed by statute, but also because he cannot exercise his remaining rights in any way unless he knows what is going on. If the matter is approached in the right way it may be that in most cases, for good reason, no notice will be given. That seems to me to be immaterial. What is important is to recognise the approach that fairness demands.

[30] Mr Isaacs sought further support for his submissions in relation to the need for notice by drawing our attention to art 6 of the convention, which, amongst other things, guarantees the rights of access to the court. He submits, with some force, that the document owner cannot seek the assistance of the courts to challenge impending or recent disclosure if he knows nothing of it, so keeping him in ignorance curtails his right and that curtailment needs to be justified.

[31] In *Golder v UK* (1975) 1 EHRR 524 a prisoner was refused access to a solicitor whom he wanted to consult about the possibility of bringing libel proceedings against a prison officer whom he was alleged to have assaulted, after the allegation of assault had been abandoned. The court said (at 535 (para 25)) that one of the two questions which it had to consider was:

'Is Article 6(1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?'

The court concluded (at 536 (para 36)) that the right of access constitutes an element which is inherent in the right stated by art 6(1), and that the refusal of access to a solicitor was a breach of that right.

[32] In *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 the applicants were Catholics in the construction industry in Northern Ireland complaining to a tribunal of unfair discrimination in the awarding of contracts, but the presentation of their case was hampered because the Secretary of State had certified that contracts had not been awarded to them on security grounds, and the High Court felt unable to investigate the justification for the certificate. The Court of Human Rights accepted (at 415 (para 72)) that the right of access to the courts is not absolute. It may be subject to limitations, as to which states enjoy a margin of appreciation, but in the end the Court of Human Rights must be satisfied that the limitations—

'do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ...'

In the *Tinnelly* case the issue of the certificates was held to constitute a disproportionate response to the applicants' rights of access to a court or tribunal.

[33] Mr Perry submits that *Golder* and *Tinnelly* can be distinguished because they were concerned with persons who wanted to commence or had commenced actions to have their civil rights and obligations determined, whereas KP is seeking to establish a prior right, outside the ambit of art 6, namely a right to be notified of facts which might lead them to decide that there is a dispute which they want to bring before the court. In *H v Belgium* (1987) 10 EHRR



a 339 the Court of Human Rights was concerned with the procedure for restoration to the roll of avocats in Belgium, and (at 346 (para 40)) it was said that:

‘Article 6(1) extends only to “*contestations*” (disputes) over (civil) “rights and obligations” which can be said, at least on arguable grounds, to be recognised under domestic law ...’

b [34] In *MS v Sweden* (1997) 3 BHRC 248 at 257–258 (paras 49–50) it was held that a right to prevent a communication of medical data could not on arguable grounds be said to be recognised under international law, so art 6(1) was not applicable.

c [35] If I am right as to what fairness requires under domestic law then Mr Isaacs does not need to resort to art 6(1) and at this stage I would prefer to leave open the question of whether he is entitled to do so.

d [36] Turning to the particular facts of this case I am not persuaded that when the matter is considered in the round the SFO did act unfairly. Admittedly KP was given very little notice of the SFO’s intention to disclose copies of warfarin documents to the Secretary of State for Health, but there was some explanation for that. Although the documents had been seized in April 2002 the final decision about the legality of that seizure was not made until 22 November 2002, and it seems to have been only thereafter that the Secretary of State for Health began to press the SFO to disclose. I do not regard the explanation for giving late notification as adequate, but the disclosure was followed almost immediately by full notification of what had been done, and the circumstances were such that the SFO could not have envisaged any meaningful objection being raised to what had been done. If KP had wanted to seek to restrain the Secretary of State for Health from using the documents they had an opportunity to do so, and, as the Divisional Court found, the reality is that KP could not and cannot prove damage of any kind.

#### CONCLUSION

g [37] For those reasons, which differ to some extent from the reasoning of the Divisional Court, I would dismiss the appeal and uphold the orders made by that court. I have not referred to the circumstances of the August disclosure, because that disclosure is not an issue in these proceedings, and having found no contravention of art 8 of the convention I have not found it necessary to explore the question of possible remedies had a contravention been proved.

#### CHADWICK LJ.

h [38] I agree that this appeal should be dismissed. For the reasons given by Kennedy LJ it cannot be said that the disclosure of documents under the power conferred by s 3(5)(a) of the Criminal Justice Act 1987 was not ‘in accordance with law’ for the purposes of art 8(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

j [39] That is sufficient to dispose of the appeal. But, as Kennedy LJ has pointed out, the Divisional Court upheld the applicant’s contention (under ground 3 of the challenge which was before it) that the Serious Fraud Office (the SFO) did not act fairly in making disclosure on 14 January 2003 without giving the applicant a reasonable opportunity to make representations in response to its letter of 13 January 2003 (in which notice of intention to disclose was first given). By a

respondent's notice the Director sought to upset that finding. In particular, she sought to persuade this court to hold (i) that there was no requirement to give notice of intention to disclose in this case and (ii) that, in the events which happened, the SFO did not act unfairly. The Secretary of State for Health, as an interested party, has gone further, in submitting that there can never be a requirement to give notice of intention to disclose under the power in s 3(5) of the 1987 Act.

[40] Kennedy LJ has rejected the submission that there can never be a requirement to give notice of intention to disclose. I agree with his analysis of the authorities, and with his conclusion. Like him, I would hold that, unless there is good reason not to do so in the particular case, the person from whom documents have been seized under the powers conferred by the 1987 Act (and, if seized from some person other than the owner, the owner of the documents) ought to be told if and when the SFO determines that it will exercise the power to disclose those documents to others. I would hold, also, that—in the circumstances of the present case—it is not open to the SFO to contend that there was some good reason not to give notice of intention to disclose. Notice was given, before disclosure, on 13 January 2003. The letter of that date, the relevant passage of which has been set out by Kennedy LJ in his judgment, is itself an answer to any such contention.

[41] The unfairness in the present case was identified by the Divisional Court ([2003] EWHC 3002 (Admin), [2003] All ER (D) 298 (Dec):

'[28] ... [Counsel] submits that fairness required the SFO to give KP the opportunity to make representations on the proposed disclosure and to give sufficient time for this to happen. If he is right, it is clear that, whilst the SFO forewarned KP of the request of the Department of Health for disclosure by a letter dated 13 January 2003 and indicated that it expected to send the warfarin documents to the Department of Health by the end of the week, in fact the disclosure was made on the very next day, 14 January. If there is a duty to allow a reasonable time for representations, it was not complied with in January ...

[32] We do not doubt that ... in some cases the desirability of informing an interested party so as to permit representations may be overridden by other factors. However, we are not persuaded that there were any such ... factors in the present case in January ... To that extent, we are satisfied that the SFO did not act fairly ...'

[42] Kennedy LJ has differed from the Divisional Court on that point. He has taken the view that, when considered in the round, the SFO did not act unfairly. I find myself unable to agree. The purpose of the letter of 13 January 2003 (which was a Monday) was to put the addressee on notice that the SFO was expecting to make disclosure of warfarin-related documents to the Department of Health 'by the end of the week'. The applicant was entitled to think that it had a few days to make representations or to seek an injunction. To pre-empt such representations, or an application for injunctive relief, by making disclosure on the following day—in the absence of some compelling reason why that had to be done—seems to me unfair. And, to my mind, it is no answer to that charge of unfairness to say that the SFO could not have envisaged any meaningful objection to disclosure being raised. As Kennedy LJ has pointed out, in an earlier passage of his judgment, it is just because the person making the disclosure may

*a* not have the information which would enable him to identify, and so to consider, an objection to disclosure, that an opportunity to make representations ought, normally, to be given.

*b* [43] I should make it clear, however, that the failure to give a proper opportunity to make representations in response to the letter of 13 January 2003 did not prejudice the applicant. This is because, in the events which happened, had the applicant wanted to restrain the Secretary of State for Health from using the documents, it had an opportunity to do so (which it did not take); and, as the Divisional Court found, the absence of any proper opportunity to make representations to the SFO has not been the cause of any damage to which the applicant can point.

*c* **DYSON LJ.**

[44] I agree that the appeal should be dismissed for the reasons given by Kennedy LJ. I also agree with his analysis of the fairness issue raised by the respondent's notice. But for the reasons given by the Divisional Court and Chadwick LJ, I consider that the Serious Fraud Office did act unfairly on the facts of this case.

*d*

*Appeal dismissed.*

Dilys Tausz Barrister.

# Fattal and another v Keepers and Governors of the Free Grammar School of John Lyon

[2004] EWCA Civ 1530

COURT OF APPEAL, CIVIL DIVISION

BUXTON, SEDLEY LJ AND SIR MARTIN NOURSE

27 OCTOBER, 30 NOVEMBER 2004

*Landlord and tenant – Leasehold enfranchisement – Valuation – Improvement – Statutory assumption requiring comparison between value of property in improved state and value if never improved – Whether assumption requiring value of potential for improvement to be excluded from valuation of unimproved house – Leasehold Reform Act 1967, s 9(1A)(d).*

The appellants were tenants, under two leases, of a property of which the respondent landlords were the freehold owners. Under each of the leases, the tenants were permitted to carry out improvements to the property with the landlords' consent, not to be unreasonably withheld. The tenants carried out extensive works of improvement to the property, and subsequently served notice under the Leasehold Reform Act 1967 of their desire to acquire the freehold. Under s 9(1A)<sup>a</sup> of the 1967 Act, the price payable was the amount which, at the valuation date, the house and premises, if sold in the open market by a willing seller, might be expected to realise on various assumptions. They included, at para (d), the assumption 'that the price be diminished' by the extent to which the value of the house and premises had been increased by any improvement carried out by the tenant or his predecessors in title at their own expense. In the course of proceedings to determine the price payable for the freehold, the tenants contended that development potential, including the planning permissions which had enabled the works of improvement to be carried out, had to be left out of account in valuing the property. That contention was rejected by the Lands Tribunal which also held, contrary to the tenants' submission, that the words 'that the price be diminished' in para (d) did not require the valuer, when determining the unimproved value of the property, to start with its value as improved, and then diminish it by the value of the improvements. On the tenants' appeal, the parties accepted that a comparison had to be made as at the valuation date between the value of the property in its improved state and the value it would have had if it had not been improved. The Court of Appeal was required, however, to determine: (i) whether assumption (d) required the value of the potential for improvement to be excluded from the valuation of the unimproved house; (ii) whether the tribunal had erred in valuing the property as if it had never been improved at all; and (iii) if the tribunal had been entitled to assume for valuation purposes that the improvements had never been carried out, whether it should also have assumed that the planning permissions which enabled them to be carried out had never been obtained.

<sup>a</sup> Section 9, so far as material, is set out at [8], below



- a** **Held** – Assumption (d) in s 9(1A) of the 1967 Act did not require the value of the potential for improvement to be excluded from the valuation of the unimproved house. It required a calculation of the amount of the increase in value caused by the improvements. That necessarily involved a valuation of the property as it would have been on the valuation date if it had not been improved. Any potential for improvement would be included in the achieved sale prices of unimproved properties. In other words, the valuation of an unimproved house and premises would include the value of any such potential. It followed that an increase in value caused by an actual improvement had to be calculated as an excess over the unimproved valuation including the value of the potential for improvement, notwithstanding that the potential was merged in or absorbed by the actual improvement. The correct comparison, therefore, was not between the value of the improved property and the value of the unimproved property, but between the value of the improved property and the value of the unimproved property with the potential to improve it. Moreover, assumption (d) simply required the price be diminished by the extent stated. It did not impose any requirement that the house and premises were to be valued either from the top down or the bottom up. The method adopted was a matter of valuation, not of law. Finally, since it was clear that an improvement was a physical concept, it was the increase in value caused by the physical works which had to be subtracted. The existence or availability of planning permission was not part of those works. Accordingly, the appeal would be dismissed (see [10], [12], [13], [18]–[22], below).

- c** *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975 considered.

### Notes

For calculation of price payable for the freehold on enfranchisement, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1297.

- f** For the Leasehold Reform Act 1967, s 9, see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 267.

### Cases referred to in judgment

- Norfolk v Masters, Fellows and Scholars of Trinity College, Cambridge* (1976) 32 P & CR 147.
- g** *Railstore Ltd v Playdale Ltd* [1988] 2 EGLR 153, Ch D.
- Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] UKHL 32, [2003] 3 All ER 975, [2004] 1 AC 802, [2003] 3 WLR 1.

### Cases referred to in skeleton arguments

- h** *Co-operative Wholesale Society Ltd v National Westminster Bank plc, Scottish Amicable Life Assurance Society v Middleton Potts & Co, Broadgate Square plc v Lehman Brothers Ltd, Prudential Nominees Ltd v Greenham Trading Ltd* [1995] 1 EGLR 97, CA.
- GREA Real Property Investments Ltd v Williams* [1979] 1 EGLR 121.
- j** *Sharp v Cadogan* (1998, unreported), Lands Trib.

### Appeal

William Simon Fattal and Francine Fattal, the tenants of a house and premises at 81 Hamilton Terrace, London NW8, appealed with permission of the Court of Appeal (Peter Gibson LJ and Sir Martin Nourse) granted on 18 March 2004 from

the decision of the Lands Tribunal (P R Francis FRICS) on 14 January 2004 determining, on an appeal by the Mr and Mrs Fattal from the decision of the London Leasehold Valuation Tribunal on 12 February 2002, that £1,941,655 was the price payable by them to the respondent landlords, the Keepers and Governors of the Free Grammar School of John Lyon, for the acquisition of the freehold under the Leasehold Reform Act 1967. The facts are set out in the judgment of Sir Martin Nourse.

*Michael Driscoll QC and Edwin Johnson* (instructed by *Julian Holy*) for the Fattals.  
*Jonathan Gaunt QC and Anthony Radevsky* (instructed by *Pemberton Greenish*) for the landlords.

*Cur adv vult*

30 November 2004. The following judgments were delivered.

### SIR MARTIN NOURSE.

[1] This appeal raises questions of construction on s 9(1A)(d) of the Leasehold Reform Act 1967 (the 1967 Act), a provision recently considered by the House of Lords, though in relation to a different question, in *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] UKHL 32, [2003] 3 All ER 975, [2004] 1 AC 802.

[2] The present case, like *Shalson's* case, is concerned with a house and premises in Hamilton Terrace, London NW8, in this case number 81 (the property), of which the respondents (the landlords) are the freehold owners. The enfranchisement price payable by the tenants, Mr and Mrs Fattal, for the freehold interest in the property was determined by a decision of the Lands Tribunal (Mr PR Francis FRICS) dated 14 January 2004, on an appeal by Mr and Mrs Fattal against a decision of the London Leasehold Valuation Tribunal (the LVT) dated 12 February 2002. With the permission of this court, Mr and Mrs Fattal appeal against the decision of the Lands Tribunal.

[3] Mr and Mrs Fattal are tenants under two leases executed in 1927 and 1928 respectively, each for a different part of the property and each for a term of 80 years expiring on 28 September 2007, at fixed annual ground rents of £50 and £5 respectively. Nothing turns on the fact that there are two leases and not one. Under each of them the tenants are permitted to carry out improvements to the property with the landlords' consent, not to be unreasonably withheld.

[4] In 1927 the property comprised a gross internal area of 3,834 square feet. At that time it was a four-bedroom house with no bathroom or garage and only basic services. Between 1927 and 1993 various extensions and improvements were effected and made by the tenants for the time being, but they were, for the most part, demolished and removed in order to carry out the far more extensive works carried out by Mr and Mrs Fattal after they had acquired the leases in January 1993. Those works comprised the addition of, first, a new second floor over the original house, secondly, an extension on lower ground, upper ground and first floors, thirdly, a swimming pool complex linked to the main house and, fourthly, two garages (one on each side of the main house) and an in-and-out forecourt. By 2002 the property had seven bedrooms and seven bathrooms with a gross internal area of 7,041 square feet, or 9,192 square feet including the swimming pool complex and the adjacent linking covered way.

a [5] Mr and Mrs Fattal did not begin to occupy the property as their residence until May 1997. On 31 August 2000 (the valuation date) they duly served notice under Pt 1 of the 1967 Act of their desire to have the freehold. The effect of the notice was to give rise to a statutory contract for the purchase of the freehold, subject to the leases, at a price to be agreed or, in default, determined by the LVT as at the valuation date.

b [6] The parties having been unable to agree the price, the matter was referred to the LVT who determined it at £2,468,985. On Mr and Mrs Fattal's appeal to the Lands Tribunal the price was reduced by £527,330 to £1,941,655. Pursuant to r 50(4) of the Lands Tribunal Rules 1996, SI 1996/1022, which provides that, where an amount determined by the Lands Tribunal is dependent upon its decision on a point of law, it must ascertain and state in its decision any alternative amount which it would have determined if it had come to a different decision on the point of law, the member stated that, if he had accepted the first or second basis of valuation put forward by Mr and Mrs Fattal, he would have determined a price of £1,376,855, alternatively of £1,765,155, which would have resulted in a further reduction of £564,800, alternatively of £176,500. It is clear  
d from these figures that the appeal is of great importance to both sides.

[7] In his decision (para 116) the member said that Mr and Mrs Fattal's case raised two points of principle: first, whether development potential, including in particular the value of any planning permission, was to be left out of account in valuing the property; second, whether the value of the property should be  
e assessed by taking its improved value and then deducting the value of tenant's improvements.

[8] Subsection (1A) of s 9 was inserted into the 1967 Act by the Housing Act 1974. It applies to houses of higher rateable values and thus to the property. It provides that the price payable 'shall be the amount which at the [valuation date] the house and premises, if sold in the open market by a willing seller, might be  
f expected to realise' on six assumptions. The only two of them to which reference has been made in the present case are (a) and (d). Assumption (d), which it was correctly observed in argument is in reality a direction to valuers, is in these terms:

g '... on the assumption that the price be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense ...'

h [9] In *Shalson's* case [2003] 3 All ER 975, [2004] 1 AC 802 the question was whether the reconversion to a single undivided house of one which had previously been divided into five flats was an 'improvement' within assumption (d). It was held that it was. That was a different question from any that arises here. But both Lord Hoffmann and Lord Millett made general observations about the assumption. Lord Hoffmann said:

j '[19] ... What does it mean to say that the value of the house and premises has been increased by the improvement? In my opinion, it signifies a simple causal relationship: but for the improvement, the house and premises would have been worth less. The comparison is between the value of the house as it stands and what its value would have been if the improvement had not been made.'

[20] The hypothetical house envisaged by this comparison is in my opinion one which has all the features of the real house, including its history, save for one: that the improvement in question had not been made.'

Lord Millett said (at [40]):

'The "extent to which the value of the house and premises has been increased" by an improvement is simply the difference between the value of the property with the improvement in question and the value of the property without it.'

[10] On the basis of those observations each side accepts that a comparison must be made as at the valuation date between the value of the property in its improved state and the value it would have had if it had not been improved. The essential dispute is as to whether, in making the unimproved valuation, there should or should not be included an element for the potential to make improvements. The dispute can be illustrated by a hypothetical example put forward by Mr Driscoll QC on behalf of Mr and Mrs Fattal, in which the following assumptions are made: (A) the value of the improved property is £500,000; (B) the value of the unimproved property is £300,000; and (C) the value of the unimproved house with the potential to improve it is £350,000. The question is whether assumption (d) requires a comparison between (A) and (B), so that the diminution is £200,000, or between (A) and (C), so that it is £150,000. Mr Driscoll has argued for the former comparison and Mr Gaunt QC, on behalf of the landlords, for the latter.

[11] The Lands Tribunal held that the latter comparison was correct. In para 119 of his decision, in deciding the first point in favour of the landlords, the member said:

'In its assumed unimproved state the house would have had the potential for improvement, and any planning permissions which would have been granted for such improvements would fall to be taken into account. The fact that planning permission had already been granted is plainly relevant. I do not accept the appellants' argument that because the permissions had been implemented, they have to be ignored.'

On that basis he determined the unimproved freehold vacant possession value of the property to be £2.75m. After adjustments to take account of the 7.07 years of the terms which were still to run and adding in marriage value, he determined the price at £1,941,655. If he had decided the first point in favour of Mr and Mrs Fattal, the member would have determined the price at £1,376,855 (see [6], above).

[12] Does assumption (d) require the value of the potential for improvement to be excluded from the valuation of the unimproved house? That, without doubt, is a question of law. But if there is no such requirement, the matter becomes one of valuation according to the statutory assumption. For much of the argument I was of the provisional view that such a requirement ought to be implied. But on reflection I have come to the conclusion that there is no legitimate basis on which such an implication can be made.

[13] What assumption (d) requires is a calculation of the amount of the increase in value caused by the improvements. That necessarily involves a valuation of the property as it would have been on the valuation date if it had not been improved. Before the Lands Tribunal both valuers agreed that any potential



a for improvement would be included in the achieved sale prices of unimproved properties; in other words, that a valuation of an unimproved house and premises would include the value of any such potential. It follows that an increase in value caused by an actual improvement must be calculated as an excess over the unimproved valuation (including the value of the potential for improvement), notwithstanding that the potential is merged in or absorbed by the actual improvement. As the Lands Tribunal decided, the correct comparison is b between (A) and (C) in Mr Driscoll's example.

[14] In essence, Mr and Mrs Fattal's case on the first point, as advanced by Mr Driscoll, is that the policy behind the legislation is that, on exercising his statutory right to acquire the freehold of his own home, a tenant should not be required to pay a price for it which reflects the increase in its value attributable to c improvements that he himself has carried out and paid for out of his own pocket. That case has been supported in several different ways, including a reliance on assumption (a), which requires it to be assumed that the landlord is selling for an estate in fee simple, subject to the tenancy, with the potential for development being owned, so it is said, by the tenant, who cannot have been intended to pay d for something which is already his own or which at any rate has ceased to exist on the valuation date.

[15] While I have felt the force of Mr and Mrs Fattal's case, I do not think it is open to them on the true construction of assumption (d). That provision does not credit the tenant with the value of the relevant improvements, but only with the increase in value they have caused. That increase can only be calculated in e the manner already stated.

[16] It is important to understand how the potential for improvement was valued. Although Mr Gaunt thought that the methodology was perhaps unusual, the valuers were agreed that it should be valued as a percentage of the value of the improvements themselves. The landlords' valuer said it should be 40%, but f the Lands Tribunal accepted the view of Mr and Mrs Fattal's valuer that it should be 25%. In the result Mr and Mrs Fattal were credited with 75% of the value of the improvements.

[17] In his decision the member dealt with the second point as follows:

g '120. As to point 2, the argument was advanced by the appellants that the words "that the price be diminished" required the valuer to start with the value of the house as improved, and then diminish it by the value of those improvements. The appellants said that their arguments on valuation methodology in this context had not previously been tested before the Tribunal or the courts, and in response to the question as to why it had not been, it was submitted that it was the subject of development value, that had h only recently been included in enfranchisement valuations, that made it necessary for a precedent to be established. Just because a particular valuation practice had developed by convention over many years, the appellants said, did not make it right.

j 121. The suggestion that there was a statutory obligation restricting the valuer in his analysis to this basis, thus preventing him from considering unimproved comparables, is plainly wrong. What the valuer has to establish in order to apply the provision in (d) is "what its value would have been if the improvement had not been made" (see Lord Hoffmann in *Shalson's case* [2003] 3 All ER 975 at [19]). How that value is established is clearly a matter of valuation, and the valuer is not constrained by law to adopt a particular

method in doing so. Indeed both Mr Buchanan and Mr Briant [called by counsel to give valuation evidence] admitted they adopt either method (described in evidence as valuing from the top-down or from the bottom up) depending upon the circumstances, in enfranchisement valuations. a

122. It seems to me that the appellants are simply trying to force an interpretation of the wording of (d) that imposes a restriction on how a valuer arrives at the open market value of the house ...' b

[18] Mr Driscoll has submitted that the approach of the Lands Tribunal in valuing the property as if it had never been improved at all was erroneous. I reject that submission. Assumption (d) simply requires that the price be diminished by the extent stated. It does not impose any requirement that the house and premises shall be valued either from the top down or from the bottom up. The method adopted is a matter of valuation, not of law. Moreover, it appears that the method adopted here has been the standard method adopted by the Lands Tribunal ever since its decision in *Norfolk v Masters, Fellows and Scholars of Trinity College, Cambridge* (1976) 32 P & CR 147; see *Hague on Leasehold Enfranchisement* (4th edn, 2003) p 225 (para 9-31): c

'The manner in which the assumption is given effect is for the property to be valued (at all stages of the valuation—including the calculation of the marriage value) as if the improvements had not been made.' d

[19] On the footing that the Lands Tribunal's decision on the first point was, as I have held, correct, Mr Driscoll raised a third point. He submitted, in the alternative, that the Lands Tribunal ought to have assumed, not only that the improvements had never been carried out, but also that the planning permissions which enabled them to be carried out had never been obtained. Mr Driscoll said that the member had incorrectly treated this third point as part and parcel of the first. Assuming that it is indeed a separate point, I would reject it. It being clear (see *Shalson's case* [2003] 3 All ER 975 at [18], [2004] 1 AC 802) that an improvement is a physical concept, I agree with Mr Gaunt that it is the increase in value caused by the physical works which has to be subtracted; the existence or availability of planning permission is not part of those works. By way of confirmation of this view, Mr Gaunt relied on the decision of Knox J in *Railstore Ltd v Playdale Ltd* [1988] 2 EGLR 153, where it was held that a rent review clause containing a direction to disregard any effect on rent of any improvements carried out by the tenant did not require the arbitrator to disregard the existence of a planning permission for the buildings which the tenant had built and was occupying. e

[20] I would dismiss this appeal. f

**SEDLEY LJ.**

[21] I agree. g

**BUXTON LJ.**

[22] I also agree. h

*Appeal dismissed.*

Kate O'Hanlon Barrister. i

a R (on the application of Laporte) v Chief  
Constable of Gloucestershire Constabulary  
(Chief Constable of Thames Valley Police  
and Commissioner of Police of the  
b Metropolis, interested parties)

[2004] EWCA Civ 1639

COURT OF APPEAL, CIVIL DIVISION

c LORD WOOLF CJ, CLARKE AND RIX LJJ

14, 15 OCTOBER, 8 DECEMBER 2004

*Police – Powers – Power to stop, search and detain – Protestors – Protest demonstration at RAF base – Police stopping coaches en route to protest – Police forming opinion occupants of coaches likely to cause breach of the peace – Police escorting coaches back to departure point – Whether police entitled to take measures to prevent breach of the peace – Whether claimant’s enforced return on coach lawful.*

The claimant and others travelled from London to Gloucestershire by coach, intending to demonstrate against the war in Iraq at a Royal Air Force air base. After the demonstration had been authorised the police received information that hardline protesters were intent on being at the demonstration. Acting on further intelligence received, the police stopped, boarded and searched four vehicles, including the coach in which the claimant was travelling, at a lay-by some 5 km from the air base. They seized various items which were mainly protective or useful to conceal identity, but included a few capable of being used offensively. Nobody accepted responsibility for the items. The claimant refused to give her name and address when asked. The police concluded that the coach passengers were heading for the air base, and were likely to cause a breach of the peace. The coaches were returned to London with a police escort, which prevented them from stopping or leaving the motorway. The claimant applied for judicial review of the police action. The Divisional Court held that the decision of the police to prevent the passengers from proceeding to the air base had been lawful, but that the decision to enforce the return of the passengers to London had been unlawful. The defendant Chief Constable appealed and the claimant cross-appealed. The claimant contended, inter alia, (i) that the judge had applied the wrong test as to whether preventive action by the police had been justified; (ii) that the information available had not enabled the police to do more than reasonably conclude that some, but not all, of the passengers in the claimant’s coach were likely to be responsible for performing acts which would constitute a breach of the peace, and that there had to be a nexus between the perceived likely harm and the person against whom the preventive action was taken; and (iii) that there had been no basis for the police conclusion that action had to be taken in relation to the coaches so as to enable others to take part in a lawful and peaceful protest at the air base.

**Held** – (1) In determining whether action to prevent a breach of the peace was justified it was necessary to distinguish between arrest and preventive action short of arrest, including temporary detention. What was sufficiently imminent to justify

taking action to prevent a breach of the peace was dependent on all the circumstances. There was no conflict between the tests of 'real risk' or 'close proximity' and 'imminence'. Action should not be taken unless it was necessary and reasonable. In the instant case the alternatives had been either taking preventive action at the lay-by or waiting until the coaches had arrived at the air base at which the disturbance was feared. To have delayed taking action until the coach passengers had reached the air base could have provoked the very disturbance which the preventive action was intended to avoid (see [44]–[46], below); *Moss v McLachlan* [1985] IRLR 76 approved.

(2) The justification of the ability to take preventive action was based on a need to prevent the apprehended breach of the peace, and was not derived from the person against whom the action was taken having actually committed an offence. In some situations, preventing a breach of the peace would only be possible if action were taken which risked affecting a wholly innocent individual. In other situations, it would be possible to identify precisely which individuals were the likely troublemakers and when that was the position, the type of action taken would be determined by what was necessary to prevent the apprehended breach of the peace. In the instant case it was most unlikely that it would have been possible to identify passengers who would not have played a part in provoking a breach of the peace at the air base (see [48], below).

(3) There had been ample evidence to support the conclusion of the police that action had to be taken to prevent the coaches proceeding to the air base (see [49], below).

(4) The action taken by the police in returning the coaches to London with a police escort did not fall within the ambit of action reasonably taken to prevent a breach of the peace. Preventive action which was more limited in its impact upon the claimant and her fellow passengers could have been taken. The appeal and the cross-appeal would therefore be dismissed (see [53]–[56], below).

Decision of the Divisional Court [2004] 2 All ER 874 affirmed.

## Notes

For the common law power of arrest to deal with or prevent breaches of the peace, see 11(1) *Halsbury's Laws* (4th edn reissue) para 709.

## Cases referred to in judgment

*Albert v Lavin* [1981] 3 All ER 878, [1982] AC 546, [1981] 3 WLR 955, HL.

*Duncan v Jones* [1936] 1 KB 218, [1935] All ER Rep 710, DC.

*Moss v McLachlan* [1985] IRLR 76, DC.

*Piddington v Bates, Robson v Ribton-Turner* [1960] 3 All ER 660, [1961] 1 WLR 162, DC.

*R v Howell* [1981] 3 All ER 383, [1982] QB 416, [1981] 2 WLR 501, CA.

*R (on the application of Gillan) v Metropolitan Police Comr, R (on the application of Quinton) v Metropolitan Police Comr* [2004] EWCA Civ 1067, [2004] 3 WLR 1144.

*Redmond-Bate v DPP* (1999) 7 BHRC 375, DC.

## Cases referred to in skeleton arguments and written submissions

*Bibby v Chief Constable of Essex* (2000) 164 JP 297, CA.

*Brogan v UK* (1989) 11 EHRR 117, [1989] ECHR 11209/84, ECt HR.

*Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844, [2004] 04 LS Gaz R 31.

*Cyprus v Turkey* (1982) 4 EHRR 482, ECt HR.

*De Jong v Netherlands (No 1)* (1986) 8 EHRR 20, [1984] ECHR 8805/79, ECt HR.



- Djavit An v Turkey* [2003] ECHR 20652/92, ECt HR.
- a** *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, [2004] 1 WLR 945, DC.
- DPP v Morrison* [2003] EWHC 683 (Admin), [2003] Crim LR 727, DC.
- Engel v Netherlands (No 1)* (1976) 1 EHRR 706, [1976] ECHR 5100/71, ECt HR.
- Ezelin v France* (1992) 14 EHRR 362, [1991] ECHR 11800/85, ECt HR.
- b** *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705, CA.
- Fox v UK* (1991) 13 EHRR 157, [1990] ECHR 12244/86, ECt HR.
- Guzzardi v Italy* (1981) 3 EHRR 333, [1980] ECHR 7367/76, ECt HR.
- Hashman v UK* (2000) 8 BHRC 104, ECt HR.
- c** *King v Hodges* [1974] Crim LR 424, DC.
- Lawless v Ireland (No 3)* (1961) 1 EHRR 15, [1961] ECHR 332/57, ECt HR.
- Malone v UK* (1985) 7 EHRR 14, [1984] ECHR 8691/79, ECt HR.
- McGrogan v Chief Constable of Cleveland Police* [2002] EWCA Civ 86, [2002] 1 FLR 707.
- McLeod v Commissioner of Police of the Metropolis* [1994] 4 All ER 553, CA.
- d** *Nielsen v Denmark* (1989) 11 EHRR 175, [1989] ECHR 10929/84, ECt HR.
- R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.
- R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15, [2001] 2 AC 19, [2000] 3 WLR 843, HL.
- e** *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
- R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
- R v Spear, R v Boyd, R v Saunby* [2002] UKHL 31, [2002] 3 All ER 1074, [2003] 1 AC 734, [2002] 3 WLR 437.
- f** *Raimondo v Italy* (1994) 18 EHRR 237, ECt HR.
- Sporrong v Sweden* (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.
- Steel v UK* (1998) 5 BHRC 339, ECt HR.
- Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14.
- g** *Winterwerp v Netherlands* (1979) 2 EHRR 387, [1979] ECHR 6301/73, ECt HR.
- X v Federal Republic of Germany* (1981) 24 DR 158, E Com HR.
- Ziliberberg v Moldova* (4 May 2004, unreported), ECt HR.

## **h Appeal and cross-appeal**

- The defendant Chief Constable of Gloucestershire Constabulary appealed from the decision of the Divisional Court (May LJ and Harrison J) on 19 February 2004 ([2004] EWHC 253 (Admin), [2004] All ER 874) in proceedings for judicial review brought by claimant, Jane Laporte, making a declaration that the decision of the defendant's officer forcibly to return the claimant from Lechlade to London on 22 March 2003 was unlawful. The claimant cross-appealed against the refusal of the court to make a declaration that the decision of the defendant's officer to prevent the claimant from proceeding to Fairford on the same day was lawful. The Chief Constable of Thames Valley Police and the Commissioner of Police of the Metropolis appeared as interested parties. Written representations were made on behalf of Liberty. The facts are set out in the judgment of the court.
- j**

*Simon Freeland QC and Jeremy Johnson* (instructed by *Richard Cawdron*, Cheltenham) for the defendant.

*Michael Fordham* (instructed by *Bindman & Partners*) for the claimant.

*Edward Faulks QC and Simon Readhead* (instructed by *Guy Lemon*, Kidlington) for the Chief Constable of Thames Valley Police.

*John Beggs and Amy Street* (instructed by *David Hamilton*) for the Commissioner of Police of the Metropolis.

*Cur adv vult*

8 December 2004. The following judgment of the court was delivered.

## LORD WOOLF CJ.

### INTRODUCTION

[1] This judgment deals with an issue of importance. The issue relates to the ability of the police to take action to avoid a breakdown in law and order as a result of a demonstration. This still depends, at least in part, on the police's duty, which they share with members of the public, at common law to take action to prevent breaches of the peace. The limits on this common law power are by no means clear. This makes it difficult for the police to know what steps they can and cannot take, without unlawfully infringing the civil rights of individual members of the public, to avoid losing control of demonstrations with the consequential risk of causing personal injuries and damage to property.

[2] The appeal arises out of a decision of the Administrative Court (May LJ and Harrison J) given on 19 February 2004 ([2004] EWHC 253 (Admin), [2004] 2 All ER 874). That court had to decide whether police action in connection with a demonstration against the war in Iraq was lawful. The claimant was partly successful in the proceedings. The Chief Constable of the Gloucestershire Constabulary was the defendant. He appeals against the judgment in so far as the outcome was favourable to the claimant. The claimant cross-appeals against the judgment in so far as she was unsuccessful. Both parties were given permission to appeal by the court below because of the importance of the issues involved.

[3] There are also two interested parties, the Chief Constable of the Thames Valley Police and the Metropolitan Police Commissioner. Liberty sought permission to intervene by way of written submissions only and was granted permission to do so on 15 September 2004. The Chief Constable of the Thames Valley Police and the Metropolitan Police Commissioner were represented at the hearing of the appeal. We have taken into account the submissions made on behalf of the interested parties and the intervener in coming to our decision.

### THE FACTUAL BACKGROUND

[4] The facts are fully set out in the judgment of the court below. For the purposes of the appeal the following facts are relevant.

(a) Fairford is an air base near Cirencester. It was used heavily by the United States Air Force in the build-up to and early stages of the Iraq war. Its perimeter runs for approximately 13 miles, parts of which were not secure.

(b) Between 14 December 2002 and 22 March 2003, there were a number of demonstrations at Fairford against the war in Iraq. On 26 January, 1,500 protesters were present, and on 23 February, 500 were present. During the protests there were incursions onto the site resulting in numerous arrests, damage to the perimeter fence and runway lights, and £40,000 damage to vehicles. On 18 March,

a an individual was found hiding near the site with ingredients for a suspected incendiary device.

(c) On 15 February 2003, several groups advertised an intended protest demonstration at Fairford on 22 March 2003. One group that advertised was called 'Disobedience Against War'. On 20 February 2003, military action against Iraq began.

b (d) The staging of a lawful assembly at Fairford on 22 March 2003 was authorised by the police under ss 12 and 14 of the Public Order Act 1986. However, Gloucestershire Police subsequently received intelligence indicating that hardline protesters were intent on being present at that demonstration. They therefore prepared detailed plans which were intended to ensure that the protest would pass peacefully. There was a chain of command. Gold commander was the assistant chief constable with overall strategic control. Under him was the Silver commander, Chief Supt Lambert (Mr Lambert), who was responsible for tactical aspects of the operation, and under him Bronze command, being those police officers responsible for operational matters on the ground.

c (e) The police objectives were twofold: (a) preventing violence; and  
d (b) facilitating peaceful protest. Coachloads of protesters were expected from all over the country. The police plan involved escorting coaches to pre-determined drop-off points and allowing protesters to continue on foot to the prescribed route of the march. The police had circulated publicity about the arrangements warning that those who deviated from the arrangements risked arrest.

e (f) The Wombles are an activist group. Their acronym stands for White  
f Overall Movement Building Libertarian Effective Struggles. Members of the Wombles were present at Fairford on 23 February 2003 when there was serious disorder. The main gate of the base was forced open and there was a major incursion into the base. The Wombles have a website which states that they promote anarchist ideas. A message posted on their website on 11 March 2003, under the heading 'Smash USAF Fairford! Info on coaches', stated:

g 'The first [time] we went there 50 people entered the base, the second time the main gates were pulled down, what happens on March 22nd at USAF Fairford is up to you. Are we going to passively spectate while hundreds of thousands of Iraqis are murdered or are we going to be actively involved in changing history and stopping this war by any means necessary? Book a place on the coach and find out!'

(g) Mr Lambert made a statutory stop and search authorisation under s 60 of the Criminal Justice and Public Order Act 1994 on 21 March 2003, the day before the demonstration. At 10.45 am on 22 March 2003, Gloucestershire Police received  
h further specific intelligence in relation to members of the Wombles being on board: '... 3 coaches and a van are en route from London carrying items and equipment to disrupt [the] protest today and gain entry to the air base.'

(h) Acting upon that intelligence and pursuant to the authorisation in place, at 12.50 pm on 22 March 2003, the police stopped, boarded and searched four vehicles  
j matching the description at a lay-by on the A417, near the town of Lechlade. This included the claimant's coach. The lay-by was less than five kilometres by road from the perimeter of Fairford, and approximately two kilometres on foot.

(i) Mr Lambert then made a removal of disguises authorisation under s 60AA of the 1994 Act and one arrest was made. But on the instructions of Mr Lambert, there were to be no further arrests (unless other offences were apparent) as he did not consider a breach of the peace to be sufficiently imminent at that stage.

(j) Discovered on the three coaches were: 'some protective clothing, spray paint, two pairs of scissors, a smoke bomb and five shields'. May LJ noted in his judgment ([2004] 2 All ER 874 at [16]) that those items were 'in the main protective or useful to conceal identity [but] [t]here were few items capable of being used offensively'. Protective (white) clothing was the known uniform of the Wombles, but other protesters had been encouraged to wear similar clothing for symbolic reasons (to look like civilian weapons inspectors). Other items retrieved included a balaclava, a crash helmet, a wood saw, a hammer, two knives and garden clippers, but the lower court made no positive finding that these articles had been seized from the coaches, and the claimant contends that these items did not play any role in the decisions taken by the police.

(k) May LJ noted (at [15] and [16]) that passengers 'tried to conceal their identities', that 'nobody accepted responsibility for [the items]' and that the claimant 'refused to give her name and address when she was asked [and] gave no good reason for not co-operating'. There is evidence that an officer of the Metropolitan Police recorded the presence of eight named individuals whom he readily recognised as members of the Wombles and that '[t]he police knew that transport arrangements had been advertised not only on the Wombles website but also elsewhere' (see [32]). Mr Fordham, on behalf of the claimant, criticises the police for not asking more questions, but it is by no means clear that further questioning would have revealed any further relevant information.

(l) Following the seizure of those items, Mr Lambert concluded that the coach passengers were heading for Fairford and were likely to cause a breach of the peace. At 2 pm, he gave instructions that the coaches and passengers were to be escorted back to London. This happened and the claimant disembarked from a coach at Shepherds Bush at 4.54 pm, approximately two-and-a-half hours later.

#### MR LAMBERT'S REASONING FOR TAKING THE ACTION HE DID

[5] In his statement, Mr Lambert says that he discussed the operation with the Gold commander, and it was—

'agreed that the operation would aim to protect life, property and the Queen's peace, minimise the risk of disruption to military operations and RAF Fairford [and] facilitate peaceful protest outside RAF Fairford.'

In addition, he wished to 'maintain public confidence in the Gloucestershire Constabulary'.

[6] He added:

'... my decision not to allow the coaches to proceed to Fairford to protest was based upon: (a) the history of the Wombles and Disobedience Action Groups. [He] was satisfied that hardcore members were on the coaches; (b) the intelligence sources leading up to and on 22nd March 2003; (c) the articles seized from passengers on the coach, and those found in communal areas abandoned.'

[7] He had taken into consideration alternative courses of action but concluded that the passengers on the coaches intended to cause a breach of the peace at Fairford. He could not predict the precise location of the likely breach of the peace, and was mindful that intelligence had indicated that a previous tactic had been to create a diversionary disturbance in one area, while a smaller group would gain access to the target at another location.



a [8] Mr Lambert added that he was concerned that, if allowed to proceed, the group would be able to gain access to other offensive articles. He could not be confident that they were not co-ordinating activity with protesters elsewhere or, as highlighted in intelligence reports, that offensive items had not been secreted near the base or carried in other vehicles travelling separately. He concluded that if the coaches had been allowed to continue to Fairford, the protesters on the coaches  
b would inevitably have had to be arrested on arrival at Fairford, breach of the peace then being sufficiently imminent.

[9] He was also of the view that allowing the coaches to proceed provided a risk that the individuals on board would succeed in disrupting military operations by unlawful acts. He was 'mindful that [his] decision affected the right of the people on the coach to protest at Fairford' and 'did not take the decision lightly'. However,  
c he concluded that the risk and consequence of allowing the coaches to proceed were not in the interests of the villagers of Fairford or the peaceful protesters attending the demonstration. The arrest of the coach passengers would have been a logistical nightmare. Each of the individuals would have required police transport and the detentions would have considerably exceeded the number of places  
d identified for custody procedures. If he had arrested the 150 individuals on the coaches, it would have 'vastly reduced [his] tactical options to deal with other incidents anticipated on the day'. Furthermore, he felt that this course of action was disproportionate and that turning the coaches around offered a more reasonable alternative.

[10] Finally, he acknowledged that there remained a potential risk that some  
e peaceful protesters had been caught up in the decision not to allow the coaches to proceed, but it was not possible to be certain as to this. Those on the coaches had been asked to state who had brought the articles onto the coaches. They had failed to do so. No one had disassociated themselves from the articles seized, which he viewed as evidence of their collective intent.

f [11] Although passengers on the three coaches were prevented from taking part in the protest, many others attended, but far less than the 10,000 for whom arrangements had been made. In the event, the protest passed off peacefully without significant incident. The police regarded this outcome as a success.

g NATURE OF THE PROCEEDINGS AND THEIR OUTCOME IN THE COURT BELOW

[12] The claimant brought her proceedings by way of judicial review. To a significant extent, her case effectively amounts to an allegation that she was unlawfully detained by the police, analogous to an allegation of false imprisonment. Proceedings for false imprisonment are normally not commenced in this way but  
h in an ordinary civil action for damages, and are usually heard by a jury. The defendant suggested that judicial review was not the appropriate vehicle for the claimant's allegations but no technical point concerning the correctness of the procedure chosen is now pursued.

[13] An advantage of using judicial review is the likelihood of significantly reduced costs compared to an ordinary action for damages. However, a  
j consequence of bringing the proceedings by judicial review is that no oral evidence was heard by the court below, there not having been any application by the parties for cross-examination of the witnesses on their written statements.

[14] The justification for the proceedings being brought by judicial review was the fact that the claimant was seeking clarification of the law. The grounds for judicial review state that:

'This case is about the lawfulness of police action which severely curtailed the civil liberties of the Claimant and other peace protesters. At the heart of the case is whether it is legally permissible for the police to take "containment" action to restrict movement and liberty, by a blanket response attributing to a group of protesters an imputed collective intent, without reference to their individual circumstances, and without arresting them or having any grounds which would justify effecting a lawful arrest. Whether the police action was lawful or unlawful in this case has widespread ramifications for police powers and civil liberties.'

[15] In addition in her grounds the claimant states that—

'the question is whether the police can discharge the onus of showing that the interferences with [her] rights, which the police action represents, were carried out with lawful authority and were justified and proportionate.'

[16] The claimant's evidence in support of the application makes clear that she was 'utterly opposed to the US led military assault on Iraq'. She believed that military intervention of the kind that took place was morally wrong and had no legal basis. Her beliefs are 'deeply held'. She wanted to demonstrate at Fairford in particular to draw attention to its direct role in the military assault, namely its use for the launch of B52 bombing raids on Iraq, destroying infrastructure and killing civilians. She had been part of the demonstration at Fairford on 26 January 2003 but denied any involvement in breaking into the base. She said that she expected the 22 March demonstration to be broadly similar to the 26 January demonstration but on a larger scale.

[17] The claimant describes how, having got off the coach in order to be searched, she eventually re-boarded the coach at the suggestion of the driver of her coach. She thought that when the passengers had returned to the coach it would be driven to Fairford. In fact it was driven to the motorway where police motorcycle outriders prevented the coach from turning off to the motorway services, even though many of the passengers had become desperate for the toilet and signs had been put up which would be clearly visible to the police saying this was the case.

[18] In his statement, Mr Lambert explains the reason for escorting the coaches by saying, this—

'was necessary to ensure that the protesters did not find an alternative route towards RAF Fairford ... the coaches travelling away from Fairford did not guarantee that the protesters would not attend nearby RAF Welford or return to us later in the day.'

[19] In his summary grounds of defence, the defendant makes clear that there were significant differences of fact between the claimant's and the defendant's cases. He gives as an example, apparent disagreement 'about when the escorting motorcyclists were made aware that some passengers wished to go to a service area to use the toilets'. He also suggests that differences might emerge between the factual cases of the various police forces, or as to the responsibility of one police force rather than another for any particular operational decisions which may have been made. However, as to the last point, the interested parties confined their contentions to the points of principle and not the facts, although it is recorded in a statement on behalf of the Chief Constable of the Thames Valley Police, that an officer had given information that, 'pursuant to the instructions he received on

a departure from Lechlade he and his motorcyclist colleagues used standard escort techniques to prevent the coaches from leaving the motorway.' It is also suggested that there would have been difficulties in allowing the coaches to stop while they were on the motorway for safety reasons.

[20] A number of additional statements were also filed on behalf of the claimant. For example there is a statement from Sue Davis who is 76 years of age. She regards b the suggestion that it was impossible to distinguish between hardcore activists bent on violence and those protesters who were intending to protest lawfully as nonsense.

#### THE JUDGMENT IN THE COURT BELOW

c [21] In his judgment, May LJ noted that the claimant had chosen to proceed by judicial review upon untested written evidence. In those circumstances he accepted that Mr Lambert had reason for being concerned that some at least of the coach passengers would have caused or contributed to a breach of the peace at Fairford if the coaches had been permitted to continue there. He then considered whether such an apprehension justified preventing the coaches from proceeding to d Fairford and enforcing the return of their occupants to London as a matter of law. May LJ reviewed the authorities both as to the position at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (the ECHR). In so doing, he accepted that—

e 'the court is obliged ... to conduct a rigorous and intensive review, including a close and penetrating examination of the defendant's factual justification for what Mr Lambert instructed his officers to do.' (See [2004] 2 All ER 874 at [29].)

f [22] May LJ regarded it necessary to distinguish between arrest and preventive action short of arrest. He came to the conclusion that, in accordance with Mr Lambert's own assessment at the time, there was no justification for arrest of the coach passengers while the coaches were in the lay-by. However, as to preventing the passengers proceeding to Fairford, May LJ (at [39]) regarded *Moss v McLachlan* [1985] IRLR 76 as providing 'strong support for [the defendant's] case that the preventive measures ... falling short of detention were legitimate'.

g [23] May LJ added that whether preventive measures were necessary and thus proportionate was a question of fact and, in the circumstances, Mr Lambert was here lawfully entitled to give the instructions he did. He further decided (at [41]) that 'there may be circumstances in which individual discrimination among a large number of unco-operative people is impractical' and that that was the position here.

h [24] As to the detention of the claimant and the other passengers in the coach for approximately two-and-a-half hours during the journey back to London, May LJ took a different view. He summarised the position as follows (at [47]):

j 'Upon this view of the law, in my judgment the claimant's enforced return on the coach to London was not lawful because (a) there was no immediately apprehended breach of the peace by her sufficient to justify even transitory detention, (b) detention on the coach for two-and-a-half hours went far beyond anything which could conceivably constitute transitory detention such as I have described, and (c) even if there had been, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace.'

[25] In accordance with May LJ's judgment, the Administrative Court declared that:

1. The decision of the defendant's officer forcibly to return the claimant from Lechlade to London on 22 March 2003 was unlawful.
2. The further declaration that the decision to prevent the claimant from proceeding to Fairford was unlawful be refused.

In addition the court ordered that the inquiry as to the level of damages to which the claimant was entitled (if any) be adjourned until the final determination of this appeal.

[26] In the defendant's notice of appeal to this court, three grounds are relied on. The first is that the court had erred in finding that a breach of the peace was not imminent. Secondly, the court had erred in finding that art 5(1)(b) of the ECHR did not apply to detention to prevent a breach of the peace. Thirdly, the court had erred in finding that detention to prevent a breach of the peace, other than transitory detention was not compatible with the ECHR.

[27] In her cross-appeal, the claimant also relies on three grounds. They are that May LJ was wrong as to: (a) the 'imminence' point, in identifying and/or applying a lesser 'real risk/close proximity' test for preventive action short of arrest/detention; (b) the 'blanket' point, in identifying and/or applying a test of 'impracticability' which was wrong and unjustified at common law and/or under s 6 of the Human Rights Act 1998 and arts 10 and 11 of the ECHR; and (c) the 'justification' point, in concluding that the circumstances of this case justified the preventive action taken, contrary to common law and/or s 6 of the 1998 Act and arts 10 and 11 of the ECHR.

#### OUR CONCLUSIONS

[28] Although the decision on this appeal involves a careful examination of what should be the limits on the power of the police to take action to prevent a breach of the peace, it also involves a careful analysis of the facts in order to determine the reasonableness and proportionality of their action in the circumstances with which they were faced on 22 March 2003. In determining what those circumstances are, we have the same problems as did the Administrative Court because of the lack of oral evidence and the conflicts that exist in the written evidence. In the case of conflict, we have to give the benefit of the doubt to the defendant since the claimant brings the proceedings and it is her task to prove her case. Furthermore, she chose to bring the proceedings by judicial review, a course which the defendant opposed, so she is in no position to complain at our adopting the traditional approach to evidence on an application for judicial review.

[29] However, in determining the principal issues arising on the appeal and cross-appeal, conflicts in evidence in the event do not prove to be critical. So, as often proves to be the case, judicial review is a satisfactory procedure for determining the outcome of the issues that conventionally would be dealt with differently. The position may well, however, be different when it comes to resolving any outstanding issue as to damages.

[30] We can deal with the issues of fact briefly by indicating that we agree with the views expressed in May LJ's judgment on behalf of the Administrative Court. In particular, we agree with that court as to the reasonableness of Mr Lambert's apprehension of a breach of the peace, and the reasonableness of his decision to prevent the claimant and her fellow passengers from proceeding to Fairford.



a [31] Furthermore, in view of the unco-operative stance of the passengers on the coaches and the constraints to which the police were subject, both as to time and resources, it is our view that it was not practical to identify the potential troublemakers and to distinguish them from those who were intending to protest peacefully. While we do not suggest that the claimant herself would have acted unlawfully, we do note that she was not prepared to provide her identity and that b she had herself, at the lay-by, put on the white suit which is the uniform of the Wombles, only to remove it shortly afterwards.

[32] As between the appeal and cross-appeal, it is convenient to address the issues on the cross-appeal first since the cross-appeal is concerned with the earlier events at the lay-by and this approach accords with the way in which the argument proceeded before us.

c THE CROSS-APPEAL

[33] The powers and duties of the police in relation to apprehended breaches of the peace depend upon the common law, as it has developed and is still developing. This is subject, now, to the influence of arts 5, 10 and 11 of the ECHR. The articles d so far as relevant provide as follows:

*'Article 5*

*Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (b) the lawful arrest or detention of a person e for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or f fleeing after having done so; ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law ...

*Article 10*

*Freedom of expression*

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security ... public safety, for the prevention of disorder or crime ...

*Article 11*

*Freedom of assembly and association*

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or

crime ... or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of ... the police ...'

[34] We intend to examine the claimant's three points, 'the imminence point', 'the blanket point' and 'the justification point' in turn. However, before we do so, it is helpful to make some general points as to how we see the common law and the requirements of the ECHR combining in this area.

[35] The rights to freedom of expression, and assembly and association, which are protected by arts 10 and 11 of the ECHR respectively, are of the greatest importance to the proper functioning of any democracy. Any intrusion upon the rights, either by the developing common law or by the intervention of statute law, has to be jealously scrutinised. However, as appears from arts 10 and 11 themselves, the rights for which they provide are not absolute. In the case of both articles, they are subject to an express qualification contained respectively in arts 10(2) and 11(2).

[36] These qualifications are necessary to prevent the rights being abused and the rights of others suffering in consequence. Unfortunately, as the facts of this case demonstrate, there are, among the public, those who intend to take advantage of others seeking to exercise their right to protest lawfully, by creating public disorder, committing unlawful acts and causing personal injuries and damage to property. Today, those who have such an intent, can, by using technology, assemble greater numbers of individuals wishing to create disturbances than has hitherto been possible. When this is happening, it presents great challenges for the authorities. While the authorities must be prepared to have their actions scrutinised to ensure that they are proportionate and reasonable and in accordance with the law, it is equally important that, subject to any action taken to comply with these requirements, the authorities are not prevented from taking action and that the required action is in fact taken by the authorities to prevent disturbances happening. Otherwise, the conduct of those intent on creating unlawful disturbances can undermine the ability of others lawfully to exercise their rights, including their rights under arts 10 and 11 to protest.

[37] Legislation has already given specific enabling powers to the police which can be exercised in appropriate circumstances. For example, the stop and search powers which were used by the defendant on this occasion. In addition to the statutory powers, important protection for the rights contained in arts 10 and 11 is provided by the duty of the police, which is shared by members of the public, to take reasonable steps to prevent a breach of the peace occurring. The advantage of this duty is that, because it is a common law duty, it is capable of evolving to meet modern circumstances. Particularly, because we are concerned with possible restrictions on the exercise of art 10 and 11 rights, the evolution of the law has to be based on principle, and the law developed bearing in mind the admonition pithily expressed by Lord Bingham of Cornhill extra-judicially that, 'On the whole, the law advances in small steps, not by giant bounds' (see *The Business of Judging: Selected Essays and Speeches* (2000) p 32).

[38] As to the common law, a good starting point for examining the position is provided by a much-quoted statement of Lord Diplock in *Albert v Lavin* [1981] 3 All ER 878 at 880, [1982] AC 546 at 565. Lord Diplock stated—

'that every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break

a the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.'

b [39] The fact that the breach of the peace has to be actually in the process of being committed, or reasonably to appear to be about to be committed, introduces the 'imminence point' we are about to address. The 'duty' in the case of a constable is augmented by his power to arrest someone who wilfully obstructs him in the execution of his duty. The manner in which the duty to prevent a breach of the peace and the power of a constable to arrest for wilful obstruction combine, is well illustrated by the decision in *Duncan v Jones* [1936] 1 KB 218, [1935] All ER Rep 710.

c In that case the appellant was about to address a number of people in the street. A police officer reasonably apprehended that a breach of the peace would occur if the meeting was held. He therefore ordered the appellant not to hold the meeting. The appellant however persisted in trying to hold the meeting and obstructed the police officer in his attempt to prevent her from doing so. Neither the appellant nor anyone present, committed, incited or provoked a breach of the peace, but the

d appellant was held to have wilfully obstructed the officer in the execution of his duty. The fact that the officer reasonably apprehended a breach of the peace was a justification for the finding that he was acting in the execution of his duty.

e [40] The relationship between the duty to prevent a breach of the peace and the power of a police officer to arrest a person who interferes with the execution of his duty also features in *Moss v McLachlan* [1985] IRLR 76, the facts of which are closest to those we are considering here.

[41] *Moss's* case involved four striking miners. They were travelling in a convoy of motor vehicles and were stopped by a police cordon at a junction within several miles of four collieries. The inspector in charge of the operation had reason to believe that a breach of the peace would be committed if they continued to the pits and asked them to turn back. He told them that if they continued they would be obstructing an officer in the execution of his duty and therefore liable to arrest. Many refused to turn back however and, after blocking the road with their vehicles, a group comprising the four striking miners attempted to push their way through the police cordon. They were arrested on the ground that the police feared a

f breach of the peace at one of the four collieries if the miners had been allowed to proceed. The men were convicted of wilfully obstructing a police officer in the execution of his duty and their appeal was dismissed by the Divisional Court. In the course of his judgment Skinner J (who was sitting with Otton J) said (at 78–79):

g

h '20 The situation has to be assessed by the senior police officers present. Provided they honestly and reasonably form the opinion that there is a real risk of a breach of the peace in the sense that it is in close proximity both in place and time, then the conditions exist for reasonable preventive [action] including, if necessary, the measures taken in this case ...

j 22 But, says [counsel], the police can only take preventive action if a breach of the peace is imminent and there was no such imminence here. In support of this proposition he relies on a passage in the judgment of Lord Justice Watkins in *R v Howell* ([1981] 3 All ER 383 at 388, [1982] QB 416 at 426): "... there is a power of arrest for breach of the peace where ... the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach

..."

23 This passage must be read in the light of the judgment of Lord Parker, Chief Justice, in *Piddington v Bates* ([1960] 3 All ER 660 at 663, [1961] 1 WLR 162 at 169), in which he says the police must anticipate “a real, not a remote, possibility” of a breach of the peace before they are justified in taking preventive action.

24 We do not think that there is any conflict between the two approaches. The possibility of a breach must be real to justify any preventive action. The imminence or immediacy of the threat to the peace determines what action is reasonable ...’ (My emphasis.)

[42] Later Skinner J added:

‘27 For the reasons we have given, on the facts found by the Magistrates, a breach of the peace was not only a real possibility but also, because of the proximity of the pits and the availability of cars, imminent, immediate and not remote ...’

These comments by Skinner J conveniently lead into Mr Fordham’s first point.

#### THE ‘IMMINENCE’ POINT

[43] Mr Fordham submits that May LJ ([2004] 2 All ER 874) adopted the wrong test in determining that preventive action was justified. The approach of May LJ appears from [38] and [39] of his judgment. He first addresses the submission of Mr Freeland QC on behalf of the defendant, in which Mr Freeland relies on *Moss’s* case as authority for the assertion that a breach of the peace was properly to be regarded as imminent. May LJ considered that it was difficult ‘to submit persuasively that any apprehended breach of the peace justifying arrest was imminent at the time when the coaches were in the lay-by’. However, May LJ also distinguished between arrest and preventive action short of arrest and, in relation to what happened at the lay-by which did not involve arrest, he stated: ‘... *Moss’s* case is an authority providing strong support for Mr Freeland’s case that the preventive measures in the present case falling short of detention were legitimate.’ May LJ (at [39]) recognised that to comply with arts 10(2) and 11(2)—

‘restrictions of this kind have to be prescribed by law and necessary in the democratic society in the interest of public safety or for the prevention of disorder or crime’,

but in this case he said:

‘It is, in my judgment, a question of fact in each case whether preventive measures of this kind are necessary in this context and thus proportionate. For them to be prescribed by law, it is necessary that the law sufficiently defines the circumstances in which the police may lawfully take preventive measures of this kind. In my view, this requirement is in substance satisfied by the judgment of Skinner J in *Moss’s* case. The essential features are that a senior police officer should honestly and reasonably form the opinion that there is a real risk of a breach of the peace in close proximity both in place and time; that the possibility of a breach must be real; that the preventive measures must be reasonable; and that the imminence or immediacy of the threat to the peace determines what action is reasonable. I would add that the police are entitled to have regard to what is practical and that the number of people from whom a breach of the peace is apprehended may be relevant. The question of imminence is thus relevant to the lawfulness of preventive measures of this



a kind, but the degree of imminence may not be as great as that which would justify arrest.' (My emphasis.)

It was on the basis of this approach that May LJ found in favour of the defendant.

b [44] On this aspect of the case, we would adopt a very similar approach to that of May LJ. We agree with him that it is necessary to distinguish between arrest and preventive action short of arrest, including temporary detention. We regard what is sufficiently 'imminent' to justify taking action to prevent a breach of the peace as dependent on all the circumstances. As in *Moss's* case, so here, it is important that the claimant was intending to travel in a vehicle if the preventive action had not taken place. The relatively small distance involved did not mean that there was no sufficient imminence. What preventive action was necessary and proportionate, c however, would be very much influenced by how close in proximity, both in place and time, the location of the apprehended breach of the peace was. The greater the distance and the greater the time involved, the more important it is to decide whether preventive action is really necessary and, if it is necessary, the more restrained the action taken should usually be as there will be time for further action if the action initially taken does not deter. It may be that as the police thought, d arrest at the lay-by would have been a disproportionate level of action, but this does not necessarily mean that no action was appropriate.

e [45] We would see the instant case as being very much on all fours with the decision in *Moss's* case which we would indorse. If the police had done no more than direct the passengers to re-board the coach and instructed the driver not to proceed to the Fairford base, this would have been an appropriate response that was both necessary and proportionate. We will deal with the additional action that the police would have been entitled to take when considering the appeal as opposed to the cross-appeal.

f [46] Like May LJ, we would regard the 'real risk' or 'close proximity' test and the 'imminence' test as not being in conflict. Action should not be taken until it is necessary and reasonable to take the action on the facts of the particular circumstances. In the present case, on the evidence before us, the alternatives were either taking the preventive action at the lay-by or waiting until the coaches had arrived at Fairford, the site at which the disturbance was feared. To have delayed taking action until the coach passengers reached the air base could have provoked the very disturbance which the preventive action was intended to avoid. g

#### THE 'BLANKET' POINT

h [47] Mr Fordham here relies upon the fact that the information that was available did not enable Mr Lambert to do more than reasonably to conclude that some, but not all, of the passengers in the claimant's coach were likely to be responsible for performing acts which would constitute a breach of the peace. He relies on the statement of Sedley LJ in *Redmond-Bate v DPP* (1999) 7 BHRC 375 at 377:

i '... a judgment as to the imminence of a breach of the peace does not conclude the constable's task. The next and critical question for the constable, and in turn for the court, is where the threat is coming from, because it is there that the preventive action must be directed.'

He submits that there is a need for a nexus between the perceived likely harm and the person against whom preventive action is taken.

[48] Again, in our judgment, the answer to Mr Fordham's point is provided by the need for the police to act reasonably. In view of the attitude adopted generally

by the passengers in the coaches, it is difficult to see how it would be possible to distinguish between the occupants. The occupants were clearly committed to seeking to proceed to the base and, being realistic, it is most unlikely that it would have been possible to identify passengers who would not play a part in provoking a breach of the peace. The important feature to note about the ability to take preventive action is that its justification is not derived from the person against whom the action is taken having actually committed an offence, but based upon a need to *prevent* the apprehended breach of the peace. In some situations, preventing a breach of the peace will only be possible if action is taken which risks affecting a wholly innocent individual. In other situations, it will be possible to identify precisely which individuals are the likely troublemakers and when this is the position, the type of action taken will be determined by what is necessary to prevent the apprehended breach of the peace. Again, we would agree with the approach of the court below.

#### THE 'JUSTIFICATION' POINT

[49] The argument here is that, looking at all the relevant circumstances, there is no basis for Mr Lambert coming to his conclusion that action had to be taken to prevent the coaches proceeding to the air base so as to enable others to take part in a lawful and peaceful assembly and protest. As to this, we do not accept that the evidence before us bears out Mr Fordham's submissions. In our view there was ample evidence to support Mr Lambert's assessment of the position.

#### THE APPEAL

[50] Mr Freeland submits that the decision of the Administrative Court makes practical policing impossible. He contends that the approach of the Administrative Court made Mr Lambert powerless to prevent a breach of the peace that could potentially have had extremely serious consequences. It is submitted that if we uphold the decision of the Administrative Court and reject the cross-appeal, then Mr Lambert was under a duty to prevent the coach from proceeding to Fairford, yet the decision in the court below means that he was not entitled to take the only practical measures that would achieve this.

[51] There are significant differences between the factual position giving rise to the cross-appeal and that leading to the appeal. For example there is the legal point that the action of the police which is the subject of the cross-appeal could not, in our judgment, constitute detention either at common law or under art 5. So, to resolve the cross-appeal, there is no need to consider art 5 further. This is the position as to the cross-appeal notwithstanding Liberty's submission to the contrary. Our view is supported by the recent decision of the Court of Appeal in *R (on the application of Gillan) v Metropolitan Police Comr*, *R (on the application of Quinton) v Metropolitan Police Comr* [2004] EWCA Civ 1067, [2004] 3 WLR 1144.

[52] The position is far more complex as to the appeal and the appeal could not succeed without a careful examination of the impact of art 5. Once the coaches had embarked on the return journey, the evidence makes it clear that, while the passengers could move about within the coaches, they were unable to leave the coaches, even to relieve themselves, until after the two-and-a-half hour journey back to Shepherds Bush had been completed. It is clear that the escorting police officers were positioning their vehicles in a way which prevented the coaches leaving the motorway. There was no way in which the coaches could stop on the hard shoulder or take a turning off the motorway or enter motorway services so as

a to use the facilities there. The passengers were virtually prisoners on the coaches for the length of the journey.

[53] The first question, therefore, that arises, is whether this action was justifiable as falling within the ambit of action reasonably taken to prevent a breach of the peace. The principles are now well established, but a decision that the defendant could justify at common law what happened, would go well beyond any b action previously considered as justified by the authorities. If the action on the present facts were to be regarded as justified, this would constitute a significant extension of the previously established principles. It would be a development that is more of a leap and a bound than a measured pace forward.

[54] The defendant contends that all that was involved was requiring the passengers to make the return journey earlier than they would have done c otherwise. This description of what was involved in our judgment underestimates the impact of the police action on the passengers' individual rights to freedom of action. We do not consider it necessary to decide that it would never be justifiable for the police to take action of this nature. However, we are satisfied that such action should be very much a matter of last resort and we are not persuaded that d there were no less intrusive possible alternative courses of action here.

[55] Thus, it is not suggested in the evidence that the drivers of the coaches, who were professional drivers, had indicated that they were not prepared to obey a lawful order given by the police. They could, in our judgment, have been lawfully ordered not to proceed to the air base and to leave the area. The coaches could e have been followed if this was thought necessary to see whether the order was obeyed. The order could have been backed up by a warning that, if it was not observed, the police would exercise the powers of arrest which would then be available. We appreciate that Mr Lambert did not wish to arrest the passengers for operational reasons. We also recognise that he had to conserve his resources. However, having regard to the action which was taken to escort the coaches back f to Shepherds Bush, we are unable to accept that action which was more limited in its impact upon the claimant and her fellow passengers could not have been taken. Like the Administrative Court, we regard the actions that did take place as disproportionate and not justifiable at common law. It may well be that, if the order to which we have referred was given, the driver and his passengers would g have returned to London, but if they chose to do so that would be a different situation from their being compelled to do so.

[56] In these circumstances where the detention was not lawful by reference to domestic common law, we propose to accede to the submissions of the interested police parties that we should not determine further the application of art 5 to what h happened. We leave this to be decided on the facts of the pending case concerning policing of May Day 2001 in which the issue, we understand, will have to be confronted. In our judgment the appeal can be dismissed on the evidence without any further examination of either domestic or ECHR law. The declarations made by the court below will stand and the appeal and cross-appeal will be dismissed.

[57] It only remains for us to express our appreciation of the skill with which this j case has been presented, both in the course of oral argument on the hearing of the appeal and in the written submissions.

*Appeal and cross-appeal dismissed.*

## Re Holmes

[2004] EWHC 2020 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

HENRIQUES AND STANLEY BURNTON JJ

6, 20 AUGUST 2004

*Criminal law – Obtaining money transfer by deception – Deception – Money transfer occurring when debit made to one account and credit made to another – When credit occurring – Whether necessary to identify specific account debited – Theft Act 1968, s 15A.*

The German government sought the extradition of the applicant to face charges arising out of events in which the applicant had allegedly procured without authorisation the automated transfer of funds from bank C in Germany, where he worked at the time, to an account with bank A. The funds so transferred could not initially be disposed of freely, since the transfer to bank A was originally subject to confirmation. However, the applicant confirmed the transaction in three messages to bank A, and the reservation on the funds was removed. The conduct with which the applicant was accused was specified under the authority to proceed as conduct which if it had occurred in the United Kingdom would have constituted, *inter alia*, obtaining a money transfer by deception, contrary to s 15A<sup>a</sup> of the Theft Act 1968, which provided that a person was guilty of an offence if by any deception he dishonestly obtained a money transfer. A money transfer occurred when '(a) a debit is made to one account, (b) a credit is made to another, and (c) the credit results from the debit or the debit results from the credit'. Following a committal hearing the applicant was remanded in custody to await the decision of the Secretary of State as to his jurisdiction and he applied for a writ of habeas corpus. He contended, *inter alia*, as he had done before the district judge, that the offence under s 15A of the 1968 Act had not been made out in that (i) the conduct alleged did not amount to deception as (a) the transfer process had been automated and a machine could not be deceived, and (b) the confirmatory messages, having been made after the transfer, were legally irrelevant and (ii) that the German papers did not disclose from which account the funds transferred to A bank had been drawn so that there was no information about 'the debit'.

**Held** – A bank account was not credited for the purposes of s 15A of the 1968 Act while the bank with which the account was kept maintained a reservation, precluding the account holder from dealing with the funds in question. 'Credited' in that context meant credited unconditionally. It followed that human beings had been deceived by the messages confirming the transactions. Provided that there had been a debiting of an account, and the debit was causally connected with the credit it was not essential for the purposes of s 15A to identify which account had been debited as the concomitant to the credit, or whether the account that had been debited was overdrawn or in credit. Accordingly the charge of obtaining a money transfer by deception had been made out (see [13]–[17], below).

*Davies v Flackett* [1973] RTR 8 considered.

<sup>a</sup> Section 15A is set out at [10], below



- a* Per curiam. The unnecessary technicality of the English law of theft and fraud, particularly in relation to funds in bank accounts and bank transfers, and the fact that information provided by foreign courts and prosecution authorities, which establishes an offence or offences under their own law, will not address specifically the technical requirements of English law, highlight the need for the court to consider the information provided for the purposes of extradition proceedings realistically, rather than over-critically (see [28], below).
- b*

### Notes

For sufficiency of evidence on an application for habeas corpus, and for obtaining a money transfer by deception, see, respectively, 17(2) *Halsbury's Laws* (4th edn reissue) para 1221, and Supp to 11(1) *Halsbury's Laws* (4th edn reissue), para 567A.

- c* For the Theft Act 1968, s 15A, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 494.

### Cases referred to in judgment

- A-G's Reference (No 1 of 1985)* [1986] 2 All ER 219, [1986] QB 491, CA.
- d* *A-G's Reference (No 1 of 1991)* [1992] 3 All ER 897, [1993] QB 94, [1992] 3 WLR 432, CA.
- Davies v Flackett* [1973] RTR 8, DC.
- Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, [1981] 1 WLR 578, DC.
- e* *R v Adebayo* (7 July 1997, unreported), CA.
- R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC.
- R v Graham* [1997] 1 Cr App R 302, CA.
- R v Hilton* [1997] 2 Cr App R 445, CA.
- f* *R v Preddy* [1996] 3 All ER 481, [1996] AC 815, [1996] 3 WLR 255, HL.
- Westdeutsche Landesbank Girozentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.

### Application

- g* Matthew Darren Holmes applied to the Divisional Court for a writ of habeas corpus ad subjiciendum directed to the governor of HM Prison, Brixton, where he had been detained following his committal on 24 March 2004 by Senior District Judge Workman, sitting at Bow Street Magistrates' Court, pending the decision of the Secretary of State for the Home Department on the request of the respondent, the government of Germany, for the applicant's extradition. The facts are set out in the judgment of the court.
- h*

*Mark Summers* (instructed by *Jefferies*, Westcliff-on-Sea) for the applicant.  
*Clair Dobbin* (instructed by the *Crown Prosecution Service*) for the respondents.

- j* *Cur adv vult*

20 August 2004. The following judgment of the court was delivered.

**STANLEY BURNTON J.**

[1] This is the judgment of the court.

[2] This is an application by Matthew Holmes for a writ of habeas corpus. He contends that his detention in custody pursuant to an order for committal made by Bow Street Magistrates' Court under s 9(8)(a) of the Extradition Act 1989 on 24 March 2004, to await the decision of the Secretary of State for the Home Department on a request of extradition by the government of Germany, was unlawful. The authority to proceed under s 7 of the 1989 Act was given on 7 October 2003. It specified, for the purposes of s 7(5), that the conduct of which the applicant was accused appeared to the Home Secretary to be conduct which had it occurred in the United Kingdom, would have constituted offences of theft and obtaining a money transfer by deception.

[3] The committal papers before Senior District Judge Workman included a certified translation of the arrest warrant relating to the applicant. The warrant included the following statement:

'The accused is strongly suspected in Frankfurt am Main and other places in the period from 15 August 2000 to 26 September 2000 through one independent act having misused a power to act for or engage another to act for the assets of another person granted by statute, public authority or legal transaction or having violated a duty to protect the financial interests of another granted by statute, public authority, legal transaction or trustee relationship, and thus having caused a detriment to the financial interests he was to protect. In the period from 18 October 1999 to 17 October 2000, the Accused before trial was employed as temporary staff at the Commerzbank Aktiengesellschaft (AG) in Frankfurt am Main. As part of this employment he worked in the Central Service Global Operations Investment Banking (CGO), responsible for securities development. He took advantage of this post to issue on 15 August 2000 via the SWIFT (Society for Worldwide Interbank Financial Telecommunication) payments system from the Commerzbank AG a payment order for USD 15,583,128.57 to the ABN Amro Bank in Amsterdam. The Accused before trial entered as recipient a company called Wolpert Consultants Inc., and an account held by this company at the ABN Amro Bank in Amsterdam, number 403893402. There was no underlying transaction for the payment order, the specified account of Wolpert Consultants Inc. at the ABN Amro Bank was dormant up until that time, ie there had been no movements to or from the account. This fact was known to the Accused before trial, who without authorisation used the passwords of Witnesses Vogt and Phanakham, who worked in the same department as the Accused before trial, to conceal his own involvement in the transfer. After the incorrect use of the swift message type MT202, which is to be used only for bank-to-bank payments, had led to the ABN Amro Bank to make queries and the amount had initially been credited to the customer account at the ABN Amro Bank only subject to confirmation, the Accused before trial once again used his position at the Commerzbank AG to nevertheless confirm in three messages dated 17, 21 and 23 August 2000 to the ABN Amro Bank in Amsterdam, contrary to the truth, that the transfer was in order and the authorisation to credit the amount to the customer account. On the basis of these confirmations, the reservation was withdrawn and the instructed amount credited to the benefit of Wolpert Consultants Inc. Directly after this crediting, the balance was remitted in the period from 25 August to 26 September 2000 mainly via electronic transfer (home banking) to various company accounts, inter alia in the Bahamas,

*a* Switzerland, Australia, Austria and Indonesia. The Accused before trial, who terminated his employment with the Commerzbank AG more or less at the same time, was acting in his preconceived intention to damage the assets of the Commerzbank AG and to enrich himself or other non-entitled third persons. This act constitutes a violation of Section 266 Subsection 1 of the German Criminal Code. The strong suspicion arises from the following facts.

*b* 1. Message reports dated 15 August 2000, 17 August 2000, 21 August 2000 and 23 August 2000.

2. Documents relating to the company Wolpert Consultants Inc.

*c* 3. Testimony of Oliver Vogt, Marie-Noel Phanakham, Oliver Forchel, Oliver Lemkuhl, the director and head of the Business Management Department, Central Services Global Operations Investment Banking, Joachim von Eiberg, Lutz Kirchner of the Internal Auditing Department—all of Commerzbank AG.'

*d* [4] The applicant was identified by his name, stated to be Matthew Holmes, his date of birth, 4 December 1973, his place of birth and a photograph which indisputably is a photograph of the applicant. The photograph was certified as follows:

*e* 'It is hereby certified that the photograph reproduced above sent to the Federal Criminal Office in Wiesbaden by Interpol London on 21 March 2000 is that of the Accused before trial Matthew Holmes, born on 4 December 1973 in Benfleet, Great Britain.'

The document to which the photograph was attached stated that the photograph had been taken on 26 October 2000, for 'Identification purposes/international search'.

*f* [5] It was submitted on behalf of the applicant to the senior district judge that there was insufficient evidence before him to enable him to be satisfied beyond reasonable doubt that the person before him, namely the applicant, was the person wanted by the German government. Secondly, it was submitted that the conduct alleged in the warrant did not amount under English law to either the offence of theft or that of obtaining a money transfer by deception. The district judge rejected these submissions. Mr Summers, on behalf of the applicant, *g* submits to us that the district judge's rulings were in error on both matters. We shall deal first with the question of identity and secondly with the question whether the offences under English law, or one of them, were or was made out.

#### THE IDENTITY OF THE APPLICANT

*h* [6] Mr Summers's only point on the issue of the identity of the applicant is that the photograph in evidence is stated to have been taken on 26 October 2000, after the date it is said to have been sent by Interpol London to the Federal Criminal Investigation Office in Wiesbaden, which is 21 March 2000. He suggested that the evidence before the senior district judge did not exclude the reasonable possibility that there had been identity theft by the alleged true offender, who had *j* used the name of the applicant, or that in error the applicant's photograph had been substituted for the photograph taken on 26 October 2000.

[7] As mentioned above, the senior district judge was satisfied that the applicant was the person referred to in the warrant. He noted that the applicant had given his name as Matthew Darren Holmes (ie the same first and family names as the man described in the warrant) and that he had given as his date of

birth the date on the arrest warrant. The certificate was clear and unambiguous in stating that the man in the photograph was the man whose arrest was sought. The discrepancy in the date of the photograph showed no more than that there had been a mistake as to the date on which it had been taken. a

[8] We have no doubt that the senior district judge was entitled to come to this decision, and it is the decision to which we have come, for the same reasons as he gave. There is no doubt that the applicant is the person whose arrest is the subject of the arrest warrant and who is alleged to have committed the criminal acts to which it relates. b

#### THE OFFENCES UNDER ENGLISH LAW

[9] We turn to consider the more difficult question raised by this application, namely whether the conduct alleged, if it had occurred in the United Kingdom, would have amounted to at least one of the offences referred to in the authority to proceed. The first charge, as amended, alleged that the applicant— c

‘on a day between the 14th day of August 2000 and 27th September 2000 dishonestly obtained for himself a money transfer in the sum of US\$ 15,583,128.57 by deception, namely by falsely representing that the said transfer constituted bona fide banking transaction effected by or on behalf of Commerzbank Aktiengesellschaft (AG) and/or a person transacting business with that bank ...’ d

[10] The offence of obtaining a money transfer by deception was introduced by the Theft (Amendment) Act 1996 as a result of the decision of the House of Lords in *R v Preddy* [1996] 3 All ER 481, [1996] AC 815. Sections 15A and 15B of the Theft Act 1968 as so amended are as follows: e

‘15A.—(1) A person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself or another.

(2) A money transfer occurs when—(a) a debit is made to one account, (b) a credit is made to another, and (c) the credit results from the debit or the debit results from the credit. f

(3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money.

(4) It is immaterial (in particular)—(a) whether the amount credited is the same as the amount debited; (b) whether the money transfer is effected on presentment of a cheque or by another method; (c) whether any delay occurs in the process by which the money transfer is effected; (d) whether any intermediate credits or debits are made in the course of the money transfer; (e) whether either of the accounts is overdrawn before or after the money transfer is effected. g

(5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years. h

15B.—(1) The following provisions have effect for the interpretation of section 15A of this Act. j

(2) “Deception” has the same meaning as in section 15 of this Act.

(3) “Account” means an account kept with—(a) a bank; or (b) a person carrying on a business which falls within subsection (4) below ...’

[11] Mr Summers submitted that the German papers do not disclose any operative deception. The transfers made to the account of Wolpert Consultants



a Inc at ABN Amro Bank, albeit under reservation, resulted from the alleged  
misuse of other employees' passwords. The process was automated, and one  
cannot 'deceive' a machine. Mr Summers relied on the decision of the Divisional  
Court in *Davies v Flackett* [1973] RTR 8 as an authority for this proposition. He  
b submitted that the representations relied upon in charge 1 were three messages  
alleged falsely to represent that the transfer to ABN Amro Bank was a bona fide  
banking transaction. Those representations were made after the transfer and the  
making of the credit to the account of Wolpert Consultants Inc, and are,  
therefore, legally irrelevant. Lastly, he submitted that the German papers do not  
disclose from what, if any, account the moneys transferred to ABN Amro Bank  
had been drawn. There is thus no information to the effect that 'a debit [was]  
c made to one account' as required by s 15A(2)(a), or that 'the credit results from  
the debit or the debit results from the credit' within s 15A(2)(c).

[12] *Davies v Flackett* is not binding authority for the proposition that  
deception of a machine or computer is not deception for the purposes of the  
1968 Act. Ackner J so stated in terms in his judgment in that case. We none the  
less accept that 'The prevailing opinion is that it is not possible in law to deceive  
d a machine': see Professor JC Smith *The Law of Theft* (8th edn, 1997) p 97  
(para 4-12); and see Professor Edward Griew *The Theft Acts* (7th edn, 1995) p 148  
(paras 8-12, 8-13). In the modern world, where Internet banking involves the  
transfer of funds by the use of passwords and PIN numbers, and within banks and  
other organisations funds can be transferred by the misuse of passwords (as in the  
present case), it is regrettable that obtaining by means of PIN numbers,  
e passwords and the like operating on computers by a person who knows that he  
has no right to do so is not a substantive offence of theft or a cognate offence; and  
we note that Professor Griew thought that it should be. So far as the alleged  
deception of the bank's computer in the present case is concerned, we say no  
more about it, other than to draw attention to the provisions of s 2 of the  
f Computer Misuse Act 1990, which might have been used to frame a charge in the  
present case: cf *A-G's Reference (No 1 of 1991)* [1992] 3 All ER 897, [1993] QB 94.

[13] There were, however, three deceptions of human beings in the present  
case. Mr Summers submits that these deceptions occurred after the crediting of  
the account of Wolpert Consultants Inc. The facts stated in the arrest warrant are  
contradictory so far as this is concerned, stating both that 'the amount had  
g initially been credited to the customer account at the ABN Amro Bank only  
subject to confirmation' before the three deceptive messages were sent by the  
applicant and, in a later sentence:

h 'On the basis of these confirmations, the reservation was withdrawn and  
the instructed amount credited to the benefit of Wolpert Consultants Inc.  
Directly after this crediting, the balance was remitted ...'

[14] However, we agree with the senior district judge that a bank account is  
not credited, for the purposes of s 15A of the 1968 Act, while the bank with which  
the account is kept maintains a reservation that precludes the account holder  
j from dealing with the funds in question. 'Credited', in this context, means  
credited unconditionally. If Commerzbank had not apparently confirmed the  
legitimacy of the transfer of funds to the account of Wolpert Consultants Inc, the  
entry in its bank account would have been reversed by ABN Amro. Until the  
reservation was removed, the credit to that account was of no practical effect.

[15] Section 15A requires that, in addition to a credit to a bank account, there  
is a debit made to an account, and that the credit results from the debit or vice

versa. In the present case, there was no specific evidence that any debit was in fact made. However, the court is entitled to take judicial notice of invariable banking and accountancy practice. In practice, a money transfer could not be made by Commerzbank without a bank account being debited with the amount of that transfer. That bank account may have been a customer's account or its own internal account, and ultimately it may have been with the bank with which it and ABN Amro settled their inter-bank transactions; but some debit of a bank account there must have been; and the debit and the credit must have been causally connected.

[16] Assuming that there was a debit, the arrest warrant does not specify whether it was to the account of a customer with Commerzbank or to an internal account of the bank itself, or to an account of Commerzbank with some other bank. Mr Summers referred us to the judgment of the Court of Appeal, Criminal Division in *R v Graham* [1997] 1 Cr App R 302, *R v Hilton* [1997] 2 Cr App R 445 and *R v Adebayo* (7 July 1997, unreported). Those were very different cases from the present. In our judgment it is not essential to identify what account had been debited as the concomitant to the credit, or whether the account that was debited was overdrawn or in credit, provided there was a debiting of an account and the debit was causally connected with the credit; and such a debiting there must have been.

[17] Accordingly, we are satisfied that the charge of obtaining a money transfer by deception was made out.

[18] In these circumstances, it is strictly unnecessary for us to consider the charge of theft. We have not reached a final conclusion on it, but since the matter was fully argued we should state that our provisional view is that for the reasons set out below it too was made out.

[19] In his judgment, the senior district judge stated as follows:

'Although I do not have the precise details of the account, I am satisfied that the sum of approximately \$US 15.5m was taken from an account and that it was an account with a credit balance and not an overdraft. I am satisfied in taking the money from the account and applying it elsewhere that there was an appropriation and that it was property capable of being stolen.'

[20] We do not think that the senior district judge would have had the information before him to justify his finding that the account from which the moneys were drawn was not an overdrawn account. The arrest warrant implies that the moneys transferred to ABN Amro were from an account of Commerzbank itself, since the machinery of transfer was said to be appropriate to an inter-bank transfer. A bank cannot owe itself money, and so it is not clear to us that there was theft of a chose in action, as there would have been if the moneys transferred had been debited to a customer's account in credit. It is almost certain that if we had full details of the mechanism of the transfer of funds to ABN Amro, it would involve the appropriation of a chose in action, but it is not identified. But we think, however, that the charge of theft can be supported on another basis.

[21] If the recipient bank account had been situated in England, ABN Amro and the account holder would have held the moneys credited to it on a constructive trust for the defrauded party Commerzbank. In *Westdeutsche Landesbank Girozentrale v Islington London BC*, *Kleinwort Benson Ltd v Sandwell BC* [1996] 2 All ER 961 at 998, [1996] AC 669 at 716 Lord Browne-Wilkinson said:

a 'Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.'

b [22] The beneficial interest on property held on constructive trust is 'property' within the meaning of the 1968 Act, and is regarded as belonging to the person entitled to that beneficial interest (see s 4 read with s 5). The applicant was under a legal duty to return the funds transferred into the account of Wolpert Consultants Inc to Commerzbank, to whom they belonged in equity. Accordingly, s 5(3) of the 1968 Act applied. The moneys in the account of the name of Wolpert Consultants Inc were, on the basis of the facts set out in the arrest warrant, dishonestly appropriated by the applicant when he caused them to be remitted out of that account to various company accounts.

c [23] This analysis avoids what would otherwise be an irrational distinction between the obtaining of property by another's mistake (s 5(4)) and the obtaining of property by fraud. It remains to consider the decision of the Court of Appeal in *A-G's Reference (No 1 of 1985)* [1986] 2 All ER 219, [1986] QB 491. That case concerned an employee who had made a secret profit by selling his own goods on his employer's premises, thereby breaking the terms of his contract of employment. The court held that the moneys the employee received from his private customers were not received on account of his employer within the meaning of s 5(3), that the profits made by the employee were not the subject of a constructive trust, and that if they were, that constructive trust did not give the employer a proprietary right or interest in the secret profit within the ambit of s 5(1). The present case is not concerned with a secret profit, but with the fraudulent taking of property (the chose in action constituted by the credit in the bank account at ABN Amro) obtained as a result of fraud on the employer and belonging to it. In *A-G's Reference (No 1 of 1985)* [1986] 2 All ER 219 at 223, [1986] QB 491 at 503, the court stated:

g '... if the contentions of the Crown are well founded and if in each case of secret profit a trust arises which falls within s 5, then a host of activities which no layman would think were stealing will be brought within the 1968 Act. As this court pointed out in *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430 at 433, [1981] 1 WLR 578 at 583: "... the court should not be astute to find that a theft has taken place where it would be straining the language so to hold, or where the ordinary person would not regard the defendant's acts, though possibly morally reprehensible, as theft." The second matter is this. There is a clear and important difference between on the one hand a person misappropriating specific property with which he has been entrusted, and on the other hand a person in a fiduciary position who uses that position to make a secret profit for which he will be held accountable. Whether the former is within s 5, we do not have to decide. As to the latter we are firmly of the view that he is not, because he is not a trustee.'

j [24] This case is of conduct that any ordinary person would regard as theft, and is far closer to the misappropriation of specific property entrusted to an accused than to the making of a secret profit in breach of a contract of employment. We do not think that the Court of Appeal's decision in that case was intended to apply, or does apply, to facts such as those of the present.

[25] Mr Summers accepted that, if the Commerzbank account had been in England, there would have been no answer to the charge of theft. However, he submitted that since it was situated in Amsterdam, there was no evidence that the funds in the account were held on trust for Commerzbank, and indeed, since the concept of a constructive trust is a peculiarly common law concept, it is unlikely to have been so.

[26] However, foreign law is assumed to be the same as English law unless the contrary is proved (see *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) p 221 (para 9-001) r 18(2)). There may be cases in which the court should be unwilling to apply that principle to questions of foreign law arising in extradition proceedings. However, in our judgment it is inconceivable that, on the acts alleged in the arrest warrant, the laws of the Netherlands and of Germany would not treat the moneys in the Wolpert account as moneys to which Commerzbank was entitled. Put simply, we feel that the law of any developed commercial system would recognise that the moneys of a party defrauded in circumstances such as the present belong to that party. The fact that the moneys in question were situated in the Netherlands, rather than in Germany, when the act of appropriation took place is irrelevant: see *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277.

#### CONCLUSION

[27] For the applicant to succeed, he had to demonstrate that neither of the English criminal charges was made out. In agreement with the senior district judge, we hold that the offence of obtaining a money transfer by deception was made out. This is a conclusion at which we are happy to arrive given the obvious criminality of the alleged conduct of the applicant.

[28] We make two final points. First, this case again demonstrates the unnecessary technicality of the English law of theft and fraud, particularly in relation to funds in bank accounts and bank transfers. Offences under the 1968 Act are perhaps the most common offences, and the law on them should be the most simple rather than among the most technical. Secondly, it is scarcely surprising that information provided by foreign courts and prosecution authorities, which establishes an offence or offences under their own law, does not address specifically the technical requirements of English law. In the present case, for example, there was, as mentioned above, no express evidence as to the debiting of a bank account with the sum of \$US 15,583,128.57, doubtless because a German lawyer would consider it either irrelevant or obvious. The conduct alleged in the German arrest warrant is very obviously criminal conduct of a most serious nature, and it would have been highly regrettable if extradition were not available for the allegation to be tried and if found proved for the applicant to be convicted and punished. These points highlight the need for the court to consider the information provided for the purposes of extradition proceedings realistically rather than over-critically.

*Application dismissed.*

Martyn Gurr Barrister.



a Independent Publishing Co Ltd v Attorney  
General of Trinidad and Tobago  
and another

b Trinidad and Tobago News Centre Ltd and  
others v Attorney General of Trinidad and  
Tobago and another

[2004] UKPC 26

c PRIVY COUNCIL

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD WALKER OF GESTINGTHORPE,  
LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

15–18 MARCH, 8 JUNE 2004

d *Contempt of court – Publications concerning legal proceedings – Postponement of publication – Prohibition of report of proceedings – Whether court possessing common law power to postpone publication of open court proceedings.*

e Ten people were committed to stand trial in Trinidad and Tobago for murder. There was very widespread publicity about the case. In June 1996 the trial judge made an order restraining the media from publishing, referring to or commenting in any way on certain matters before the court. Three days later a newspaper published by the claimant T&T carried articles pertaining to those matters written by the claimants A and B. Contempt charges were issued against f A and B alleging that the articles contravened the non-publication order. The trial judge found them both guilty. He then confirmed a further non-publication order restraining the media from referring to the contempt proceedings. Shortly thereafter the claimant IPC, the publisher of a weekly journal, issued proceedings seeking redress under the Constitution of Trinidad and Tobago for violation of g its rights to free expression by the non-publication orders. T&T, A and B sought, inter alia, similar redress. The judge dismissed both constitutional motions. The claimants appealed. The Court of Appeal of Trinidad and Tobago held, inter alia, that the non-publication orders had been properly made, that the trial judge had an inherent jurisdiction to make them and that they had been justified in the h interests of a fair trial. The claimants appealed. The issues before the Privy Council included the reach of the court's contempt jurisdiction at common law.

j **Held** – The court had no power at common law to order that the publication of a report of open court proceedings be postponed. The power of the court to make orders against the public at large had to be conferred by legislation. Even without legislation, however, it remained open to the court to explain its concern and warn the press that they would be at risk of contempt proceedings were they to publish the matter in question. Such a warning would make it both less likely that a contempt would be committed and easier to punish if it were. The claimants were entitled to seek declaratory relief by way of constitutional motion and would be granted a declaration that the right to free expression should not be

contravened by non-publication orders made in excess of the court's jurisdiction (see [65], [67], [68], [76], [82], below).

*Scott v Scott* [1911–13] All ER Rep 1, *R v Socialist Worker Printers and Publishers Ltd, ex p A-G* [1975] 1 All ER 142, *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, *Ex p The Telegraph Group* [2001] 1 WLR 1983 and *R v Horsham Justices, ex p Farquharson* [1982] 2 All ER 269 considered

*R v Clement* (1821) 4 B & Ald 218 doubted.

## Notes

For contemporary reports of proceedings, see 9(1) *Halsbury's Laws* (4th edn reissue), para 428.

## Cases referred to in judgment

- A-G for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342, NSW CA  
*A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.  
*Ahnee v DPP* [1999] 2 LRC 676, [1999] 2 AC 294, [1999] 2 WLR 1305, PC.  
*Boodram v A-G of Trinidad and Tobago* [1996] 2 LRC 196, [1996] AC 842, [1996] 2 WLR 464, PC.  
*Chokolingo v A-G of Trinidad and Tobago* [1981] 1 All ER 244, [1981] 1 WLR 106, PC.  
*Clement, Re* (1822) 11 Price 68, 147 ER 404.  
*Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.  
*Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, Can SC.  
*Devi v Roy* [1946] AC 508, PC.  
*Forbes v A-G of Trinidad and Tobago* [2002] UKPC 21, [2003] 1 LRC 350.  
*Harrikissoon v A-G of Trinidad & Tobago* [1980] AC 265, [1979] 3 WLR 62, PC.  
*Hinds v A-G of Barbados* [2001] UKPC 56, [2002] 4 LRC 287, [2002] 1 AC 854, [2002] 2 WLR 470.  
*HTV Cymru (Wales) Ltd, Ex p* [2002] EMLR 184.  
*John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, NSW CA.  
*Maharaj v A-G for Trinidad and Tobago* [1977] 1 All ER 411, PC.  
*Maharaj v A-G of Trinidad and Tobago (No 2)* [1978] 2 All ER 670, [1979] AC 385, [1978] 2 WLR 902, PC.  
*Observer Publications Ltd v Matthew* [2001] UKPC 11, [2001] 4 LRC 288.  
*R v Border Television Ltd, ex p A-G, R v Newcastle Chronicle and Journal Ltd, ex p A-G (Note)* (1978) 68 Cr App R 375, DC.  
*R v Brandreth* (1817, unreported).  
*R v Central Criminal Court, ex p Crook* (1984) Times, 8 November.  
*R v Clement* (1821) 4 B & Ald 218, 106 ER 918.  
*R v Horsham Justices, ex p Farquharson* [1982] 2 All ER 269, [1982] QB 762, [1982] 2 WLR 430, CA.  
*R v Poulson* [1974] Crim LR 141.  
*R v Socialist Worker Printers and Publishers Ltd, ex p A-G* [1975] 1 All ER 142, [1975] 1 QB 637, [1974] 3 WLR 801, DC.  
*R v Watson* (1817, unreported).  
*Raybos Australia Pty Ltd v Jones* (1985) 2 NSW LR 47, NSW CA.  
*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.  
*Taylor v A-G* [1975] 2 NZLR 675, NZ CA.  
*Telegraph Group plc, The, Ex p* [2001] EWCA Crim 1075, [2001] 1 WLR 1983.

**a Appeals and cross appeal**

*Independent Publishing Co Ltd v Attorney General of  
Trinidad and Tobago and anor*

**b** Independent Publishing Co Ltd (IPC) appealed from the decision of the Court of Appeal of Trinidad and Tobago (Sharma and Warner JJA, de la Bastide CJ dissenting) on 6 June 2002 dismissing its appeal from the decision of Sealey J on 26 July 1996 dismissing its application under s 14(1) of the Constitution of Trinidad and Tobago for declarations against the respondents, the Attorney General of Trinidad and Tobago and the Director of Public Prosecutions, that non-publication orders made by Jones J on 10 and 14 June 1996 relating to the trial of Dole Chadee and nine others, violated IPC's constitutional rights. The facts are set out in the opinion of the Board.

*Trinidad and Tobago News Centre Ltd and ors v Attorney General of  
Trinidad and Tobago and ors*

**d** Trinidad and Tobago News Centre Ltd (T&T), Ken Ali and Sharmain Baboolal appealed from the decision of the Court of Appeal of Trinidad and Tobago (Sharma and Warner JJA, de la Bastide CJ dissenting) on 6 June 2002 dismissing their appeals from the decision of Sealey J on 26 July 1996 dismissing their applications under s 14(1) of the Constitution of Trinidad and Tobago for declarations against the respondents, the Attorney General of Trinidad and Tobago and the Director of Public Prosecutions, that non-publication orders made by Jones J on 10 and 14 June 1996 relating to the trial of Dole Chadee and nine others, violated the appellants' constitutional rights. Mr Ali and Ms Baboolal had also appealed to the Court of Appeal against orders of Jones J convicting them of contempt of court and sentencing them, respectively, to imprisonment and a fine. The Court of Appeal had (i) allowed Mr Ali's appeal against conviction, quashed his sentence of imprisonment, and allowed his constitutional appeal in relation to breach of due process; and (ii) allowed Ms Baboolal's appeal against conviction, quashed her fine, and dismissed her constitutional appeal in relation to breach of due process. The respondents cross appealed against the decision of the Court of Appeal allowing Mr Ali's due process appeal. The facts are set out in the opinion of the Board.

**g** Phillip Havers QC, Ian Benjamin (of the Trinidad and Tobago Bar) (instructed by Herbert Smith as agents for *Lex Caribbean*) for IPC.  
**h** Andrew Nicol QC, Odai Ramischand (of the Trinidad and Tobago Bar) and Anthony Hudson (instructed by *Simons Muirhead & Burton* as agents for *Odai Ramischand & Co*, Trinidad and Tobago) for T&T, Mr Ali and Ms Baboolal.  
*James Guthrie QC, Simon Davenport and Dalisa Christopher SC* (of the Trinidad and Tobago Bar) (instructed by *Charles Russell*) for the respondents.

**j** The Board took time for consideration.

8 June 2004. The following judgment of the Board was delivered.

**LORD BROWN OF EATON-UNDER-HEYWOOD.**

[1] These appeals raise fundamental questions both as to the reach of the court's contempt jurisdiction at common law and as to the circumstances in

which a claimant is entitled to constitutional redress under s 14 of the Constitution of Trinidad and Tobago (the Constitution). Before the issues can properly be identified, however, it is necessary to recount something of the background as well as the more immediate circumstances surrounding the appeals.

[2] On 10 January 1994 four members of a family were brutally murdered as a result of which Dole Chadee (also called Nankissoo Boodram), a notorious drug lord, and nine others were charged with murder and on 30 September 1994, following the preliminary inquiry, committed to stand trial on 4 November 1994.

[3] Both before and after the preliminary inquiry there was massive publicity about the case and in particular about Dole Chadee, publicity later to be described by Sharma JA as 'sensational, unrelenting, and scandalous'. 'The whole country' observed Sharma JA 'appeared to be riveted and obsessed with the pending trial and many commentators had dubbed it as "the trial of the century"'. Chadee in the result filed a constitutional motion complaining about the Director of Public Prosecution's failure to put an end to this pre-trial publicity and contending that it had infringed his rights to due process and a fair trial. He was seeking either discontinuance or at least the postponement of his trial. In the event the application failed successively before the judge, before the Court of Appeal and before the Privy Council: see *Boodram v A-G of Trinidad and Tobago* [1996] 2 LRC 196, [1996] AC 842, where several examples of the prejudicial publicity are to be found. On dismissing the appeal, Lord Mustill, giving the judgment of the Board, said:

'In a case such as this, the publications either will or will not prove to have been so harmful that when the time for the trial arrives the techniques available to the trial judge for neutralising them will be insufficient to prevent injustice ... The proper forum for a complaint about publicity is the trial court, where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury, and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution.' (See [1996] 2 LRC 196 at 204, 206, [1996] AC 842 at 852, 855.)

[4] Following the Privy Council's decision (given on 19 February 1996) the trial was re-fixed for hearing on 10 June 1996. The publicity did not cease. A key witness, Clint Huggins, who had testified at the preliminary inquiry, was killed shortly after leaving protective custody in February 1996. Amongst the many daunting tasks facing the trial judge, Jones J, was the selection of an unbiased jury, a process which was to take from 13 June–26 July and to involve the oral examination of each potential juror to see whether they were affected by the weight of adverse publicity. Many were held to be disqualified. All the accused's challenges were used. The jury pool had to be supplemented by 'praying a tales'.

[5] Meanwhile there had been a dramatic development in the case. On 10 June 1996 counsel (Mr Peter Thornton QC for the ten accused and Mr Cassell QC for the state) saw Jones J in Chambers and told him that one of the accused, Levi Morris, had decided to plead guilty to the four counts of murder and testify against his co-accused in return for which his mandatory death sentence was to be commuted by presidential pardon to one of life



a imprisonment. The pardon was conditional on Morris giving evidence for the prosecution in accordance with a statement taken from him on 4 June.

b [6] Mr Thornton then said that he would ask the judge in open court for an order that none of this should be reported for the time being. Were Morris not ultimately to give evidence in line with his fresh statement, prior publication of his change of position would have prejudiced the jury. The proposed order was  
c 'in order to secure a fair trial [and] that there should not be any further difficulty with juries' (assuming that counsel's imminent application 'to stay the proceedings because of the adverse pre-trial publicity ... should be unsuccessful'—an application in the event made on 10 June and dismissed on 13 June). Mr Thornton told the judge: 'You have an inherent power to control the proceedings of your court at common law, inherent jurisdiction.' Mr Cassell  
d agreed and said that he did not resist the proposed order. He indicated, however, that before opening the case for the prosecution he would be applying to the judge to rule on the admissibility of Mr Morris's evidence and the evidence of Mr Huggins's deposition since otherwise there would be no case to open.

[7] Upon the adjournment of the hearing into open court, Jones J then made  
e the order sought by counsel (the 10 June order) in these terms:

'It is ordered that the media, both printed and electronic for the time being and until further order, refrain from publishing, referring to or commenting upon in any way the matters in this court which relate to the accused Levi Morris or Modeste, and in particular, to his plea or to the sentence imposed by this Court.'

[8] Despite that order there appeared in the TNT Mirror newspaper on the morning of Friday 14 June 1996, three articles respectively headlined 'State has Bombshell Witness', 'Remember Parmassar?' (Parmassar had similarly turned  
f state's evidence in an equally sensational murder trial some 20 years earlier) and 'Chadee's Cool Confidence', the combined effect of which would lead readers to suspect that one of the accused had pleaded guilty and would be giving evidence against his co-accused. The editor of that day's issue and author of the second article was the appellant, Ken Ali; the author of the third article was the appellant, Sharmain Baboolal, a freelance journalist; the publishers of the newspaper were  
g the appellants, T & T News Centre Ltd (T&T).

[9] Contempt charges were immediately issued against Mr Ali and Ms Baboolal and they were required to attend before Jones J at 2 pm that day to show cause why they should not be punished for contempt of court. The charges  
h alleged that the articles contravened the 10 June order. Having been served with the notices only some 15 minutes before the hearing, Mr Ali and Ms Baboolal attended with junior counsel and made a series of applications for adjournments, first to allow counsel to take instructions, 35 minutes being allowed for the purpose; then to await the arrival of Mr Maharaj, senior counsel by then instructed on their behalf and on his way to court, 20 minutes being allowed for that; then, on Mr Maharaj's arrival, for him to research the law and consider  
j whether to file affidavit evidence, 17 minutes only being allowed for that, despite the offer of an undertaking that such publications would not be repeated. Mr Maharaj was not shown the 10 June order (which in any event had probably not been transcribed) and had no time even to read the three articles. Upon inquiring of the judge whether it was proposed to lead any evidence against the two journalists, Mr Maharaj was told that none was thought necessary. Having

called Ms Baboolal and the newspaper's editor-in-chief to give evidence, Mr Maharaj then renewed his application for an adjournment for an opportunity 'to check the constitutionality of this order'. The application was refused and Mr Maharaj was instead required to address the judge. Following his submissions, essentially to the effect that the articles (which he himself had not read) did not breach the order, Mr Hudson-Phillips QC, counsel instructed by the Attorney General, then addressed the court in response. Having found both appellants guilty, the judge immediately committed Mr Ali to prison for 14 days and fined Ms Baboolal TT\$1,000 to be paid within 7 days, 21 days' imprisonment in default.

[10] The judge then confirmed a further non-publication order made at an earlier stage of the hearing that afternoon (the 14 June order) in the following terms:

'Members of the press, that is, both the electronic and print media ... I ... order that for the time being and until further order you refrain from publishing, referring to, commenting upon in any way whatsoever the matters in this court which relate to the contempt proceedings against Ken Ali and Sharmain Baboolal, including the charges, their pleas or any submissions made in the matter, nor may you publish this order.'

[11] On 17 June Mr Ali and Ms Baboolal appealed against their convictions and sentences, Mr Ali being released on bail by the Court of Appeal the following day, 18 June.

[12] On 18 June the appellant, Independent Publishing Co Ltd (IPC), publishers of *The Independent*, a weekly journal, issued a notice of motion seeking redress under s 14(1) of the Constitution for alleged violations of their constitutional rights by the non-publication orders made respectively on 10 and 14 June 1996.

[13] It is convenient at this stage to set out the provisions of the Constitution directly relevant to IPC's (and later T&T's) motion:

'4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist ... the following fundamental human rights and freedoms, namely ... (i) freedom of thought and expression ... (k) freedom of the press ...

14(1). For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.'

[14] On 25 June the appellants T & T, Mr Ali and Ms Baboolal similarly issued a notice of motion under s 14(1) of the Constitution, in the case of Mr Ali and Ms Baboolal seeking redress not only for alleged violations of their rights enshrined in paras (i) and (k) but also for alleged violations of their rights under para (a) of s 4:

'the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law.'

a [15] In short, Mr Ali and Ms Baboolal were contending both that the orders of 10 and 14 June were not lawfully made whereby their freedom of expression and the freedom of the press (which includes the right of the public to receive information) (rights collectively referred to hereafter as the right to free expression) were infringed, and in addition that they had not had a fair trial upon the contempt charges brought against them.

b [16] Both constitutional motions were heard by Sealey J and dismissed by her in judgments delivered on 26 July 1996. At that time, of course, Mr Ali's and Ms Baboolal's appeals against their convictions and sentences for contempt were outstanding. They were to remain so for a further six years.

c [17] Albeit of no direct relevance to the issues now before the Board, it may be noted that the criminal trial before Jones J finally began before the jury on 26 July 1996 and ended on 3 September 1996 with the conviction (and subsequent hanging) of all nine accused. Morris had duly given evidence against them.

d [18] IPC, T & T, Mr Ali and Ms Baboolal all appealed against the dismissal of their respective constitutional motions. Those appeals were heard together with Mr Ali's and Ms Baboolal's outstanding appeals against their contempt convictions and sentences by the Court of Appeal (de la Bastide CJ, Sharma and Warner JJA) on 1–5 March 1999, three further years then elapsing before judgments were finally handed down on 6 June 2002. Despite this regrettably long delay their Lordships pay tribute to all three members of the court for the quality of their judgments. The issues for determination were many, various and difficult and each was most carefully and thoughtfully addressed. The judgments extend in all to some 150 pages of transcript.

e [19] In summary, the Court of Appeal's decisions were as follows:

f (1) IPC's and T&T's constitutional appeals were dismissed (de la Bastide CJ dissenting). The orders of 10 and 14 June were properly made: the trial judge had an inherent jurisdiction to make them and furthermore they were justified in the interests of a fair trial.

g (2) Mr Ali's contempt appeal and (on the due process ground but not on the ground of free expression) his constitutional appeal were allowed (Sharma JA dissenting). His conviction and sentence were quashed. Damages for the breach of his constitutional right to due process were ordered to be assessed by a judge in chambers.

(3) By unanimous decision Ms Baboolal's contempt appeal was allowed and her conviction and fine set aside; both grounds of her constitutional appeal, however, were dismissed.

h The reasoning of each member of the court on the many issues arising (even when in agreement on the outcome) was for the most part very different.

[20] Five issues now arise for determination by the Board (the first four being raised by the appellants, the fifth by the respondents on their cross-appeal):

(1) Does the court have a common law power to order that the publication of a report of proceedings conducted in open court be postponed?

j (2) Were the orders made respectively on 10 and 14 June 1996 justifiable?

(3) Were IPC and T&T entitled to redress by constitutional motion for interference with their right to free expression?

(4) Were Mr Ali and Ms Baboolal entitled to redress by constitutional motion for interference with their right to free expression?

(5) Was Mr Ali entitled to constitutional relief for a violation of his right to due process?

ISSUE 1. IS THERE POWER AT COMMON LAW TO ORDER THE PUBLICATION OF A REPORT OF OPEN COURT PROCEEDINGS TO BE POSTPONED?

[21] It is, of course, the general rule that justice must be administered in public (see *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1). As, moreover, Lord Diplock observed in *A-G v Leveller Magazine Ltd (The Leveller)* [1979] 1 All ER 745 at 750, [1979] AC 440 at 450:

‘The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted ... As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.’

[22] Lord Diplock, however, then noted that in certain circumstances:

‘[T]he application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the “trial within a trial” as to the admissibility of a confession in a criminal prosecution. The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the “trial within a trial” until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the “trial within a trial” is held in open court in the presence of the press and public but in the absence of a jury. So far as publishing those proceedings outside the court is concerned any report of them which might come to the knowledge of the jury must be withheld until after they have reached their verdict; but it may be published after that. Only premature publication would constitute contempt of court.’ (See [1979] 1 All ER 745 at 750, [1979] AC 440 at 450.)

[23] A ‘trial within a trial’—concerning the admissibility of a confession (Lord Diplock’s illustration) or of previous convictions or of similar fact evidence or of any similarly prejudicial matter—is one obvious example of where press reporting of open court proceedings must be postponed. Another example is where the court, again exercising ‘its inherent power to control the conduct of proceedings before it’ and ‘reasonably believe[ing] it to be necessary in order to serve the ends of justice’, allows a witness to withhold his name. Such was the position in *The Leveller* itself, where the magistrates, in committal proceedings for an offence under the Official Secrets Acts, had for reasons of national security allowed a witness to be referred to solely as ‘Colonel B’. Such also had been the position in *R v Socialist Worker Printers and Publishers Ltd, ex p A-G* [1975] 1 All ER 142, [1975] 1 QB 637 (*The Socialist Worker*), where the judge at a blackmail trial had allowed the two alleged victims to be called simply ‘Mr Y’ and ‘Mr Z’.



[24] Three points should at once be noted about those two cases. First, that in neither of them was any order made directing the media not to publish the names of the witnesses who had been allowed to testify under pseudonyms. Secondly, that in both cases the Crown accepted that there would have been no power to make such an order. The report of the Crown's argument in *The Socialist Worker*, advanced by Sam Silkin QC (the Attorney General), Gordon Slynn QC and Harry Woolf, records counsel's acknowledgement that the trial judge 'had no power to make orders affecting the press or other media in their conduct outside the court' (see [1975] 1 QB 637 at 639). In *The Leveller* [1979] 1 All ER 745 at 754, [1979] AC 440 at 455 Viscount Dilhorne noted that concession in *The Socialist Worker* and continued, 'in the present case the Crown, rightly in my opinion, did not contend that examining magistrates had any such power'. Thirdly, that the absence of specific orders against the press did not save them from a finding of contempt. The Divisional Court found *The Socialist Worker* in contempt both because the publication was 'an affront to the authority of the court' and because 'by destroying the confidence of witnesses in potential future blackmail proceedings in the protection which they would get, there was an act calculated to interfere with the due course of justice' (see [1975] 1 All ER 142 at 151, [1975] 1 QB 637 at 652 per Lord Widgery CJ). The publisher's main argument in the case, it may be noted, was not that no order had been made against the press but rather that the trial judge had no power in law to allow the witnesses to withhold their names in the first place. This argument was roundly rejected: such a direction, it was held, was clearly preferable to an order for trial in camera where 'the entire supervision by the public is gone'. Similarly in the second case, *The Leveller's* appeal to the House of Lords succeeded, not for want of an order against the press, but rather because Colonel B's own evidence had enabled his identity to be discovered without difficulty. But for that, the appeal would have been dismissed. As Viscount Dilhorne said:

'It must have been clear to all in court and to all who learnt what had happened in court that the object sought to be achieved by the justices allowing Colonel B to write down his name was the preservation of his anonymity ... If he had not given that evidence, then the appellants would have frustrated the object which the magistrates by their ruling sought to achieve. True it is that no warning was given that anyone who published his name might be proceeded against for contempt of court. In *R v Border Television Ltd, ex parte Attorney General* and *R v Newcastle Chronicle and Journal Ltd, ex parte Attorney General* (Note) (1978) 68 Cr App R 375 heard together by the Divisional Court on 17 January 1978 [where the media was found guilty of contempt for reporting that the defendant had pleaded guilty at the outset of her trial to a number of other charges against her] it was held that ... no warning was necessary. While I do not think that it was strictly necessary for the magistrates to give such a warning in this case, I think it very desirable that in future cases where a court takes the course that the magistrates took in this case, a warning that publication of the witness's identity might lead to proceedings for contempt should be given.' (See [1979] 1 All ER 745 at 754-755, [1979] AC 440 at 456.)

[25] By the same token that a contempt may be committed in the witness identity cases without there being any order against the press, so too, of course, as Lord Diplock pointed out in *The Leveller* (see [22], above), it may be committed

by premature publication where there has been a 'trial within a trial'. What both these classes of case have in common, their Lordships note, is that the court has made an order directly affecting the conduct of the proceedings before it—in the 'trial within a trial' cases by sending the jury out of court; in the witness identity cases by allowing the name to be withheld—and that the press thwart the evident object of such orders at their peril. In the 'trial within a trial' cases, of course, press publication is merely postponed until the jury's verdict has been reached; in the witness identity cases, however, it is implicitly forbidden on a permanent basis.

[26] Their Lordships turn to consider the different category of case in which the present appeal lies, cases in which the court has no occasion to make any order directly affecting the conduct of the proceedings before it but is concerned rather to guard against press publicity which may imperil the fairness of those proceedings (or, indeed, of other proceedings). The court, in short, may wish to do precisely that which the Crown in *The Socialist Worker* [1975] 1 QB 637 at 639 acknowledged there is no power to do: 'to make orders affecting the press or other media in their conduct outside the court'. Typically, as in the present case, the court's concern will be merely to postpone the publication of a report of some aspect of the proceedings before it until a later stage in the hearing. Sometimes, however, it will be to postpone publication until a later time still, perhaps when other proceedings have been completed. An example of the latter situation is *R v Poulson* [1974] Crim LR 141, in the course of which Waller J as the trial judge said that he did not see how the press could report the evidence in the case without running the risk of being in contempt of other criminal proceedings which had already begun against Poulson and other defendants in respect of similar offences. Waller J's observation was described in the Phillimore Committee's Report on Contempt of Court (Cmd 5794) (presented December 1974) para 134, as a 'ruling', by Borrie and Lowe *The Law of Contempt* (3rd edn, 1996), p 279, as a 'direction' and by Lord Denning MR in *R v Horsham Justices, ex p Farquharson* [1982] 2 All ER 269 at 286, [1982] QB 762 at 792 as a 'warning'. Whichever it was, Waller J expressly based it on *R v Clement* (1821) 4 B & Ald 218, 106 ER 918 and *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1.

[27] The greatest single question raised on the present appeal is whether these cases, in particular *R v Clement*, do indeed support the view that the court has a common law power to make postponement orders of this nature, at any rate those which forbid the report of prejudicial matter, as here, until the conclusion of the proceedings before it, (if not orders made on a longer term basis).

[28] The position in the United Kingdom, it is convenient to note at this stage, has been governed for many years by the Contempt of Court Act 1981 (the 1981 Act), in particular ss 4 and 11. It will later become necessary to consider these provisions in a little detail. Meantime, all that need be remarked is that neither the press nor anyone else aggrieved could appeal against non-publication orders made under the 1981 Act until, seven years later, such right of appeal was expressly accorded (as a result of a 'friendly settlement' following a Strasbourg challenge by the press) by s 159 of the Criminal Justice Act 1988 (the 1988 Act).

[29] The contention that the court has power at common law to postpone press reporting of all or part of the proceedings rests almost entirely on the case of *R v Clement*, a contempt case arising out of the trial for high treason of those involved in the Cato Street Conspiracy in 1820.

[30] Clement was the editor of the only newspaper to breach that 'injunction'. At the conclusion of the criminal trials he was fined £500. He then failed successively before the Court of King's Bench in his challenge to the legality of

a the fine (*R v Clement* (1821) 4 B & Ald 218, 106 ER 918) and before the Court of Exchequer in his application to be discharged from the fine (*Re Clement* (1822) 11 Price 68, 147 ER 404). Each conspirator having elected to be tried separately, Lord Abbott CJ had indicated that no reports of the trials should be published until all were concluded. Gurney's account of the treason trials, vol 1 p 56, records the Lord Chief Justice's direction as follows:

b 'As there are several persons charged by this indictment whose trials may come on one after another, the Court thinks it necessary, for the furtherance of justice, strictly to prohibit the publication of the proceedings on this or any other trial, until all the trials shall be gone through. It is highly necessary, for the purposes of justice, that the public mind, or the minds of those who may be to serve on trials hereafter, may not be influenced by publications of anything which takes place on the present trial; we hope all persons will observe this injunction.'

c [31] Fining Clement in his absence, the Lord Chief Justice is recorded by d Gurney (vol 2, p 654) as having said:

e 'No person can rationally doubt that the publication which has been complained of manifestly tended to obstruct the course of public justice ... The mischievous tendency of such publications cannot, as I have already said, be doubted by any mind; the Court thought it right before the first trial was begun, to express in the strongest terms its opinion as to the impropriety of any such publication, and to admonish those who were concerned in the publication of the daily or weekly papers to abstain from such insertion ...'

f [32] In what followed the Lord Chief Justice on three further occasions referred to the court's earlier 'injunction' as an 'admonition'. That language g notwithstanding, several members both of the Court of King's Bench and of the Exchequer Chamber expressed the view, first, as Baron Garrow put it, that it was 'an actual order' rather than 'a mere admonitory recommendation of the Judge', and secondly that, as Baron Wood said ((1822) 11 Price 68 at 87–88, 147 ER 404 at 410), the court 'had a right to make such an order for such a purpose; and, consequently, if it were infringed, they might fine and imprison for contempt'. Bayley J in the Court of King's Bench stated ((1821) 4 B & Ald 218 at 229–231, 106 ER 918 at 922):

h 'The whole trial of all these individuals constituted one entire proceeding; for if they had not severed in their challenges, the prisoners would have been tried all at once. In point of fact, however, they did sever in their challenges, and were tried seriatim. It could not, therefore, be said that the whole proceeding was terminated, until the last of those prisoners had taken his trial. Now the Court before whom the trial was about to take place was a Court of General Gaol Delivery, and had authority to make any order which j they might judge to be necessary, in order to preserve the purity of the administration of justice in the course of the proceeding then depending before them, and to prohibit any publication which might have a tendency to prevent the fair and impartial consideration of the case ... [I]t is argued that if the Court had this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very

different; for the prohibition, here, has only been till the whole trial was completed.'

[33] Holroyd J expressed a similar opinion ((1821) 4 B & Ald 218 at 232–233, 106 ER 918 at 923):

'Now, I take it to be clear, that a Court of Record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending.'

[34] That said, it is quite clear from the judgments of the Court of Exchequer that the *publication* was in any event found to be a contempt. Baron Graham observed ((1822) 11 Price 68 at 84, 147 ER 404 at 409):

'If we call this order of the court an order, or an admonition, or a notice, the object of it was most proper, and the best reasons are to be found for it, in the necessity of such a cause for ensuring fair administration of law and justice.'

[35] Chief Baron Richards put it altogether more trenchantly ((1822) 11 Price 68 at 83, 147 ER 404 at 409):

'The publication was a gross and wretchedly wicked contempt and the court most properly fined him ... [T]herefore, the publication cannot but be considered as a direct contempt, tending to obstruct and impede the due administration of justice, necessarily having the effect of prejudicing the case of the other prisoners ...'

[36] That approach was consistent with how the Crown's case had been put before the Court of King's Bench ((1821) 4 B & Ald 218 at 220–221, 106 ER 918 at 918–919). In contending for the discharge of the original rule nisi, the law officers argued not only that the trial court 'had authority to make the original order, prohibiting the publication of the proceedings' (for which two precedents were cited) but also—

'Besides, a publication, the effect of which is likely to prevent or obstruct the course of public justice, has always been held to be a contempt of the court.'

The two precedents said to support the proposition that the original order was properly made were *R v Watson* (1817, unreported) and *R v Brandreth* (1817, unreported), each arising out of a high treason trial in 1817 in which similar orders had been made and infringed by newspaper editors. In neither case, however, was any application in fact made to punish the editors for breach of the orders.

[37] *R v Clement* was cited to the House of Lords in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 and was referred to by two of their Lordships. *Scott v Scott* itself, of course, was concerned with a very different question, namely the circumstances in which a court can properly sit in camera. Viscount Haldane LC, having noted that it is often necessary for the court to exclude the public in cases involving wards of court and lunatics, and may be necessary too when litigating about a secret process since 'it may well be that justice could not be done at all if it had to be done in public' and as 'the paramount object must always be to do



a justice, the general rule as to publicity, after all only the means to an end, must accordingly yield', continued ([1913] AC 417 at 438, [1911–13] All ER Rep 1 at 10):

b 'I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *R v Clement*, where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge *had impeded justice*, and was, *therefore*, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of a class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is contest between parties.' (Our emphasis.)

c [38] Lord Atkinson stated:

d 'One of the strangest things in this strange case is that the case of *R v Clement* should be cited as an authority for the proposition that a [court] has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial. That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited.' (See [1913] AC 417 at 453, [1911–13] All ER Rep 1 at 17–18.)

e [39] The point about *R v Clement*, Lord Atkinson then explained, was that the several trials of the conspirators had 'constituted one entire proceeding' so that the contemptuous publication was 'in the middle and not at the end of that proceeding' (see [1913] AC 417 at 453–454, [1911–13] All ER Rep 1 at 18). The case was accordingly no authority for the proposition that it had been lawful to sit in camera, as in *Scott v Scott*, and thereby seek to prevent a report of the proceedings even after their conclusion. Clement, Lord Atkinson further noted, had been f 'punished for contempt of court in having acted "contrary to the order of this court, and to the obstruction of public justice," not merely the first'. Whilst, therefore, Lord Atkinson had described *R v Clement* as 'a weighty authority', he does not appear to have considered it authority for the proposition that a breach of the court's order would of itself constitute a contempt. The words italicised g above in the Lord Chancellor's judgment suggest that he too may have been of that view.

h [40] *R v Clement* was not cited to the court either in *The Socialist Worker* or in *The Leveller* [1979] 1 All ER 745, [1979] AC 440, authorities, as already explained, concerned with orders affecting the conduct of proceedings in the courtroom rather than directed to the press outside. Their Lordships' speeches in *The Leveller* nevertheless bear upon the issue now arising and it is necessary to cite briefly from each of them. Lord Diplock said:

j 'My Lords, in the argument before this House little attempt was made to analyse the juristic basis on which a court can make a "ruling", "order" or "direction" (call it what you will) relating to proceedings taking place before it, which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their legal representatives or as witnesses. The Court of Appeal of New Zealand in *Taylor v A-G* [1975] 2 NZLR 675 was clearly of opinion that a court had power to make an explicit order directed

to and binding on the public ipso jure as to what might lawfully be published outside the courtroom in relation to proceedings held before it. For my part I am prepared to leave this as an open question in the instant case.' (See [1979] 1 All ER 745 at 751, [1979] AC 440 at 451.)

[41] Viscount Dilhorne having, as already noted, stated that in his opinion the Crown was right not to have contended for 'any power to make orders affecting the press or other media in their conduct outside the court', continued:

'It is not necessary to express an opinion on whether [*Taylor v A-G* before the New Zealand Court of Appeal] was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute.' (See [1979] 1 All ER 745 at 754, [1979] AC 440 at 456.)

[42] Lord Edmund-Davies said:

'Neither in [*The Socialist Worker*] nor in the instant case did the court give any direction against publication purporting to operate outside the courtroom. It has to be said that hitherto the view seems to have been widely accepted that no such power exists ... In the present appeal ... appellants and respondents alike concurred in submitting that ... the magistrates' court had no power to direct that there should be no publication in the Press or by any other means of the identity of [Colonel B] ... Counsel for the Attorney General told your Lordships in terms that the court could not direct the outside world, but added that its ruling nevertheless extended outside its walls ... After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt ... For [contempt] to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future ... [T]he Press and others could, as I believe, be helped were a court when sitting in public to draw express attention to any procedural decisions it had come to and implemented during the hearing, to explain that they were aimed at ensuring the due and fair administration of justice, and to indicate that any who by publishing material or otherwise acting in a manner calculated to prejudice that aim would run the risk of contempt proceedings being instituted against them. Farther than that, in my judgment, the court cannot go.' (See [1979] 1 All ER 745 at 760–762, [1979] AC 440 at 463–465.)

[43] Lord Russell of Killowen said:

'I find no problem in the concept that a decision or direction may have no immediate aim and no direct enforceability beyond the deciding and directing court, but yet may have such effect in connection with contempt of court. Merely to state, as is the law, that in general contempt of court is the improper interference with the due administration of justice is to state that it need not involve disobedience to an order binding on the alleged contemnor.' (See [1979] 1 All ER 745 at 763, [1979] AC 440 at 468.)

[44] Lord Scarman said:

'I would summarise my conclusions thus. If a court is satisfied that for the protection of the administration of justice from interference it is necessary to order that evidence either be heard in private or be written down and not given in open court, it may so order. Such an order, or ruling, may be the foundation of contempt proceedings against any person who, with knowledge of the order, frustrates its purpose by publishing the evidence ... The order or ruling must be clear and can be made only if it appears to the court reasonably necessary ... [T]hose who are alleged to be in contempt must be shown to have known, or to have had a proper opportunity of knowing, of the existence of the order ...' (See [1979] 1 All ER 745 at 768, [1979] AC 440 at 473.)

[45] Although, as stated, *R v Clement* itself was not cited to their Lordships in *The Leveller*, *Scott v Scott* was and so too was the Phillimore Report, both of which made reference to *R v Clement*.

[46] The final United Kingdom authority to which their Lordships refer upon this first issue is *R v Horsham Justices, ex p Farquharson* [1982] 2 All ER 269, [1982] QB 762. It is in this connection that the following provisions in the Contempt of Court Act 1981 become most relevant:

'4.—(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose ...

6. Nothing in the foregoing provisions of this Act ... (b) implies that any publication is punishable as contempt of court under [the strict liability] rule which would not be so punishable apart from those provisions ...

11. In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.'

The influence on these provisions of *The Leveller*, decided just two years earlier, will be obvious.

[47] In *Ex p Farquharson* Shaw and Ackner LJ held that premature publication in contravention of a postponement order under s 4(2) of which the publisher was aware is a contempt of court notwithstanding s 6(b). Otherwise, as Shaw LJ pointed out ([1982] 2 All ER 269 at 290, [1982] QB 762 at 798), a s 4(2) order 'would be quite futile'. Lord Denning MR, however, took a different view:

'[Counsel] suggested that once an order is made by a court under s 4(2), and a newspaper publishes in breach of it, then the newspaper is automatically guilty of a contempt of court without any inquiry as to whether the order was rightly made or not. I cannot accept this suggestion

for one moment. It would mean that every court in the land would be given a new power, by its own order, to postpone indefinitely publication in the newspapers of the whole or any part of the proceedings before it or in another court. Such an order could be made, and would be made, *against* the newspaper without their having any notice of it or any opportunity of being heard on it. They have no right of appeal against it. It could be done on the application of one party, and the acquiescence of the other, without the court itself giving much, if any, thought to the public interest. It would be nothing more nor less than a power, by consent of the parties, to muzzle the press ... Parliament has, I think, guarded against this danger. It has done so by s 6(b) ...' (See [1982] 2 All ER 269 at 284, [1982] QB 762 at 790.)

[48] Lord Denning MR then turned ([1982] 2 All ER 269 at 285, [1982] QB 762 at 791) to the question: 'what are the circumstances in which publication of a fair and accurate report would be a contempt at common law?' and continued:

'It has long been settled that the courts have power to make an order *postponing* publication (but not prohibiting it) if the postponement is necessary for the furtherance of justice in proceedings which are pending or imminent. It was so held in *R v Clement* which was approved by the House of Lords in *Scott v Scott* ...'

[49] Lord Denning then gave as other instances of common law contempt the premature reporting of a trial within a trial and the publishing of a person's true name in cases in which the court had allowed a pseudonym to be used. He then continued:

'Yet another instance at common law may arise when two men are jointly indicted but tried separately. Then it may be necessary to make an order postponing publication, as in *R v Clement*. Similarly, when there is another case going on at the same time, such as happened in *R v Poulson* [1974] Crim LR 141. Waller J gave a warning in open court that certain items of evidence given at the trial should not be published because of the risk of causing prejudice to other criminal proceedings which had already begun.' (See [1982] 2 All ER 269 at 285–286, [1982] QB 762 at 792.)

[50] Mr Guthrie QC for the respondents not surprisingly seeks to pray in aid Lord Denning MR's assertion that—

'it has long been settled that the courts have power to make an order *postponing* publication ... in proceedings which are pending or imminent [and] [i]t was so held in *R v Clement*.' (See [1982] 2 All ER 269 at 285, [1982] QB 762 at 791.)

There are, however, a number of difficulties in the argument. In the first place Lord Denning's statement is mere assertion. Secondly, on any view, it goes too far. As Lord Atkinson pointed out in *Scott v Scott*, *R v Clement* is certainly no authority for an order postponing publication beyond the end of the actual proceedings before the court (the several trials in *R v Clement* constituting a single proceeding). There was never, therefore, power at common law to make an order enforcing the warning (if such it was) in *R v Poulson* [1974] Crim LR 141—nor, indeed, power to have postponed the reporting of committal



a proceedings as in *Exp Farquharson* itself. Thirdly, it is wrong to regard cases involving a trial within a trial or witness identity order, as Lord Denning appeared to do, as instances of the court having a common law power actually to direct non-publication by the press—*The Socialist Worker* and *The Leveller* do not support such a view.

b [51] In short, s 4(2) must be regarded as having conferred on the court power to make at least some postponement orders which it had not previously been able to make. Similarly, in the witness identity cases, s 11 for the first time allowed the court actually to prohibit publication (provided only and always that it would previously have had the power to allow the witness to withhold his name or, as the case may be, sit in camera for some or all of the proceedings). In either case, of course, for the order to be valid, it would have to appear to the court  
c 'necessary'—in a s 4(2) case 'for avoiding a substantial risk of prejudice to the administration of justice'; in a s 11 case 'for the purpose for which [the matter] was ... withheld'. Unless, however, the publisher could show that the court's perception of such necessity had been unreasonable, a breach of the order would of itself constitute contempt.

d [52] Their Lordships turn next to the Commonwealth cases, the first of which, *Taylor v A-G* [1975] 2 NZLR 675, was, as already noted, doubted by Lord Diplock and Viscount Dilhorne in *The Leveller*. *Taylor v A-G* was itself a 'Colonel B' type of case. The trial judge there, however, had additionally ordered (at 676):

e 'By consent I make an order prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Service. They will be described by a letter or symbol in each case.'

f *R v Clement* was not cited to the New Zealand Court of Appeal. But, in reliance on a dictum of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301:

g 'There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction.'

Wild CJ and Richmond J (Woodhouse J dissenting) held that the trial court had had inherent jurisdiction to make the order.

h [53] Next come a trilogy of decisions in the Court of Appeal of New South Wales, each concerning a witness identity order, none of them finally deciding the point now at issue. In *Raybos Australia Pty Ltd v Jones* (1985) 2 NSW LR 47 at 57 Kirby P said:

i 'It is unnecessary and undesirable in the present case to determine finally the question of the power of the court to make an order such as is sought by Mr Jones, directed to the world at large. For the reasons shortly to be given, if there be a power, it should not be exercised in the present case.'

[54] In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, the only one of these three cases in which *R v Clement* was cited, McHugh JA said (at 477):

'The decision in *R v Clement* was approved [by Viscount Haldane LC and Lord Atkinson in *Scott v Scott*]. In the light of statements made in later cases, however, I do not think that *R v Clement* can be regarded as an authority for holding that an order made to preserve the purity of the administration of justice is ipso jure binding on members of the public.'

[55] In *A-G for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 348 Mahoney JA said:

'Whether and to what extent a non-publication order may bind or otherwise affect non-parties is not a matter which has yet been finally determined in this State.'

[56] The final Commonwealth case to which brief reference should be made is *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835, a decision of the Supreme Court of Canada. At first blush it might appear to support the power for which the respondents contend. Take, for example, the following passage from the judgment of L'Heureux-Dubé J (see 916-917):

'[A]s part of our democratic tradition, judges have always had the discretion to order *in camera* hearings or issue full or partial publication bans related to judicial proceedings, be it under the criminal, civil or common law ... It is not up to this court, or any other court for that matter, to reverse a rule which has existed for hundreds of years in this free and democratic Canadian society without any disastrous effect or even complaint. Such a radical change in the way our criminal law has operated for hundreds of years must be made by Parliament.'

[57] Once, however, it is appreciated that the power there in question was not that of the trial judge purporting to exercise an inherent jurisdiction but rather the court's power to grant an interlocutory injunction restraining the appellants from broadcasting a fictional account which the judge thought would prejudice the trial before him, it will be seen that the decision casts little light on the issue now arising. There is, the Board notes, power also in the English Crown Court (under s 45(4) of the Supreme Court Act 1981) to grant an injunction restraining a threatened contempt of court, though it is clear that such power should only be sparingly used: see *Ex p HTV Cymru (Wales) Ltd* [2002] EMLR 184.

[58] Having set out the case law in some detail, their Lordships can state their conclusions on Issue 1 comparatively briefly.

[59] The first point to make is that the power in question—the power to postpone the reporting of open court proceedings—would be worthless unless it carried with it the power to punish any breach of the order as a contempt. No doubt, as with s 4(2) orders in the United Kingdom, the court making the order would have to find it 'necessary' (and nowadays proportionate too)—a partial answer to the concern expressed by Lord Denning in *Ex p Farquharson* [1982] 2 All ER 269, [1982] QB 762 (see [47], above). But, as noted in [51], above, the publisher would have no defence to a contempt charge based on breach of the order unless he were able to show that the court's perception of such need had been unreasonable.

[60] Do the authorities support the existence of such a power at common law? The only case directly appearing to do so is *R v Clement* itself. Even there, however, there had been no real need for the court to decide the point: each of the many judges involved in the case clearly regarded the publication as a gross

a contempt in any event—irrespective, that is, of whether any binding non-publication order had been made. Nor were the two precedents relied on by the law officers in the least convincing: in neither was the power to punish for breach of the order put to the test.

b [61] *R v Clement* gains little if any support from the later cases. *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 was concerned with a very different question and neither Viscount Haldane nor Lord Atkinson, the only two members of the House to refer to *R v Clement*, appears to have regarded it as authority for the proposition that a breach of the court's order would of itself constitute a contempt—without which the power would, as stated, be worthless anyway.

c [62] *The Leveller* [1979] 1 All ER 745, [1979] AC 440 plainly affords no assistance whatever to the respondent's argument. On the contrary, Viscount Dilhorne (himself a most experienced ex-Attorney General) and Lord Edmund-Davies both expressed the strong view that the court has no power to make any non-publication direction operating outside the courtroom and Lord Diplock clearly doubted the existence of such a power 'binding on the public ipso jure'.  
d Although neither Lord Russell nor Lord Scarman touched directly on the issue, both appear to have assumed that no such power exists—hardly surprisingly given the Crown's concession (as previously in *The Socialist Worker*) to that effect.

e [63] Turning to *Ex p Farquharson* [1982] 2 All ER 269, [1982] QB 762, although Lord Denning's endorsement of *R v Clement* in his minority judgment (see [48], above) cannot be regarded as obiter having regard to his approach to ss 4(2) and 6(b) of the 1981 Act, it suffers from several weaknesses as pointed out in [50], above. On the approach taken by the majority of the court in that case, of course, it was not necessary to reach any view whether, before s 4(2) was enacted, there was power to make an order postponing publication (although, if there was, clearly it had not extended as far as the new statutory power).

f [64] As for the Commonwealth cases, only in *Taylor v A-G* [1975] 2 NZLR 675 was the power held to exist and that was solely in reliance on Lord Morris's dictum in *Connelly v DPP* [1964] 2 All ER 401, [1964] AC 1254, hardly a convincing basis for such a conclusion. Lord Diplock's and Viscount Dilhorne's doubts about *Taylor's* case were clearly well-founded. In the second of the later New South Wales cases, their Lordships note, McHugh JA expressed the view that in the light  
g of later cases *R v Clement* could not be regarded as authority for the power in question (see [54], above)—he must surely have had *The Leveller* in mind.

[65] Their Lordships conclude that *R v Clement* provides too insecure a foundation on which to rest the existence of such an inherent power in the court today. The case had been heard at fever-pitch. And, of course, in those days the  
h rights of the press and of free expression counted for rather less than they do today. As long ago as 1935, Professor Goodhart, writing in the Harvard Law Review ('Newspapers and Contempt of Court in English Law' 48 Harv LR 885 p 904), said of *R v Clement*:

j 'Whether this case is still good law seems doubtful, for a criminal trial must be held in public, and, except in a few statutory cases, the judge has no power to forbid the publication of evidence given publicly.'

[66] The Phillimore Committee included at p 60 of their 1974 report a footnote written before the court's decision in *The Socialist Worker* but after the publication of the blackmail victims' names:

'We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation ... should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial.'

[67] Their Lordships likewise conclude that if the court is to have the power to make orders against the public at large it must be conferred by legislation; it cannot be found in the common law. It is not for the Board to say whether or not such legislation is desirable. Sometimes, no doubt, an actual order rather than merely a warning may be judged necessary (as perhaps in this very case). There may, however, be fears lest the power be too readily invoked—always a concern with regard to prior restraint orders. If, moreover, legislation is to be enacted, it should include a right of appeal by those aggrieved (such as was added in the United Kingdom by s 159 of the 1988 Act).

[68] Even without legislation, however, it remains open to the court (and is generally desirable, as indicated by Lord Edmund-Davies in *The Leveller*—see [42], above) to explain its concern and warn the press that they would be at risk of contempt proceedings were they to publish the matter in question. Such a warning would make it both less likely that a contempt would be committed and easier to punish if it were.

#### ISSUE 2. WERE THE ORDERS OF 10 AND 14 JUNE 1996 JUSTIFIED?

[69] Given that the contempt charges were based exclusively on contravention of the 10 June order (there being no alternative allegation, as in *R v Clement*, of prejudice to the due administration of justice), and given further the Board's conclusion that the court had no power to make the orders, it might be thought that issue 2 no longer arises. It is their Lordships' view, however, that the question whether the press could properly have published the material which the orders were designed to prevent bears upon issues 3 and 4. It would be one thing to hold the various appellants entitled to constitutional redress as the only means of safeguarding their future right to free expression uninhibited by orders made without jurisdiction; quite another to hold that the particular orders made in this case prohibited them from publishing material which otherwise they could properly have published. Issue 2 may, therefore, be re-formulated thus: would it in any event have been a contempt of court to publish the material which the orders forbade to be published? This question is not substantially different from the question whether, assuming (as in the United Kingdom under s 4(2) of the 1981 Act) the court *had* the power to make these orders, they were properly made. As to the correct approach to that question, their Lordships are much assisted by the judgment of the Court of Appeal in *Ex p The Telegraph Group* [2001] EWCA Crim 1075, [2001] 1 WLR 1983, an appeal by the press against a s 4(2) order under s 159 of the 1988 Act. Essentially the case decided that the trial judge (and, on appeal, the Court of Appeal) must apply a three part test accurately summarised in the headnote as follows:

'[I]n considering whether it was "necessary" both in the sense under section 4(2) of the 1981 Act of avoiding a substantial risk of prejudice to the administration of justice and therefore of protecting the defendant's right to a free trial under article 6 of the Convention and in the different sense



a contemplated by article 10 of the Convention as being “prescribed by law”  
and “necessary in a democratic society” by reference to wider considerations  
of public policy, the factors to be taken into account could be expressed as a  
b three-part test; that the first question was whether reporting would give rise  
to a not insubstantial risk of prejudice to the administration of justice in the  
relevant proceedings, and if not that would be the end of the matter; that, if  
such a risk was perceived to exist, then the second question was whether a  
c section 4(2) order would eliminate the risk, and if not there could be no  
necessity to impose such a ban and again that would be the end of the matter;  
that, nevertheless, even if an order would achieve the objective, the court  
should still consider whether the risk could satisfactorily be overcome by  
some less restrictive means, since otherwise it could not be said to be  
“necessary” to take the more drastic approach; and that, thirdly, even if there  
was indeed no other way of eliminating the perceived risk of prejudice, it still  
did not follow necessarily that an order had to be made and the court might  
d still have to ask whether the degree of risk contemplated should be regarded  
as tolerable in the sense of being the lesser of two evils; and that at that stage  
value judgments might have to be made as to the priority between the  
competing public interests represented by articles 6 and 10 of the  
Convention.’

[70] This approach, the Board notes, is not dissimilar to that followed by the  
Supreme Court of Canada in *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR  
e 835 with regard to the exercise of the injunctive power there in question—an  
approach based on the Canadian Charter of Rights and Freedoms 1982 which  
itself (as de la Bastide CJ pointed out in the present case) ‘provided the model for  
the section of [the] Constitution which deals with fundamental rights and  
freedoms’.

f [71] One asks, therefore, whether on this approach the press could properly  
have published the material which Jones J wished to exclude. The 10 June order, the  
appellants point out, was sought by defence counsel principally lest Morris at trial  
were not to come up to proof. Mr Thornton was concerned that in those  
circumstances the jury might have been unduly influenced by what they had read  
g of Morris’s plea bargain. But that risk, the appellants contend, provided no sufficient  
reason for postponing reporting. Had that been the only risk of prejudice at trial,  
their Lordships would agree. But it appears that there were two other and stronger  
reasons for excluding this material and for regarding it as a contempt to have  
published it. First, at the time the order was made, there was an outstanding  
challenge to the admissibility of Morris’s evidence, doubtless on the basis that it had  
h been falsely induced by the promise of a pardon. Mr Havers QC submits that  
without Morris’s evidence the trial would have collapsed anyway. That, however,  
was far from clear, else Morris would have had no incentive to plead guilty in the  
first place. Secondly, the anticipated problems of empanelling an unbiased jury  
would have become more acute still had the media been free to publish this  
j dramatic turn of events, thereby adding significantly to the massive output of  
prejudicial publicity previously noted by the Privy Council in *Boodram v A-G of  
Trinidad and Tobago* [1996] 2 LRC 196, [1996] AC 842. In these circumstances it  
seems to their Lordships hardly surprising that Sealey J and the majority in the  
Court of Appeal thought the orders amply justified (although, it is right to note, de  
la Bastide CJ thought otherwise). As Sharma JA observed:

'The judge's arsenal of procedural and substantive measures is not to be regarded as a general panacea for pre-trial publicity, otherwise no proceedings will ever be stayed ... The order was being made in the knowledge that the publicity was likely to affect people who were perhaps not yet otherwise affected ... [Making the order] was the only reasonable and sensible thing to do in the circumstances.'

[72] As for the 14 June order, the reporting of the contempt proceedings would inevitably have directed attention to the articles giving rise to the charges. Even had the names of the contemnors been withheld, the publication would have been swiftly identified. The media in Trinidad and Tobago has relatively few organs. This second order was accordingly necessary to preserve the integrity of the first. Publication of the matter it prohibited, therefore, would in any event of itself have constituted a contempt.

[73] Although the respondents invited the Board, in reliance on the Privy Council decision in *Devi v Roy* [1946] AC 508, to decline to review the evidence on Issue 2 for a third time given the concurrent judgments on liability arrived at by both courts below, their Lordships have preferred in the particular circumstances of this case to come to their own conclusions on the issue. This is, after all, a case where justifiability depends on the law as well as the facts.

ISSUE 3. WERE IPC AND TNT ENTITLED TO CONSTITUTIONAL REDRESS FOR INTERFERENCE WITH THEIR RIGHT TO FREE EXPRESSION?

[74] The newspapers were concerned to obtain a declaration that the orders of 10 and 14 June unlawfully interfered with their right to free expression and were thus unconstitutional. On the face of it s 14 of the Constitution entitled them to apply for such redress. The respondents contend, however, that they should instead have sought relief by applying to the trial judge to vary or discharge his own orders. It is an impossible argument. In the first place it is unclear whether such a course was open to the appellants. Certainly Sealey J thought not—and might have cited in support of her view the decision of the Divisional Court in *R v Central Criminal Court, ex p Crook* (1984) Times, 8 November. Even supposing, however, as the Court of Appeal found and as their Lordships think the better view, the newspapers could have applied directly to the trial judge to be relieved from his orders, it is hardly to be supposed that such an application would have succeeded and there would certainly then have been no right of appeal against its refusal. Sharma JA's contrary view cannot be accepted; there are no rights of appeal save those conferred by statute.

[75] These considerations apart, it is no answer to a constitutional claim of this nature to say that some other remedy would or might have been open to the claimant. The Privy Council's decision in *Observer Publications Ltd v Matthew* [2001] UKPC 11, [2001] 4 LRC 288 similarly concerned the media's right to free expression, the appellant's claim there arising out of the Government of Antigua's refusal of a broadcasting licence. The Court of Appeal had dismissed the company's appeal, finding their proper remedy to have been mandamus and relying upon Lord Diplock's statement in *Harrikissoon v A-G of Trinidad & Tobago* [1980] AC 265 at 268, [1979] 3 WLR 62 at 64 that the value of the right to constitutional redress 'will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action', and that a constitutional claim was not allowed when it was—

- a 'an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action ...'

Lord Cooke of Thorndon took a different approach ([2001] 4 LRC 288 at [53]):

- b '[H]uman rights guaranteed in the Constitution are intended to be a major influence upon the practical administration of the law. Their enforcement cannot be reserved for cases in which it is not even arguable that an alternative remedy is available. As Lord Steyn said, delivering the judgment of the Privy Council in [*Ahnee v DPP* [1999] 2 LRC 676 at 687, [1999] 2 AC 294 at 307] "bona fide resort to rights under the Constitution ought not to be discouraged". Frivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled. To that extent, their Lordships agree with the judgments delivered in *Antigua*. But, by contrast, the right of freedom of communication is at the heart of this case.'
- c

- d [76] Correctly analysed, the authorities (including those referred to below) establish that it is only when a constitutional motion is properly to be regarded as an abuse of the court's process that it will be dismissed by reference to some other available remedy. On no view were the claims of IPC and TNT an abuse of process. Their Lordships accordingly conclude that they were entitled to seek declaratory relief by way of constitutional motion. Having regard, however, to the Board's conclusion on issue 2, their Lordships would grant the appellants no constitutional redress beyond a declaration that the right to free expression should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction.
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f ISSUE 4. WERE MR ALI AND MS BABOOLAL ENTITLED TO SIMILAR CONSTITUTIONAL REDRESS?

- g [77] The difference between the journalists and the corporate appellants is that the former, unlike the latter, had the opportunity to dispute the constitutionality of the 10 June order (although not, of course, the 14 June order) in the course of appealing against their contempt convictions. Is this, however, a sufficient basis on which to distinguish between the two cases, in particular given that the Court of Appeal allowed the contempt appeals on different grounds and without reference to the legality of the order itself? The respondents submit that it is and rely in particular upon the judgment of the Privy Council in *Chokolingo v A-G of Trinidad & Tobago* [1981] 1 All ER 244, [1981] 1 WLR 106.

- h [78] Since *Chokolingo's* case bears certain superficial resemblances to the present case it is necessary to examine it with some care. The appellant was a newspaper editor convicted of contempt for 'scandalising the court' and committed to prison for 12 days. By a constitutional motion brought two years after his conviction he contended that 'scandalising the court' no longer amounted to a criminal contempt. The argument failed both at first instance and before the Court of Appeal. The Court of Appeal, however, also concluded that even had the judge made a mistake of law, this was not capable of constituting an infringement of the appellant's right not to be deprived of his liberty except by due process of law. Before the Court of Appeal, it should be noted, the appellant had expressly abandoned any claim based on infringement of his rights to free expression (under what is now s 4(i) and (k) of the 1976 Constitution); he was relying solely on his right to due process under s 4(a). In giving the judgment of
- j

the Privy Council Lord Diplock said ([1981] 1 All ER 244 at 248, [1981] 1 WLR 106 at 111):

‘It was argued on behalf of the appellant that, if he could persuade the Board that, because it had become obsolete long before 1962, no such offence as “scandalising the court” was known to the common law in force in Trinidad at the commencement of the Constitution, this would entitle the applicant to redress under s 6 [of the 1962 Constitution now s 14 of the 1976 Constitution] for his having been imprisoned by the state for exercising his constitutional rights of freedom of expression and freedom of the press ... Even if it were possible to persuade their Lordships that [this] publication ... no longer constituted a criminal contempt of court ... it would merely show that the judge had made an error of substantive law as to a necessary ingredient of the genus of common law offences which constitute contempt of court. In their Lordships’ view there is no difference in principle between this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under s [14] of the Constitution so must the latter be.’

[79] Having then pointed out that cumulative parallel remedies of this sort would allow a convicted person whose criminal appeal has failed then to launch a collateral attack on his conviction by constitutional motion, Lord Diplock said (at 112) that such an interpretation of the Constitution would be ‘quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine’.

[80] The respondents argued that by the same token that the Privy Council held Mr Chokolingo not to have been entitled to constitutional relief even had the judge committed him to prison for contempt of court upon a misunderstanding of the law, so too here the appellant journalists should not be entitled to constitutional redress even though their contempt convictions were founded upon breaches of an order which the judge mistakenly thought he had power to make.

[81] *Chokolingo’s* case, however, cannot in their Lordships’ view be understood as deciding that in no case where the judge errs in determining the ingredients of a particular offence will it be open to the aggrieved citizen to seek a declaration of the true legal position by constitutional motion. Despite the reference in Lord Diplock’s judgment to the appellant’s argument being based on his imprisonment ‘for exercising his constitutional rights of freedom of expression and freedom of the press’, the essential rights being pursued there were those of due process and the protection of the law. The passage just cited from Lord Diplock’s judgment was immediately preceded by reference to what he had earlier said in *Maharaj v A-G of Trinidad & Tobago (No 2)* [1978] 2 All ER 670, [1979] AC 385 (*Maharaj (No 2)*), namely that the fundamental human right guaranteed by the right to due process and protection of the law ‘is not to a legal system that is infallible but to one that is fair’ (see [1981] 1 All ER 244 at 248).

[82] Their Lordships do not regard *Chokolingo’s* case as authority for denying constitutional relief to those like the appellant journalists concerned not with making a parallel or collateral attack on their contempt convictions (which had already been set aside) but rather with vindicating and securing for the future their right to free expression. These appellants too are entitled to a declaration



a that this right should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction.

ISSUE 5. WAS MR ALI ENTITLED TO CONSTITUTIONAL REDRESS FOR A VIOLATION OF HIS RIGHT TO DUE PROCESS?

b [83] The majority of the Court of Appeal held that he was, basing their decision principally upon the authority of *Maharaj* (No 2). Mr Ali contends that his case is on all fours with *Maharaj* (No 2). The respondents dispute this.

c [84] Mr Maharaj was a barrister who was committed to prison for seven days for an alleged contempt in the face of the court. At that date there was no right of appeal to the Court of Appeal against such an order. An appeal, however, lay directly to Her Majesty in Council by special leave of the Board. Mr Maharaj brought such an appeal and succeeded upon it—*Maharaj v A-G for Trinidad & Tobago* [1977] 1 All ER 411. The Privy Council quashed the committal order on the grounds that there had been a fundamental failure of natural justice: before making the order the judge had not told the appellant what he had done so as to enable him to explain or excuse his conduct.

d [85] Meantime Mr Maharaj had been pursuing a constitutional motion for redress, including monetary compensation, on the ground that he had been deprived of his liberty without due process of law. In this too he was to succeed on appeal to the Privy Council. The judgment of the majority of the Board was given by Lord Diplock who expounded the governing principle as follows ([1978] 2 All ER 670 at 679–680, [1979] AC 385 at 399):

e 'The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a) [of the 1962 Constitution, now s 4(a) of the 1976 Constitution], and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event ... [Even] a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 [now s 14] unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under s 6(1) with a further right of appeal to the Court of Appeal under s 6(4). The High Court, however, has ample powers, both inherent and under s 6(2), to prevent its process being misused in this way ...'

j [86] Lord Hailsham of St Marylebone, it is convenient to note at this stage, observed in his dissenting opinion ([1978] 2 All ER 670 at 687–688, [1979] AC 385 at 409–410):

'If I were at all of the opinion that s 6 did unambiguously confer a right of damages in circumstances like the present, I would not, of course, be deterred from saying so in view of any inconveniences of public policy which

might ensue from this conclusion. But since I am not of this opinion, I feel that I am entitled to point to some of the inconveniences which I believe to exist. In the first place, as I understand the decision of the majority it is that a distinction must be drawn between a mere judicial error and a deprivation of due process as in the instant appeal, and that the former would not, and the latter would, attract a right of compensation under the present decision, even though in each case the consequences were as grave. I have already touched on this. I do not doubt the validity of the distinction viewed as a logical concept, though the line might be sometimes hard to draw. But I doubt whether the distinction, important as it may be intellectually, would be of much comfort to those convicted as a result of judicial error as distinct from deprivation of due process or would be understood as reasonable by many members of the public, when it was discovered that the victim was entitled to no compensation, as distinct from the victim of a contravention of s 1 of the Constitution who would be fully compensated.'

[87] Lord Diplock's judgment has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.

[88] In deciding whether someone's s 4(a) 'right not to be deprived [of their liberty] except by due process of law' has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to 'a legal system ... that is fair'. Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr Ali was able to secure his release on bail within four days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system as a whole to be a fair one.

[89] Once someone committed to prison for contempt of court could appeal in Trinidad and Tobago to the Court of Appeal, and meantime apply for release on bail, his position became essentially no different from that of a person convicted of any other offence. Convicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison. The authorities are clear on the point. Just two need be mentioned. In *Hinds v A-G of Barbados* [2001] UKPC 56, [2002] 4 LRC 287, [2002] 1 AC 854 the appellant was convicted of arson and sentenced to eight years imprisonment. He had been refused legal aid and was unrepresented at trial although represented by counsel on appeal to the Court of Appeal. Following the dismissal of his appeal he brought a constitutional motion complaining that his right to a fair trial had been infringed. The motion was dismissed by the Court of Appeal and its decision was affirmed by the Board. The Board held that, since the appellant had been represented by counsel on his appeal, the ordinary appellate

a processes had given him adequate opportunity to vindicate his right to a fair hearing. Lord Bingham of Cornhill said ([2002] 4 LRC 287 at [24]):

‘It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal.

b As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ... The appellant’s complaint was one to be pursued by way of appeal against conviction, as it was ...’

c [90] *Hinds’s* case was followed by *Forbes v A-G* [2002] UKPC 21, [2003] 1 LRC 350. The appellant there had been sentenced to five years imprisonment for possession of drugs, then released on bail pending appeal after nineteen months, then detained again following the decision of the Court of Appeal varying his sentence to one of eighteen months imprisonment to start afresh, then finally released after serving eleven months when ultimately the Privy Council allowed his appeal against conviction. Giving the judgment of the Privy Council dismissing Mr Forbes’s subsequent constitutional appeal, Lord Millett said ([2003] 1 LRC 350 at [18]):

e ‘[The authorities] establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed ...’

[91] True it is, as Mr Nicol QC for Mr Ali points out, that Mr Forbes’s original trial was described there by Lord Millett as having been ‘fair and proper’, a description, he submits, inapplicable to Mr Ali’s committal by the trial judge in the present case. As, however, Lord Hailsham pointed out in his dissenting opinion in *Maharaj (No 2)*, it is not always easy to distinguish between mere judicial errors on the one hand and the deprivation of due process on the other. Take this very case. Jones J’s main mistake was in believing his non-publication orders to have been lawfully made and their breach ipso jure to constitute a contempt—a readily understandable mistake given both counsel’s assurances in that regard. On that view it is perhaps not surprising that he thought it appropriate to proceed as with a contempt in the face of the court and unnecessary therefore, either for any evidence to be led by the prosecution or for any substantial adjournment to be granted to the defence. The error of law, in short, made for the unfairness of the hearing.

[92] Be that as it may, given that Mr Ali had a right of appeal, their Lordships regard him as having enjoyed the benefit of due process. As in *Hinds's* case, so too here: any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile. The system as a whole was fair. a

[93] Now that rights of appeal exist, indeed, their Lordships see little reason to maintain the original distinctions made in *Maharaj (No 2)* (and still relevant, of course, at the time of *Chokolingo's* case [1981] 1 All ER 244, [1981] 1 WLR 106) between fundamental breaches of natural justice, mere procedural irregularities and errors of law—distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham. b

[94] Their Lordships would accordingly allow the respondents' cross-appeal on this issue and discharge the order for the assessment of damages for the breach of Mr Ali's constitutional right to due process. c

[95] So much for the cross-appeal. As for the orders to be made in the light of the Board's conclusions on the appeals (issues 1–4) including orders as to costs, their Lordships invite further submissions from the parties in writing.

*Appeals allowed. Cross appeal allowed.* d

Celia Fox Barrister.



a **European Roma Rights Centre and others v  
Immigration Officer at Prague Airport and  
another (United Nations High  
Commissioner for Refugees intervening)**

b [2004] UKHL 55

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD,  
BARONESS HALE OF RICHMOND AND LORD CARSWELL

c 25–28 OCTOBER, 1 NOVEMBER, 9 DECEMBER 2004

*Immigration – Leave to enter – Refugee – Scheme enabling immigration rules to be operated extra-territorially – Pre-entry clearance system at Prague airport – Claimants Czech Roma refused entry – Whether system contrary to international refugee convention – Whether system contrary to customary international law – Whether operation of system racially discriminatory – Race Relations Act 1976, s 1(1)(a) – Convention relating to the Status of Refugees 1951, art 33.*

e The effect of an agreement between the United Kingdom and the Czech Republic was to permit British immigration officers to give or refuse leave to enter the United Kingdom to passengers at Prague airport before they boarded an aircraft bound for the United Kingdom. Among those refused leave to enter were six individuals, all of whom were of Romani ethnic origin (Roma). Those claimants and the European Roma Rights Centre applied for judicial review. They argued that the procedure was incompatible with the obligations under the Geneva  
f Convention relating to the Status of Refugees 1951 (the refugee convention). Article 33<sup>a</sup> of the refugee convention provided: 'No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political  
g opinion'. The claimants also challenged the procedure as contrary to customary international law and argued that it involved unjustifiable discrimination on racial grounds, contrary to s 1(1)(a)<sup>b</sup> of the Race Relations Act 1976, which provided that a person discriminated against another inter alia 'if on racial grounds he treats that other less favourably than he would treat other persons'.  
h The judge dismissed the application and the claimants appealed. The Court of Appeal held against the claimants on the convention and international law issues and, by a majority, on the discrimination issue. The claimants appealed.

**Held** – (1) The protection obligations imposed by the refugee convention upon  
j contracting states concerned the status and civil rights to be afforded to refugees who were within contracting states and therefore could not apply to the individual claimants who had never left the Czech Republic. However generous and purposive its approach to interpretation, the court's task remained one of

a Article 33, so far as material, is set out at [6], below

b Section 1, so far as material, is set out at [77], below

interpreting the written document to which the contracting states had committed themselves. It had to interpret what they had agreed. The convention gave a special, defined, meaning to refugee, and it was common ground that 'refouler', whatever its wider dictionary definition, was in the instant context, to be understood as meaning 'return'. Moreover, the functions performed by the immigration officers at Prague, even though they were formally treated as consular officials, could not possibly be said to be an exercise of jurisdiction in any relevant sense over non-United Kingdom nationals such as the claimants (see [15]–[21], [72], [108], below).

(2) The existence of the refugee convention was no obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the convention in its application to those seeking asylum as refugees. Moreover, there was a general principle that a person who left the state of his nationality and applied to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claimed to have a well-founded fear. In the instant case, however, the latter principle could not avail the claimants, who had not left the Czech Republic, nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom (see [23], [26], [31], [72], [108], below).

(3) United Kingdom immigration officers operating under the authority of the Home Secretary at Prague Airport had discriminated against Roma who were seeking to travel from that airport to the United Kingdom by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom, contrary to s 1(1)(a) of the 1976 Act. The immigration officers had treated Roma, because they were Roma, more sceptically than the non-Roma. Setting up an operation prompted by an influx of asylum seekers who were overwhelmingly from one comparatively easily identifiable racial or ethnic group, as in the instant case, required enormous care if it was to be done without discrimination. That had not happened. Thus the inevitable conclusion was that the operation had been inherently and systematically discriminatory and unlawful. Accordingly, the appeal would be allowed (see [38], [73], [47], [97], [104], [105], [106], [114], below); *Glasgow City Council v Zafar* [1998] 2 All ER 953 and *Nagarajan v London Regional Transport* [1999] 4 All ER 65 applied.

Decision of the Court of Appeal [2003] 4 All ER 247 reversed.

## Notes

For the powers and duties of the Secretary of State and immigration officers, for asylum, refugees, and consideration of asylum claims, see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue), paras 140, 238–240, and for the meaning of racial discrimination, see 13 *Halsbury's Laws* (4th edn reissue) paras 399, 400.

For the Race Relations Act 1976, s 1, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 161.

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- j* **Appeal**
- The claimants, the European Roma Rights Centre (the Centre) and HM, RG, MZ, AK, IB, and AKu, nationals of the Czech Republic of Romani ethnic origin (the appellants), appealed with permission of the Court of Appeal (Simon Brown, Mantell and Laws LJ) from its decision on 20 May 2003 ([2003] EWCA Civ 666, [2003] 4 All ER 247, [2004] QB 811) dismissing their appeal (Laws LJ dissenting in

part) from the decision of Burton J on 8 October 2002 ([2002] EWHC 1989 (Admin), [2002] All ER (D) 127 (Oct)) dismissing the claimants' application for judicial review of the decision of the Secretary of State for the Home Department to introduce pre-entry clearance immigration control at Prague Airport from 18 July 2001 acting by the Immigration Officer at Prague Airport. The United Nations High Commissioner for Refugees intervened in the proceedings. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Lord Lester of Herne Hill QC, Dinah Rose and Shaheed Fatima* (instructed by *Liberty*) for the Centre and the appellants.

*John Howell QC, Christopher Greenwood QC, Philip Sales, Michael Fordham and Claire Weir* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Guy Goodwin-Gill* (instructed by *Mayer Brown Rowe & Maw*) for the United Nations High Commissioner for Refugees.

Their Lordships took time for consideration.

9 December 2004. The following opinions were delivered.

#### LORD BINGHAM OF CORNHILL.

[1] My Lords, at issue in this appeal is the lawfulness of procedures adopted by the British authorities and applied to the six individual appellants at Prague Airport in July 2001. All these appellants are Czech nationals of Romani ethnic origin (Roma). All required leave to enter the United Kingdom. All were refused it by British immigration officers temporarily stationed at Prague Airport. Three of these appellants stated that they intended to claim asylum on arrival in the United Kingdom. Two gave other reasons for wishing to visit the United Kingdom but were in fact intending to claim asylum on arrival. One (HM) gave a reason for wishing to visit the United Kingdom which the immigration officer did not accept: she may have been intending to claim asylum on arrival in the United Kingdom or she may not. The individual appellants, with the first-named appellant, the European Roma Rights Centre ('the Centre', a non-governmental organisation, based in Budapest, devoted to protection of the rights of Roma in Europe), challenge the procedures applied to the individual appellants as incompatible with the obligations of the United Kingdom under the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171) (the 1951 convention) and Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the 1967 Protocol) and under customary international law. They also challenge the procedures as involving unjustifiable discrimination on racial grounds.

#### BACKGROUND

[2] It is well known that the number of those seeking asylum in the United Kingdom has risen steeply in recent years. It is also well known that while a minority of asylum applications have succeeded, whether directly or on appeal, a large majority have not. There is, as Burton J observed in para [10] of his very lucid judgment in these proceedings ([2002] EWHC 1989 (Admin), [2002] All ER (D) 127 (Oct), [2003] ACD 53), an 'administrative, financial and indeed social burden borne as a result of failed asylum seekers'.



- a* [3] An increasing number of applications for asylum in recent years have been made by Czech nationals. The number more than doubled from 515 in 1998 to 1,200 in 2000. It is agreed that the vast majority (if not all) of these applications were made by Roma. At around this time Czech Roma generally had low levels of education, suffered from high unemployment and lived in relatively poor housing conditions. Some Roma may have faced discrimination from within
- b* Czech society in employment, education and access to services. Sporadic attacks by 'skinheads' occurred. In some individual cases (it is agreed) discrimination and harassment may have been sufficiently severe to reach the level of persecution. But the success rate of asylum applications in this country was not high. Of 1,800 asylum decisions affecting Czech applicants made by the Home Secretary in the year 2000, only ten were to grant asylum and a further ten to grant
- c* exceptional leave to remain. The success rate of asylum appeals by Czech nationals was around 6% at the beginning of 2001.

- [4] In February 2001 the governments of this country and the Czech Republic made an agreement. The effect of this was to permit British immigration officers to give or refuse leave to enter the United Kingdom to passengers at Prague
- d* Airport before they boarded aircraft bound for this country. The agreement was first implemented on 18 July 2001. British immigration officers were posted to Prague airport to 'pre-clear' all passengers before they boarded flights for the United Kingdom. Leave to enter was granted to those passengers requiring it who satisfied the officers that they were intending to visit the United Kingdom
- e* for a purpose within the Immigration Rules. Others who required leave to enter, including those who stated that they were intending to claim asylum in the United Kingdom and those who the officers concluded were intending to do so, were refused leave to enter. This effectively prevented them from travelling to this country, since no airline would carry them here. This operation was
- f* mounted at Prague Airport intermittently, usually for a few days or weeks at a time, without advance warning. Its object was to stem the flow of asylum seekers from the Czech Republic. That was its effect. In the three weeks before the operation began there were over 200 asylum claims (including dependants) made by Czech nationals at entry points in the United Kingdom. Only 20 such claims were made in the three weeks after it began, during which period 110 intending travellers were refused leave to enter at Prague Airport. Among those refused
- g* leave to enter at this time were the six individual appellants, to whom it is convenient to refer collectively as 'the appellants'.

#### DOMESTIC IMMIGRATION LEGISLATION

- h* [5] The domestic statute generally governing the administration of immigration control is the Immigration Act 1971. Under ss 1 and 2 of this Act, British and some Commonwealth citizens are in the ordinary way free to come and go from the United Kingdom without let or hindrance. Others are not permitted to enter unless given leave to do so under the Act (see s 3). The power to give or refuse leave to enter is exercised by immigration officers (see s 4).
- j* There are a number of grounds, specified in the Immigration Rules, on which leave to enter may be granted, as (for example) to visit or study. The rules also specify grounds on which leave to enter will be refused, one of which (r 320(1)) is that 'entry is being sought for a purpose not covered by these Rules'. By s 3A of the 1971 Act, inserted by s 1 of the Immigration and Asylum Act 1999, it was provided (so far as relevant):

(1) The Secretary of State may by order make further provision with respect to the giving, refusing or varying of leave to enter the United Kingdom. a

(2) An order under subsection (1) may, in particular, provide for—(a) leave to be given or refused before the person concerned arrives in the United Kingdom; (b) the form or manner in which leave may be given, refused or varied; (c) the imposition of conditions; (d) a person's leave to enter not to lapse on his leaving the common travel area. b

(3) The Secretary of State may by order provide that, in such circumstances as may be prescribed—(a) an entry visa, or (b) such other form of entry clearance as may be prescribed, is to have effect as leave to enter the United Kingdom. c

It was in due course provided that visas were required to enter the United Kingdom by nationals or citizens of a large number of countries, not including the Czech Republic. It was also provided, in art 7 of the Immigration (Leave to Enter and Remain) Order 2000, SI 2000/1161, as follows:

*'Grant and refusal of leave to enter before arrival in the United Kingdom.—*(1) An immigration officer, whether or not in the United Kingdom, may give or refuse a person leave to enter the United Kingdom at any time before his departure for, or in the course of his journey to, the United Kingdom. d

(2) In order to determine whether or not to give leave to enter under this article (and, if so, for what period and subject to what conditions), an immigration officer may seek such information, and the production of such documents or copy documents, as an immigration officer would be entitled to obtain in an examination under paragraph 2 or 2A of Schedule 2 to the Act. e

(3) An immigration officer may also require the person seeking leave to supply an up to date medical report. f

(4) Failure by a person seeking leave to supply any information, documents, copy documents or medical report requested by an immigration officer under this article shall be a ground, in itself, for refusal of leave.'

This provision was supplemented by a new r 17A of the Immigration Rules, which provides: g

*'Persons outside the United Kingdom*

Where a person is outside the United Kingdom but wishes to travel to the United Kingdom an Immigration Officer may give or refuse him leave to enter. An Immigration Officer may exercise these powers whether or not he is, himself, in the United Kingdom. However, an Immigration Officer is not obliged to consider an application for leave to enter from a person outside the United Kingdom. h

THE 1951 CONVENTION AND ITS DOMESTIC EFFECT

[6] The United Kingdom is one of some 140 states parties to the 1951 convention. The broad aims of that convention are reflected in its preamble: j

*'The High Contracting Parties,*

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on December 10, 1948, by the

- a General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
- Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,
- b Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,
- Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation,
- c Expressing the wish that all States, recognising the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,
- d Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognising that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner ...'
- e Under art 1A(2), the term 'refugee' applies to any person who—
- ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- f who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’
- For present purposes the most relevant articles of the 1951 convention are arts 31, 32 and 33:
- g
- ‘Article 31
- Refugees unlawfully in the Country of Refuge*
- h 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- j 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

## Article 32

*Expulsion*

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

## Article 33

*Prohibition of Expulsion or Return ("Refoulement")*

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

[7] Under r 16 of the Statement of Changes in Immigration Rules (HC Paper (1983) 169) it was formerly provided:

'Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 and Cmnd. [3906]). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments.'

Despite this somewhat informal mode of incorporation Lord Keith of Kinkel, in *R v Secretary of State for the Home Dept, ex p Sivakumaran* (UN High Comr for Refugees intervening) [1988] 1 All ER 193 at 195, [1988] AC 958 at 990, observed that the provisions of the 1951 convention and 1967 Protocol had for all practical purposes been incorporated into United Kingdom law. But in 1993 steps were taken to strengthen the mode of incorporation by providing in primary legislation, in s 2 of the Asylum and Immigration Appeals Act 1993, headed 'Primacy of Convention', that—

'Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention [defined to mean the 1951 convention and the 1967 Protocol].'



- a Plainly the rules cannot provide for asylum applications to be handled less favourably to the applicant than the 1951 convention requires.

[8] The following Immigration Rules, relating to asylum, are relevant:

**'Definition of asylum applicant'**

- b 327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.

**Applications for asylum**

- c 328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules.

- d 329. Until an asylum application has been determined by the Secretary of State or the Secretary of State has issued a certificate under section. 11 or section. 12 of the Immigration and Asylum Act 1999, no action will be taken to require the departure of the asylum applicant or his dependants from the United Kingdom.

- e 330. If the Secretary of State decides to grant asylum and the person has not yet been given leave to enter, the Immigration Officer will grant limited leave to enter ...

**Grant of Asylum**

- f 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and (ii) he is a refugee, as defined by the Convention and Protocol; and (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group.

- g 335. If the Secretary of State decides to grant asylum to a person who has been given leave to enter (whether or not the leave has expired) or to a person who has entered without leave, the Secretary of State will vary the existing leave or grant limited leave to remain.

- h **Refusal of asylum**

336. An application which does not meet the criteria set out in paragraph 334 will be refused.'

THE COURSE OF PROCEEDINGS

- j [9] In their application for judicial review, the Centre and the appellants challenged the procedure adopted by the immigration officer at Prague Airport on the grounds, first, that it unlawfully discriminated against Roma on racial grounds and, secondly, that it was (put very generally) contrary to the obligations of the United Kingdom under the 1951 convention and customary international law. Both these contentions were fully argued before Burton J, who rejected

them in the judgment already referred to and dismissed the application. In the Court of Appeal (Simon Brown, Mantell and Laws LJ) the Centre and the appellants again advanced both contentions, this time with the support of the United Nations High Commissioner for Refugees (the UNHCR) (represented by Mr Guy Goodwin-Gill) as intervener. All three members of the court held against the Centre and the appellants on the convention and international law issue, and a majority (Simon Brown and Mantell LJ, Laws LJ dissenting) on the discrimination issue also: [2003] EWCA Civ 666, [2003] 4 All ER 247, [2004] QB 811. a  
b

[10] Both issues (perhaps better described as groups of issues) have again been fully debated before the House, again with the benefit of Mr Goodwin-Gill's submissions on behalf of the UNHCR. On the discrimination issue, I am in full and respectful agreement with the opinion of my noble and learned friend Baroness Hale of Richmond and would, for the reasons which she gives, make the order which she proposes. I shall in this opinion address only the convention and international law issue, as it is convenient to call it. c

#### THE CONVENTION AND INTERNATIONAL LAW ISSUE

[11] The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. In England, it was a prerogative power of the Crown. Sir William Holdsworth (*A History of English Law* (1938) vol X, pp 395–396) considered Jeffreys CJ undoubtedly correct when he said in *East India Co v Sandys* (1684) 10 ST 371 at 530–531: d

‘I conceive the king had an absolute power to forbid foreigners, whether merchants or others, from coming within his dominions, both in times of war and in times of peace, according to his royal will and pleasure; and therefore gave safe-conducts to merchants strangers, to come in, in all ages, and at his pleasure commanded them out again ...’ e

But the Crown's prerogative power over aliens was increasingly questioned, and since 1793 the power to exclude aliens has in this country been authorised by statute, whether temporary in effect (33 George III, c 4; 56 George III, c 86; 11 & 12 Victoria, c 20) or permanent (for example, the Aliens Act 1905, the Aliens Restriction Act 1914). f

[12] It has been the humane practice of this and other states to admit aliens (or some of them) seeking refuge from persecution and oppression in their own countries. The generous treatment of French protestants in this country is an early and obvious example (see Holdsworth, vol IX, pp 100–101), and many later examples spring to mind. But even those fleeing from foreign persecution have had no right to be admitted and no right of asylum. There is a wealth of authority to this effect: see, for example, *Blackstone's Commentaries on the Laws of England* (15th edn, 1809) vol I, p 251; *Musgrove v Toy* [1891] AC 272 at 282; *R v Kuechenmeister, ex p Bottrill* [1946] 2 All ER 434, [1947] KB 41; *Ruddock v Vadarlis* (2001) 183 ALR 1 at 32 (para 125); 1 *Halsbury's Laws* (3rd edn, 1952) para 967. Three quotations will suffice. In *A-G for Canada v Cain*, *A-G for Canada v Gilhula* [1906] AC 542 at 546, [1904–7] All ER Rep 582 at 584–585, the Privy Council held: g  
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‘One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the

- a State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s. 231; book 2, s. 125.'

In *Johnstone v Pedlar* [1921] 2 AC 262 at 283, [1921] All ER Rep 176 at 186, Lord Atkinson said: 'Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it ...' More recently, in *T v Secretary of State for the Home Dept* [1996] 2 All ER 865 at 868, [1996] AC 742 at 754, Lord Mustill said:

- b '... although it is easy to assume that the appellant invokes a "right of asylum", no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries.'
- c

Over time there came to be recognised a right in sovereign states to give refuge to aliens fleeing from foreign persecution and to refuse to surrender such persons to the authorities of their home states: see *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 at 45–46 (paras 137–138); P Weis 'The United Nations Declaration on Territorial Asylum' (1969) CYIL 92 p 95. But these rights were not matched by recognition in domestic law of any right in the alien to require admission to the receiving state or by any common law duty in the receiving state to give it.

- e [13] The treatment of those seeking refuge from persecution in their home states was, pre-eminently, a field calling for international co-operation and agreement. Inter-governmental arrangements were made between certain states in 1922, 1924, 1926 and 1928, and in 1933 a Convention relating to the International Status of Refugees was made at Geneva under the auspices of the League of Nations. This was of limited application. Article 3 provided:
- f

- 'Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin ...'
- g

This language might be understood to oblige contracting states to admit refugees coming to seek asylum, but in the opinion of a respected commentator the word 'refouler' in the authoritative French text was not used to mean 'refuse entry' but 'return', 'reconduct' or 'send back', and the provision did not refer to the admission of refugees but only to the treatment of refugees who were already in a contracting state: A Grahl-Madsen *The Status of Refugees in International Law* (1972) vol II, para 179(i). Further international conventions and arrangements were made in 1935, 1938, 1939 and 1946.

- j [14] Article 14(1) of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226) proclaimed in 1948: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' Those who drafted this provision rejected a proposal that a right to asylum should be granted, and Professor Hersch Lauterpacht described the formula adopted as 'artificial to the point of flippancy': see 'The Universal Declaration of Human

Rights' (1948) 25 BYIL 354 pp 373–374. See also F Morgenstern 'The Right of Asylum' (1949) 26 BYIL 327 pp 336–337; Grahl-Madsen, para 179(ii).

[15] The brutal persecutions and the mass displacements of people experienced during the 1930s and 1940s highlighted the need for a new international agreement on refugees. This was negotiated under the aegis of the newly-formed United Nations. The provisions most germane to this appeal have been quoted in [6], above, and need not be repeated. Nor need reference be made to the 1967 Protocol. But attention must be drawn to certain features of the 1951 convention. First, it was (like its predecessor) a convention relating to the status of refugees. The focus of the convention was on the treatment of refugees within the receiving state. Secondly, and like most international conventions, it represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 247–248, 274; *Rodriguez v US* (1987) 480 US 522 at 525–526. Thirdly, the convention was exclusively directed to those who are 'outside the country' of their nationality or, in the case of stateless persons, 'outside the country' of their former habitual residence. It is only to persons meeting that definition, expressed in art 1A(2) of the convention, that the convention applies at all, unless they have been considered to be refugees under earlier arrangements. Fourthly, the convention is directed towards those who are within the receiving state. Fifthly, the French verb 'refouler' and the French noun 'refoulement' are, in art 33, the subject of a stipulative definition: they must be understood as having the meaning of the English verb and noun 'return'. The last three of these points merit some elaboration.

[16] The requirement that a foreign national applying for refugee status must, to qualify as a refugee, be outside his country of nationality is unambiguously expressed in the convention definition of refugee quoted in [6], above. The point could not be more clearly expressed than in para 88 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (1992):

'It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.'

[17] In his work *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (Institute of Jewish Affairs, 1953) pp 162–163, Nehemiah Robinson wrote:

'Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory. In other words, Article 33 lays down the principle that once a refugee has gained asylum (legally or illegally) from persecution, he cannot be deprived of it by ordering him to leave for, or forcibly returning him to, the place where he was threatened with persecution, or by sending him to another place where that threat exists, but that no Contracting State is prevented from refusing entry in this territory to refugees at the frontier. In other words, if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.'



a This opinion was indorsed by Weis (pp 123–124) and Grahl-Madsen (p 94). It was upheld by a majority of the United States Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155 at 183 (footnote 40). It has been upheld by the High Court of Australia in *Ibrahim's case* (2000) 204 CLR 1 at 45 (para 136), and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 (para 42). In the last passage cited, McHugh and Gummow JJ said:

b 'Rather, the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States.'

c The House was referred to no judicial authority to contrary effect. It has had the benefit of expert and authoritative commentary on the negotiations which culminated in the 1951 convention, a legitimate guide to interpretation if the effect of a provision is in doubt, and the travaux préparatoires yield a clear and authoritative answer: see art 32 of the Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) (the Vienna Convention).

d Those conditions are, in my opinion, met in this case when the scope of art 33 of the convention falls to be considered. As appears from Weis *The Refugee Convention 1951* (Cambridge, 1995, pp 328, 334, 335) and 'The UN Declaration on Territorial Asylum' (1969) CYIL 92 p 124, 'expel' was understood to apply to a refugee who had already been admitted to the territory of a country. There was more doubt about the meaning of 'refouler'. It was however understood that the expression should have the same meaning as 'return', applicable to refugees who had already entered a country but were not yet resident there. The potential ambiguity was resolved by agreement that the French word 'refoulement' ('refouler' in verbal use) should be included in brackets and between inverted commas after the English word 'return' wherever the latter appeared in the text.

f In 1967 the United Nations adopted a Declaration on Territorial Asylum (Resolution 2312 (XXII)) which provided, in art 3, that no person entitled to invoke art 14 of the Universal Declaration of Human Rights should be subjected to measures such as rejection at the frontier, but a conference held in 1977 to embody this and other provisions in a revised convention ended in failure. As Gummow J put it in *Ibrahim's case* (2000) 204 CLR 1 at 49–50 (para 142), in his judgment given in October 2000:

g

'... there have been attempts which it is unnecessary to recount here to broaden the scope of the Convention itself by a Draft United Nations Convention on Territorial Asylum but these collapsed more than twenty years ago.'

h

[18] Lord Lester of Herne Hill QC, for the appellants, did not seek to advance what would have been an impossible contention, that the appellants were covered by the express provisions of the 1951 convention. Plainly they were not, for they had at no stage been outside the country of their nationality nor within this country and the procedures adopted by the British authorities at Prague airport did not involve expelling or returning them to the frontiers of the Czech Republic, a state they had never left. Instead, Lord Lester urged that the 1951 convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the preamble quoted in full in [6], above. This is, in my opinion, a correct approach to interpretation

of a convention such as this and it gains support, if support be needed, from art 31(1) of the Vienna Convention which, reflecting principles of customary international law, requires a treaty to be interpreted in the light of its object and purpose. But I would make an important caveat. However generous and purposive its approach to interpretation, the court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed. This would violate the rule, also expressed in art 31(1) of the Vienna Convention, that a treaty should be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context. It is also noteworthy that art 31(4) of the Vienna Convention requires a special meaning to be given to a term if it is established that the parties so intended. That rule is pertinent, first, because the 1951 convention gives a special, defined, meaning to 'refugee' and, secondly, because the parties have made plain that 'refouler', whatever its wider dictionary definition, is in this context to be understood as meaning 'return'. It is in principle possible for a court to imply terms even into an international convention. But this calls for great circumspection since, as was said in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 114, [2003] 1 AC 681 at 703:

'... it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree.'

And caution is needed—

'if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.'

[19] In urging a broader and less literal approach to interpretation of the 1951 convention, Lord Lester relied on art 26 of the Vienna Convention, entitled 'Pacta sunt servanda', which requires that a treaty in force should be performed by the parties to it in good faith and also on the requirement in art 31(1) that a treaty should be interpreted in good faith. Taken together, these rules call for good faith in the interpretation and performance of a treaty, and neither rule is open to question. But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that pacta sunt servanda cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do. The important backdrop to the convention was well described by Hyndman 'Refugees under International Law with a Reference to the Concept of Asylum' (1986) 60 ALJ 148 p 153, in a passage quoted by McHugh and Gummow JJ in *Khawar's case* (2002) 210 CLR 1 at 16 (para 44):

'States the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there. They have refused to agree to international instruments which would impose on them duties to make grants of asylum. Today, the generally accepted position

- a would appear to be as follows: States consistently refuse to accept binding obligations to grant to persons, not their nationals, any rights to asylum in the sense of a permanent right to settle. Apart from any limitations which might be imposed by specific treaties, States have been adamant in maintaining that the question of whether or not a right of entry should be afforded to an individual, or to a group of individuals, is something which falls to each nation to resolve for itself.

b While a state party must show good faith in interpreting and performing a treaty obligation, the International Court of Justice made plain in *Re Border and Transborder Actions (Nicaragua v Honduras)* [1988] ICJ Rep 69 at 105–106 (para 94) and repeated in *Re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (1998) ICJ Rep 275 at 297 (para 39), that—

c ‘The principle of good faith is, as the Court has observed, “one of the basic principles governing the creation and performance of legal obligations” ... it is not in itself a source of obligation where none would otherwise exist.’

d [20] Lord Lester relied by analogy on the important decision of the European Court of Human Rights in *Golder v UK* (1975) 1 EHRR 524. In that case the applicant, while a serving prisoner, had sought to consult a solicitor with a view to issuing libel proceedings but had been denied access to the solicitor. He complained of interference with his art 6 right to a fair and public determination of his civil rights and obligations but faced the difficulty that, without legal help, he had been unable to initiate a proceeding to which his fair trial right could attach. Despite this difficulty his application succeeded and the court held (at 536):

f ‘35. ... It would be inconceivable, in the opinion of the Court, that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

g 36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6(1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see *Wemhoff v Germany* (1968) 1 EHRR 55 at 75 (para 8)), and to general principles of law. The Court thus reaches the conclusion, without needing to resort to “supplementary means of interpretation” as envisaged at Article 32 of the Vienna Convention, that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only.’

The analogical argument based on *Golder v UK* is to the following effect: had the appellants not been effectively prevented by the United Kingdom authorities from travelling to this country, they could have done so and could on arrival have applied for asylum; that application would then have been assessed and, if the

requisite grounds were established, granted; the British authorities' conduct in preventing the appellants travelling to the United Kingdom and failing to evaluate their asylum applications in Prague should not prejudice the appellants. There are, in my opinion, several reasons why this argument cannot prevail. In the first place, the court's judgment in *Golder v UK* was in large measure based on a detailed analysis of the French text of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) (the European Convention on Human Rights) and on the court's interpretation of that convention as a whole. But there are more fundamental objections. Nothing in Mr Golder's claim was inconsistent with any provision of art 6 or any other article of the European Convention on Human Rights, indeed the right claimed was held to be inherent in art 6. By contrast, the appellants' claim is inconsistent with the text of the 1951 convention since it puts those expressly excluded from the protection of the convention in the same position as those expressly included. It is a further point of distinction that Mr Golder on any showing had a right under art 6; the argument was as to the scope of that right. By contrast, the appellants had no right save such as might be correlative with the obligations undertaken by the United Kingdom in the 1951 convention; but such obligations were dependent on the appellants being outside the state of their nationality, which they never were.

[21] Reliance was also placed on the European Convention on Human Rights in a more direct way. Lord Lester accepted that the application of the convention was essentially territorial, and acknowledged that, save for a fleeting reference in art 5(1)(f) and the Fourth Protocol (which the United Kingdom has not ratified), the convention does not directly address issues of immigration and asylum. But there were, he submitted, situations in which a member state could, through the action of its agents outside its territory, assume jurisdiction over others in a way that could engage the operation of the convention, and he suggested that this was one of them. The first of these points is correct, and also important. In *Bankovic v Belgium* (2001) 11 BHRC 435 at 448 (para 59) the court accepted 'that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial', and added (at 450 (para 67)):

'In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the convention.'

Its conclusions, so far as relevant for present purposes, were expressed (at 451):

'71. In sum, the case law of the court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government ...

73. Additionally, the court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific



a situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state.'

b I have the very greatest doubt whether the functions performed by the immigration officers at Prague, even though they were formally treated as consular officials, could possibly be said to be an exercise of jurisdiction in any relevant sense over non-United Kingdom nationals such as the appellants. But  
c even if this be assumed in the appellants' favour (as, on different facts, the Court of Appeal was content to assume in *R (on the application of B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344 at [66], [2004] All ER (D) 229 (Oct) at [66], the agreed facts summarised in [3], above do not disclose any threat to life such as might engage art 2 of the European Convention on Human Rights or any risk of torture or inhuman or degrading treatment or punishment such as might engage art 3. The appellants were at all times free to travel to another country, or to travel to this country otherwise than by air from Prague. The appellants' position differs by an order of magnitude from that of the Haitians, whose plight was considered in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155, above, and  
d whose treatment by the United States authorities was understandably held by the Inter-American Commission of Human Rights (Report No 51/96, 13 March 1997) para 171 to breach their right to life, liberty and security of their persons as well as the right to asylum protected by art XXVII of the American Declaration of the Rights and Duties of Man, of which the Commission found the United States to be in breach in para 163. The Commission also found the United States to be in breach of art 33(1) of the 1951 convention (paras 156–158). This was a view shared by Blackmun J in his dissent in *Sale's* case. The facts differ from the present case since the Haitians, although they never reached the United States, were certainly outside Haiti, the country of their nationality.

f [22] With the strong and erudite support of Mr Goodwin-Gill, Lord Lester submitted, first, that customary international law is part of the common law and, secondly, that customary international law precludes a state from treating a potential or prospective applicant for asylum as the United Kingdom authorities treated the appellants, that is, by refusing them leave to enter and effectively thwarting their journey by air from Prague to the United Kingdom without  
g examining the merits of any asylum claim the appellants, if allowed to travel, would make. I shall consider first the second of these submissions.

h [23] The conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical. Guidance is given by the International Court of Justice in the *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 3 at 41, on the approach where a treaty made between certain parties is said to have become binding on other states not party to the treaty:

j '70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the [Convention on the Continental Shelf (Geneva, 29 April to 31 October 1958: TS 39 (1964); Cmnd 2422)] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own

impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.'

The relevant law was, I think, accurately and succinctly summarised by the American Law Institute in its *Restatement of the Law: The Foreign Relations Law of the United States (Third)* (1986) vol 1, p 24:

'(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.'

This was valuably supplemented by a comment to this effect (p 25):

'c. *Opinio juris*. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.'

It is in my opinion clear, applying these principles, that even if the interpretation I have put on the 1951 convention is accepted as correct, that is by no means the end of the appellants' international law argument. For the convention was made more than half a century ago. Since then the world has changed in very many ways. The existence of the 1951 convention is no obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the convention in its application to those seeking asylum as refugees. That, essentially, is the argument advanced for the appellants.

[24] The principles which should govern the treatment of those seeking asylum as refugees have continued to be the subject of continuing international discussion, and the appellants were able to point to a considerable body of

a material on the subject. I will refer to only some of it. In 1966 the Asian-African Legal Consultative Committee formulated the Bangkok Principles, which defined a refugee as one who had left the country of his nationality and provided that '[a] State has the sovereign right to grant or refuse asylum in its territory to a refugee'. In 1967 the Committee of Ministers of the Council of Europe recommended (Resolution (67)14 on Asylum to Persons in Danger of  
b Persecution) that member states should act in a particularly liberal and humanitarian spirit in relation to persons seeking asylum on their territory and that they should—

c 'in the same spirit, ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution ...'

In 1977 the UNHCR Executive Committee (in Conclusion No 6 (XXVIII) 'Non-Refoulement': *Report of 28 Session*: UN doc A/AC.96/549, para 53.4) reaffirmed—

d 'the fundamental importance of the observance of the principle of non-refoulement—both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.'

e The same body reiterated in 1981 (Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx': *Report of 32 Session*: UN doc A/AC.96/601, para 57(2)) that '[i]n all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed'. In 1984 the Committee of Ministers of the Council of Europe  
f (Recommendation no R(84)1) adopted Resolution (67)14 and considered that the principle of non-refoulement had been recognised as a general principle applicable to all persons. In the same year a colloquium held at Cartagena, Colombia, on the international protection of refugees in Central America, Mexico and Panama reiterated—

g 'the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens.'

h The states parties to the 1951 convention met at Geneva in December 2001 and adopted a Declaration (doc HCR/MMSP/2001/09, 16 January 2002) in which they called for universal adherence to the convention and acknowledged—

i 'the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.'

The International Law Association, meeting in New Delhi in April 2002, referred in Resolution 6/2002 to 'the fundamental obligation of States not to return (*refouler*) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened' and declared:

‘1. Everyone seeking international protection as a refugee outside his or her country of origin and in accordance with the relevant international instruments should have access to a fair and effective procedure for the determination of his or her claim ...’

5. No one who seeks asylum at the border or in the territory of a State shall be rejected at the frontier, or expelled or returned in any manner whatsoever to any country in which he or she may be tortured or subjected to inhuman, cruel or degrading treatment or punishment, or in which his or her life or freedom may be endangered ...’

Attention should lastly be drawn to General Comment No 31 (‘The Nature of the General Legal Obligation Imposed on States Parties [to the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) (ICCPR)]’) of the Human Rights Committee of the United Nations adopted on 29 March 2004:

‘10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.’

The United Kingdom is a state party to the ICCPR but has not incorporated that covenant (which contains no article specifically directed to asylum) into its domestic law.

[25] The appellants rely very strongly on an opinion given by Sir Elihu Lauterpacht QC and Daniel Bethlehem QC on ‘The scope and content of the principle of *non-refoulement*’ published in *Refugee Protection in International Law* (2003) (ed Feller, Türk and Nicholson, Cambridge) Pt 2, p 87. Among the conclusions reached by these eminent authorities are these (pp 109–110, 111):

‘61. These principles will be particularly relevant to the determination of the application of the principle of *non-refoulement* in circumstances involving the actions of persons or bodies on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. In principle, subject to the particular facts in issue, the prohibition on *refoulement* will therefore apply to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State. An act of *refoulement* undertaken by, for example, a private air carrier or transit official



a acting pursuant to statutory authority will therefore engage the responsibility of the State concerned ...

b 67. The reasoning in these cases supports the more general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.'

Plainly, these observations are supportive of the appellants' case.

c [26] There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear. But that principle, even if one of customary international law, cannot avail the appellants, who have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom. Is there a rule of customary international law which provides that if a national of country A, wishing to travel to country B to claim asylum, applies in country A to officials of country B, he may not be denied leave to enter country B without appropriate inquiry into the merits of his asylum claim? It is an important question, since if there is such a rule it binds all states, the 140 or so states which are parties to the 1951 convention and the 50 or so states which are not.

e [27] I think it a little doubtful whether a consensus of academic opinion has been demonstrated in favour of the rule for which the appellants contend. Even if it had, that would not be conclusive for, as Cockburn CJ said in *R v Keyn* (1876) 2 Ex D 63 at 202:

f '... even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage ...'

h In considering whether the rule contended for has received the assent of the nations, it is pertinent to recall that the states parties to the 1951 convention have not, despite much international discussion, agreed to revise its terms or extend its scope at any time since 1967. None of the citations in [24], above is from a legislative instrument. The House was referred to no judicial decision supporting the rule contended for and a number of recent decisions (*Sale's* case in the United States, *Ibrahim's* case and *Khawar's* case in Australia) are inimical to it. Have the states in practice observed such a rule? It seems to me clear that they have not.

j [28] Section 1 of the Immigration (Carriers' Liability) Act 1987 provided that where a person requiring leave to enter the United Kingdom arrived in this

country by ship or by aircraft and failed to produce a visa where required, the carrier by sea or air should be liable to pay a penalty of £1,000. The visa regime and the imposition of liability on carriers were complementary measures intended to stem the flow of applicants for asylum, as Simon Brown LJ explained in *R v Secretary of State for the Home Dept, ex p Hoverspeed* [1999] INLR 591 at 594–595:

‘What, then, is it which is said to justify placing these burdens, and most notably [the Immigration (Carriers’ Liability) Act 1987 (ICLA)], upon carriers? The answer is said to be the imperative needs of immigration control in the face of ever-growing pressures from around the world. This too is deposed to in great detail by the respondent and once again I shall simplify it. In 1986 there was a significant increase in the number of asylum-seekers, in particular from the Indian subcontinent and West Africa. In the result the visa requirement was extended to India, Pakistan, Bangladesh, Ghana, and Nigeria. ICLA was passed as a necessary adjunct of the visa regime and, more generally, to complement immigration control and facilitate procedures at the port of entry. As the then Home Secretary, Mr Douglas Hurd, made plain at the second reading of the Bill in March 1987, it was intended to: “make it much more difficult for those who want to come to this country, but who have no valid grounds for doing so ... It is also intended to stop abuse of asylum procedures by preventing people travelling here without valid documents and then claiming asylum before they can be returned.” The logical necessity for carriers’ liability to support a visa regime is surely self-evident. Why require visas from certain countries (and in particular those from which most bogus asylum-seekers are found to come) unless visa nationals can be prevented from reaching our shores? Their very arrival here otherwise entitles them to apply for asylum and thus defeats the visa regime. Without ICLA there would be little or no disincentive for carriers to bring them.’

In an article published in 1998 (‘United Kingdom: Breaches of Article 31 of the 1951 Refugee Convention’ (1998) 10 IJRL 205 pp 209–210), Richard Dunstan, formerly Refugee Officer, Amnesty International United Kingdom, graphically described the practice of some leading countries:

‘There can be little doubt that this pattern of the criminal conviction and imprisonment of would-be asylum-seekers for their use of false travel documents is related to the imposition of financial penalties under “carrier sanctions” legislation in both the United Kingdom and North America. In recent years, and in common with many other western countries, the United Kingdom, Canada and the United States have imposed visa regimes on nationals of practically all significant refugee-producing countries, in an apparent attempt to reduce the number of would-be asylum-seekers from such countries arriving at their borders. These visa regimes have then been enforced by the imposition of heavy financial penalties on those transport operators bringing passengers lacking a valid visa where one is required. For example, under the Immigration (Carriers’ Liability) Act 1987, the United Kingdom authorities impose a financial penalty of £2,000 per passenger brought without either a valid passport or a valid visa where one is required. Introducing this legislation in March 1987, the then Home Secretary, Douglas Hurd, stated that “the immediate spur to this proposal has been the

a arrival of over 800 people claiming asylum in the three months up to the end of February 1987". Between May 1987 and October 1996, fines totalling £97.6 million were imposed on over 440 airlines and shipping companies. The United Kingdom authorities have also provided training, advice and technical support in respect of the detection of false travel documents to airline staff based at various points of embarkation. In September 1996, for  
b example, the Ethiopian News Agency (ENA) reported that the British Ambassador in Addis Ababa had recently donated forgery detection equipment to the Ethiopian Immigration Service; the same ENA report quoted the Ambassador as saying that a number of British immigration officers had spent two weeks in Addis Ababa in October 1995, training both  
c Ethiopian immigration officers and Ethiopian Airline staff in the "detection of forged documents and British visa and passport requirements". Similarly, in the United States a financial penalty of US\$3,000 per improperly-documented passenger may be imposed under section 273 of the Immigration and Nationality Act 1952, the penalty having been increased from US\$1,000 in 1990. And in Canada a financial penalty of up to  
d CAN\$3,200 per improperly-documented passenger may be imposed under the Immigration Act 1976, as amended. As long ago as 1986, a total of 541 airlines were each fined CAN\$1,000 by the Canadian authorities for not demonstrating sufficient vigilance in their checking of passengers' travel documents ...

e A study conducted for the European Council on Refugees and Exiles, published in February 1999, showed that all states parties to the Schengen Convention, plus Norway and Iceland, who had concluded a parallel convention, had introduced a system of carriers' liability. Of 17 western European countries only Ireland and Switzerland, at that time, had not. There was no evidence before the House to show the effect on prospective applicants for asylum of foreign countries' visa and carriers' liability regimes, but there is no reason to suppose that their effect is  
f any different from our own. The evidence in the present case states that—

[b]ut for the existence of the new pre-clearance powers under the 2000 order, [the Home Secretary] may well have felt constrained to promote the introduction [of] a visa regime in respect of the Czech Republic, as has  
g occurred (for example) with other countries that have generated large numbers of asylum applications.'

Had a visa regime been imposed, the effect on the appellants, so far as concerned their applications for asylum, would have been no different. But it could not  
h plausibly be argued that a visa regime would have been contrary to the practice of the nations. That conclusion must in my opinion apply also to the pre-clearance procedure which the appellants challenge. This makes it unnecessary to address the first submission recorded in [22], above on the extent to which and the manner in which international law is or may become part of the common law.

j [29] I should briefly mention two additional arguments relied on by the appellants. It was said that the Prague Airport procedure violated the principle of legality. That principle is perhaps most clearly stated by Lord Hoffmann in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131:

'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'

This is an important and valuable principle. But it has no application to the present case, since the appellants enjoyed no right which, on any construction, Parliament had legislated to infringe or curtail.

[30] It was argued on behalf of the three appellants who stated their purpose of seeking asylum to the immigration officers in Prague that leave to enter should not have been refused on the ground (see r 320 of the Immigration Rules: see [5], above) that entry was being sought for a purpose not covered by the rules. It was said that applying for asylum is a purpose covered by the rules. It is of course true that the rules lay down the procedure to be followed when an application for asylum is made. But it does not follow that applying for asylum is a purpose covered by the rules, and it seems to me clear that it is not. Even if an application for asylum is duly made, this does not lead to the grant or refusal of leave to enter until the application is determined.

[31] I am in full agreement with the opinion of my noble and learned friend, Lord Hope of Craighead, which I have had the opportunity to read in draft. For all these reasons, in essence those of the judge and the Court of Appeal, I would reject the appellants' arguments on the issues canvassed in this opinion. But the appeal must be allowed, for the reasons given by my noble and learned friend Lady Hale.

#### LORD STEYN.

[32] My Lords, in this appeal many significant issues have been debated. But surely the most important issue is whether the operation mounted by immigration officers at Prague Airport under the authority of the Home Secretary in 2001 and 2002 discriminated against Roma on grounds of their race. It is unlawful for public authorities, such as the Home Secretary and an immigration officer, to discriminate on racial grounds in carrying out any of their functions. The appellants put forward a case of direct discrimination on the grounds of race under the Race Relations Act 1976. The Home Secretary and the immigration officers strenuously denied that any discrimination had taken place. Mr Howell, who appeared on behalf of the Home Secretary and the immigration officer, invited the House of Lords to regard the allegations as very serious. He submitted that the case of the appellants should be viewed with an initial



a scepticism that the United Kingdom could have put in place a system of discrimination on the grounds of race. That is how I will approach the matter.

[33] The operation at Prague Airport is unique in the history of the immigration service. It was the first time such a procedure had been undertaken. And it has not been repeated. But the decision of the House transcends the particular circumstances of the case: it has implications for the responsibility of government not only for immigration policy but also for race relations policy generally.

[34] The essential features of the operation can be stated quite simply. It was designed as a response to an influx of Czech Roma into the United Kingdom. The immigration officers knew that the reason why they were stationed in Prague was to stop asylum seekers travelling to the United Kingdom. They also knew that almost all Czech asylum seekers were Roma, because the Roma are a disadvantaged racial minority in the Czech Republic. Thus there was from the outset a high risk that individuals recognised as Roma would be targeted by specially intrusive and sceptical questioning. There was a striking difference in treatment of Roma and non-Roma at the hands of immigration officers operating at Prague Airport. The statistics show that almost 90% of Roma were refused leave to enter and only 0.2% of non-Roma were refused leave to enter. Roma were 400 times more likely than non-Roma to be refused permission. No attempt was made by the Home Office to explain by the evidence of immigration officers the difference in treatment of Roma and non-Roma. Although the Home Office was from the beginning on notice of the high risk of discrimination on grounds of race, no attempt was made to guard against discrimination.

[35] New documents rightly produced by the Home Office during the hearing of the appeal are revealing. One extract is sufficient to show what immigration officers must have understood their functions at Prague Airport to involve:

f 'The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination—without reference to additional statistical or intelligence information—if an immigration officer considers such discrimination is warranted.'

The immigration officers would have read this document in the light of a formal authorisation by the Secretary of State under s 19D of the 1976 Act. That authorisation purported to confer on immigration officers the express power to discriminate by reason of a person's ethnic origin against Roma. It is true that the Secretary of State does not rely on the authorisation. But it would have been known to immigration officers sent to Prague. Counsel for the Secretary of State argued that the authorisation was not in law an instruction. I would accept that. But the documents nevertheless reveal how immigration officers would have understood their principal task.

[36] Following the principles affirmed by the House of Lords in *Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501, there is in law a single issue: why did the immigration officers treat Roma less favourably than non-Roma? In my view the only realistic answer is that they did so because the persons concerned were Roma. They discriminated on the grounds of race. The motive for such discrimination is irrelevant: see *Nagarajan's* case.

[37] The reasoning of the majority of the Court of Appeal in this case had at first glance the attractiveness of appearing to be in accord with common sense:

Simon Brown LJ said [2003] EWCA Civ 666 at [86], [2003] 4 All ER 247 [at 86], [2004] QB 811:

‘... because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be wari-er of that possibility in a Roma’s case than in the case of a non-Roma applicant. If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?’

Mantell LJ agreed with this analysis. Laws LJ dissented. In ‘Equality: The Neglected Virtue’ [2004] EHRLR 141, Mr Rabinder Singh QC convincingly exposed the flaw in the reasoning of the majority. He stated (p 154):

‘It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility—as it has done in the context of allegations of indirect discrimination—and has chosen not to do so. In so far as the fields of immigration and nationality may be thought to require special treatment, permitting discrimination on certain grounds (ethnic or national origins) but not others (such as colour), again Parliament has catered for that possibility in enabling a minister to give an authorisation. The Government did not want to rely on the authorisation in the *Roma* case: that was a matter for its tactical choice but the courts should not bend over backwards to save the executive from what may have been its own folly. Their duty, as Laws L.J. said, is to apply the will of Parliament as enacted in its laws. Moreover, the danger in the majority’s reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown L.J. expressly gives an example from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the *Roma* case itself.’

I am in respectful agreement with this analysis. In my view the majority was wrong. Laws LJ was right.

[38] I agree with the conclusion of Baroness Hale of Richmond that the system operated by immigration officers at Prague Airport was inherently and systemically discriminatory on racial grounds against Roma, contrary to s 1(1)(a) of the 1976 Act.

[39] It is now necessary to consider to what extent the operation at Prague Airport was also contrary to the obligations of the United Kingdom under

a international treaties to which the United Kingdom is a party and under customary international law.

[40] It is necessary to consider the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171) (the Refugee Convention). Article 3 provides as follows:

b 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

Before I consider the reach of art 3, it is important to bear in mind the status of the Refugee Convention in United Kingdom in law. It is not a mere unincorporated treaty. Under r 16 of the Statement of Changes in Immigration Rules (HC Paper 169 (1983)) it was formerly provided:

c 'Where a person is a refugee full account is to be taken of the provisions of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 and Cmnd. [3906]). Nothing in these rules is to be construed as requiring action contrary to the United Kingdom's obligations under these instruments ...'

d In *R v Secretary of State for the Home Dept, ex p Singh* (1987) Times, June 8, the Divisional Court held that the Refugee Convention had 'indirectly' been incorporated under English law. Later in the same year in *R v Secretary of State for the Home Dept, ex p Sivakumaran* (UN High Comr for Refugees intervening) [1988] 1 All ER 193 at 195, [1988] AC 958 at 990 Lord Keith of Kinkel observed: 'The United Kingdom having acceded to the convention and protocol, their provisions have for all practical purposes been incorporated into United Kingdom law.' Lord Bridge of Harwich, Lord Templeman and Lord Griffiths agreed with the opinion of Lord Keith. The difficulty is, however, that Immigration Rules are not law but merely instructions to immigration officers. *By themselves* they cannot effect an incorporation.

f [41] Against this background, Parliament decided to make reference to the Refugee Convention in primary legislation. Parliament was informed that the new provision was to be 'an additional safeguard': HC Official Report, SC A (Asylum and Immigration Appeals Bill), 19 November 1992, col 151. Section 2 of the Asylum and Immigration Appeals Act 1993 provides:

g 'Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention.'

h It is necessarily implicit in s 2 that no administrative practice or procedure may be adopted which would be contrary to the Refugee Convention. After all, it would be bizarre to provide that formal immigration rules must be consistent with the convention but that informally adopted practices need not be consistent with the convention. The reach of s 2 of the 1993 Act is therefore comprehensive.

j [42] Parliament must be taken to have been aware, in enacting the 1993 Act, that the courts had treated references in the Immigration Rules to the Refugee Convention as 'indirectly' or 'for practical purposes' incorporating it into domestic law: see *Bennion on Statutory Interpretation* (4th edn, 2002) p 469. In the context of the decisions of the Court of Appeal and House of Lords in 1987 Parliament must have intended that the strengthened reference to the Refugee Convention in primary legislation would be treated by the courts as an incorporation of the Refugee Convention into domestic law. Moreover, the

heading of s 2 is 'Primacy of Convention'. This is a relevant and significant pointer to the overriding effect of the convention in English law: see *R v Montila* [2004] UKHL 50 at [31]–[37], [2005] 1 All ER 113 at [31]–[37], [2004] 1 WLR 3141 per Lord Hope of Craighead. It is true, of course, that a convention may be incorporated more formally by scheduling it to an enactment, eg the Carriage of Goods by Sea Act 1971 which enacted the Hague-Visby Rules. But there is no rule specifying the precise legislative method of incorporation. It is also possible to incorporate a treaty in part, eg the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention on Human Rights) was incorporated into our law without art 13: see the Human Rights Act 1998. In my view it is clear that the Refugee Convention has been incorporated into our domestic law.

[43] The question is whether, in addition to acting in breach of the 1976 Act, the immigration officers operating at Prague Airport were in breach of art 3 of the Refugee Convention as incorporated into United Kingdom law. Having given the matter careful consideration, I am driven to the conclusion that art 3 is not applicable. The non-discrimination provision in art 3 is limited to the application of 'the provisions of this Convention'. Article 3 does not contain a free-standing non-discrimination provision. It resembles the weak provision in art 14 of the European Convention on Human Rights. The appellants never left the Czech Republic and are therefore not 'refugees' under art 1 of the Refugee Convention. They also never presented themselves at the frontier of the United Kingdom and properly construed the non-refoulement obligation under art 33 is not engaged. It is true, of course, that the Refugee Convention is a living instrument and must be interpreted as such. It must also be interpreted in accordance with good faith: see art 31 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964). These are very important principles of interpretation. But they are not capable of filling gaps which were designedly left in the protective scope of the Refugee Convention. In my view there is no answer to the reasoning of Lord Bingham of Cornhill on these points.

[44] It has been noted how in the early 1950s weak non-discrimination provisions were adopted in some early human rights treaties, namely in art 14 of the European Convention on Human Rights (1950) and arts 1 and 33 of the Refugee Convention (1951). But the strong moral condemnation of race discrimination in the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) and in the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmnd 7226) led in the 1960s in more modern human rights instruments to the formulation of free-standing non-discrimination legal norms. The first of these treaties to be considered is the International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966; TS 77 (1969); Cmnd 4108). The first three preambles of this convention read as follows:

*'Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,*



a *Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,*

b *Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination ...'*

Article 2 provides:

c '1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

d (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons ...'

On 4 January 1969 this convention entered into force. To date 169 states have become parties to it. On 6 April 1969 the United Kingdom ratified this treaty. The operation at Prague Airport placed the United Kingdom in breach of this international obligation.

e [45] The next relevant treaty provision is art 26 of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmdnd 6702) (ICCPR). It provides:

f 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

g On 23 March 1976 this convention entered into force. To date 152 states have become parties. On 20 August 1976 the United Kingdom ratified this treaty. The United Kingdom purported to exercise governmental authority at Prague Airport. The operation carried out at Prague placed the United Kingdom in breach of the ICCPR.

h [46] Lastly, I turn to customary international law. The Universal Declaration of Human Rights (1948) was a proclamation of ethical values rather than legal norms. In art 1 it stated: 'All human beings are born free and equal in dignity and rights.' Article 2 expressly condemned distinctions of any kind on the grounds of race. The moral force of this instrument was enormous. The European Convention on Human Rights (1950) and the Refugee Convention (1951) are direct descendants of the Universal Declaration. But they contained relatively weak legal norms of non-discrimination. The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race. Since 1965 international treaties have established comprehensive and strong legal norms against discrimination on the grounds of

race. In 1970 the majority of the International Court of Justice, consisting of 12 judges, delivering judgment in *Re Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (second phase)* [1970] ICJ Rep 3 at 32 (paras 33–34) referred to obligations erga omnes (ie binding on all states and also having the status of peremptory norms [jus cogens]) in contemporary international law which included ‘the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’. State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race. It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states: see Shaw *International Law* (5th edn, 2003) p 257; Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) pp 95, 112, 118, 169, 184 and 191; and Ragazzi *The Concept of International Obligations Erga Omnes* (1997) Ch 7. The operation at Prague Airport was also a breach of this rule of customary international law.

[47] For these reasons, as well as the reasons given by Lady Hale on the discrimination issue, I would allow the appeal and I would make the declaration which Lady Hale proposes.

#### LORD HOPE OF CRAIGHEAD.

[48] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill on the asylum issue and Baroness Hale of Richmond on the discrimination issue. For the reasons which they have given, with which I am in full agreement, I would make the order that Lady Hale proposes. I should like to add just a few footnotes to what they have said.

#### RULE 320 OF THE IMMIGRATION RULES

[49] Mention should be made of the appellants’ argument that a decision to refuse leave to enter the United Kingdom was inconsistent with r 320 of the Statement of Changes in Immigration Rules (HC Paper 395 (1994)). Lord Lester of Herne Hill QC chose, in the interests of time, not to develop this argument orally. But he adopted the arguments which were included in his written case, and I should like to say why, in agreement with Simon Brown LJ in the Court of Appeal ([2003] EWCA Civ 666 at [52]–[54], [2003] 4 All ER 247 at [52]–[54], [2004] QB 811, I think that this argument too cannot be accepted.

[50] These rules form part of the domestic legislation which was extended to the operation at Prague Airport in July 2001. They were made under s 3(2) of the Immigration Act 1971. This subsection permits the Secretary of State to make rules as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the United Kingdom of persons required by the Act to have leave to enter. Immigration officers are required in the exercise of their functions to act in accordance with such instructions given to them by the Secretary of State as are not inconsistent with the Immigration Rules: see Sch 2, para 1(3) to the 1971 Act. It was the statement in para 16 of the former Statement of Changes in the Immigration Rules (HC Paper 169 (1983)) that where a person is a refugee full account shall be taken of the provisions of the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954);

a Cmnd 9171) (the 1951 convention) and Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) (the 1967 Protocol) that enabled Lord Keith of Kinkel to observe in *R v Secretary of State for the Home Dept, ex p Sivakumaran (UN High Comr for Refugees intervening)* [1988] 1 All ER 193 at 195, [1988] AC 958 at 990 that their provisions had for all practical purposes been incorporated into United Kingdom law.

b [51] An updated statement of the Immigration Rules was laid before Parliament on 23 March 1990 (HC Paper 251 (1990)). It was further updated with effect from 1 October 1994 in the light of s 2 of the Asylum and Immigration Appeals Act 1993, which states that nothing in the Immigration Rules shall lay down any practice which would be contrary to the 1951 convention. Further statements of changes have been issued from time to time. As at the relevant date c the rules provided, among other things:

‘320. In addition to the grounds of refusal of entry clearance or leave to enter set out in Parts 2–8 of these Rules ... the following grounds for the refusal of entry clearance or leave to enter apply:

d Grounds upon which entry clearance or leave to enter the United Kingdom is to be refused

(1) the fact that entry is being sought for a purpose not covered by these Rules ...

**Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused ...**

e 327. Under these Rules an asylum applicant is a person who claims that it would be contrary to the United Kingdom’s obligations under the [1951 convention] for him to be removed from or required to leave the United Kingdom. All such cases are referred to in these Rules as asylum applications.

f **Applications for Asylum**

328. All asylum applications will be determined by the Secretary of State in accordance with the United Kingdom’s obligations under the [1951 convention]. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules ...

g **Grant of Asylum**

h 334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that: (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and (ii) he is a refugee, as defined by [the 1951 convention]; and (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of [the 1951 convention], to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group ...

j **Refusal of Asylum**

336. An application which does not meet the criteria set out in paragraph 334 will be refused.’

[52] The appellants argue that the refusal to grant leave to enter the United Kingdom to the individual appellants who said when they were interviewed that they were intending to claim asylum there was not authorised by r 320. This is

because leave to enter was being sought 'for a purpose' which was covered by the rules, namely for the purpose of making a claim for asylum in the United Kingdom. Thus, so the argument runs, the immigration officers at Prague Airport should have allowed the appellants to travel to the United Kingdom, neither granting nor refusing them leave to enter, in the light of what they said their purpose was when they were being interviewed in Prague. This would have enabled a decision to be taken on their arrival in the United Kingdom, where the immigration officers would have been required by r 328 to refer their applications to the Secretary of State. They would then have been given limited leave to enter or been detained pending the Secretary of State's decision on their applications.

[53] We must take the rules as we find them for the purposes of this argument. The one thing that is crystal clear is that the making of an asylum claim is not one of the purposes for which leave to enter may be given. Nor are there any rules which say that this is one of the purposes for which a person may seek leave to enter. The purposes to which r 320 refers apply to particular categories of entrants for which the rules in terms provide, such as visitors, students, family members, persons seeking to enter or remain in the United Kingdom for employment, for training or work experience, and so on. For each of these categories the rules set out the matters about which the immigration officer must be satisfied. None of these categories includes the seeking of asylum or the status of a refugee. It is also to be noted that r 334, which provides for the granting of asylum, adopts the language of the 1951 convention without any modification or enlargement. The Secretary of State must be satisfied, among other things, that the applicant is in the United Kingdom or has arrived at a port of entry in the United Kingdom and that he is a refugee as defined by the convention. Plainly, neither of these requirements was satisfied in the case of the appellants. They were refused leave to enter while they were still at Prague Airport.

[54] Recognising these difficulties, the appellants rely on the latter part of r 320 which deals with cases which are not covered by other rules dealing with the grant or refusal of leave. In these cases, while leave to enter will 'normally' be refused, the immigration officer is in terms of the rule not bound to refuse leave. But he is not bound to grant leave either. This is made clear by r 17A of the Immigration Rules, inserted by Statement of Changes in Immigration Rules (HC Paper 704 (2000)), which provides that where a person is outside the United Kingdom but wishes to travel to the United Kingdom an immigration officer may give or refuse him leave to enter. The most that can be said is that, as the Secretary of State has power to grant exceptional leave to enter, such a person may be detained or granted temporary leave to enter pending a decision as to whether or not exceptional leave is to be granted.

[55] The argument that the immigration officers at Prague Airport were not authorised by r 320 to refuse leave to the appellants breaks down at this point. The appellants would have to show that the immigration officers were not authorised to refuse leave because the purpose for which the appellants were seeking to travel to the United Kingdom was one for which the rules required that leave be granted. The latter part of r 320 does not provide any support for that argument. The rules lack any provision which requires that a person who wishes to claim asylum on arrival in the United Kingdom must be granted leave to enter before he begins his journey. As the respondents point out in their written case, visas are granted or refused on the same basis as leave to enter.



a There is no obligation under the rules to grant a visa to a person who wishes to travel in order to seek asylum in this country. Equally there is no obligation to grant him leave to enter for this purpose.

[56] For these reasons I am in no doubt that the argument which was based on r 320 of the Immigration Rules must be rejected.

b GOOD FAITH AS A SOURCE OF LAW

[57] Lord Lester made much in the course of his argument of what he described as the obligation of good faith. He said that the actions of the immigration officers at Prague Airport were in breach of the 1951 convention because their actions were designed, in breach of what he described as the obligation of good faith, to frustrate the central purposes of the convention. This argument was supported by Mr Goodwin-Gill for the intervener. But he described good faith not as an obligation but as a principle. As he put in his written case, good faith is a general principle of customary international law which requires states, among other things, to exercise their rights consistently with their other obligations. Replying to the respondents' argument that the principle had no application in this case because it cannot give rise to new obligations, he said that no new obligations were in issue here. What was in issue was the lawfulness of measures that were taken to prevent the 1951 convention ever being triggered. A state lacked good faith in the implementation of a treaty when it sought to avoid or to divert the obligation which it has accepted, or to do what it is not permitted to do directly.

[58] This argument is attractive because it appears, if sound, to provide a neat and logical solution to the problem which faithful adherence to the language of the 1951 convention presents. But it needs to be approached with caution. Lord Lester's description of good faith as an obligation is apt to mislead if taken out of context. Rules such as those on the observance of treaties described in arts 26 and 31 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) (the Vienna Convention), which provide that every treaty in force must be performed by the parties to it in good faith and that a treaty shall be interpreted in good faith, may be described as obligations. They are specific rules by which the parties to the convention have agreed to be bound. But to describe good faith generally as an obligation suggests that good faith has a life and energy of its own. It suggests that it can operate outside the obligations which a treaty creates, by enlarging their scope beyond that which the parties agreed to when they signed up to it. And even if one adopts Mr Goodwin-Gill's more accurate approach to it as a principle, care still needs to be taken lest the boundaries of its operation are exceeded and it is used to enlarge what parties have agreed to, rather than to ensure fair dealing in the performance of the agreement and the exercise of the rights and duties which have been created by it.

[59] The limited way in which the principle operates can be seen in the field of private law, where its origins lie. The modern theory of contract is derived from the consensual contracts of Roman law which are said to have been governed by the principle of bona fides: see Reinhard Zimmermann *The Law of Obligations* (1992) p 674. There are differences between the legal systems as to how extensive and how powerful the penetration of the principle has been. They range from systems in the civilian tradition where as a guideline for contractual behaviour the principle is expressly recognised and acted upon, to those of the common law where a general obligation to conform to good faith is not

recognised. In an appeal in a Scottish case, *Smith v Bank of Scotland* 1997 SC (HL) 111 at 121 Lord Clyde referred to 'the broad principle in the field of contract law of fair dealing in good faith'. The preferred approach in England is to avoid any commitment to over-arching principle, in favour of piecemeal solutions in response to demonstrated problems of unfairness: see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 at 353, [1989] QB 433 at 439 per Bingham LJ. The same result is reached by other means: see Ole Lando and Hugh Beale *Principles of European Contract Law* (2000) Pts I and II, p 116, note 1; Ewan McKendrick *Contract Law* (5th edn, 2003) pp 533–535.

[60] But, as Hector MacQueen 'Delict, Contract, and the Bill of Rights: a Perspective from the United Kingdom' (2004) 121 SALJ 359 p 382, points out, good faith in Scottish contract law, as in South African law, is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature: see also his chapter on good faith in the Scots law of contract in *Good Faith in Contract and Property Law*, ed ADM Forte (Harte Publishing, 1999). That was so in Roman law, which distinguished between obligations bona fidei and stricti iuris, and enabled the iudex in the former case to provide remedies on grounds of good faith in bonae fidei judicia: see Buckland *A Text-Book of Roman Law* (2nd edn, 1932) pp 678, 704. It was a distinction which applied properly to the remedy, rather than to the obligation. It was not a source of obligation in itself. That remains generally true today in the civilian systems, which recognise the principle.

[61] Against this background we ought not to be surprised that much of the development of international law, representing what has been agreed among nations, has been informed by the same principle and that it uses it in practice in the same way. Article 2 of the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) provides that the principles in pursuance of which the organisation and its members shall act include the principle in para 2 of the article, which states that all members 'shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'. The principle of good faith was explained by Sir Gerald Fitzmaurice, a former judge of the International Court of Justice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' (1950) 27 BYIL 1 pp 12–13:

'The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act arbitrarily or capriciously.'

The preamble to the Vienna Convention notes that 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised'. In *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253 at 268 (para 46), the International Court of Justice stated that good faith is one of the basic principles governing the creation and performance of legal obligations, whatever their source. It has been said that good faith presents itself as an absolutely necessary ingredient to the operation of the whole international legal order: see Michel Virally 'Review Essay: Good Faith in Public International Law' (1983) 77 AJIL 130 p 133.

- a [62] But it is one thing for good faith to present itself as a principle of general application, as it is in these materials. It is another for it to be appealed to as a source of obligation in itself. It is here that caution is needed. In *Re Border and Transborder Actions (Nicaragua v Honduras)* [1988] ICJ Rep 69 at 105–106 (para 94) the International Court of Justice referred to its observations in the *Nuclear Tests* case about the basic principle, adding that good faith ‘is not in itself a source of
- b obligation where none would otherwise exist’. This proposition was reaffirmed in *Re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (1998) ICJ Rep 275 at 297 (para 39). In his review essay on *La Bonne Foi en Droit International Public* by Elisabeth Zoller (Paris, 1977) Michel Virally criticises her conclusion that, as good faith is not an autonomous source of legal rights and
- c duties, no general obligation to behave in good faith exists in public international law (see (1983) 77 AJIL 130 p 131). The view which he takes (p 133), which I for my part would accept, is that good faith really is a principle of international law, that all the actors in the international legal order are subjected to it and that they must endure its consequences, since good faith will serve to determine both the legal effects of their declarations and behaviour and the extent of their duties. But
- d he also accepts it as true that, in practice, this general principle of law has only marginal value as an autonomous source of rights and duties and that, on this point, Mme Zoller’s conclusions cannot be faulted. As he puts it (at p 133–134), good faith is always related to specific behaviour or declarations. What it does is invest them with legal significance and legal effects.
- e [63] The question then is whether the appellants are seeking to do no more by appealing to this principle than insist that the rights and obligations which the 1951 convention creates are exercised within the law, as Mr Goodwin-Gill put it, or whether they are seeking to enlarge what it provides so as to impose new obligations on the contracting states. In my opinion the answer to this question
- f must be found in the language of the convention, interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, as art 31 of the Vienna Convention requires. The argument that good faith requires the state to refrain from actions which are incompatible with the object and purpose of the treaty can only be pressed so far. Everything depends on what the treaty itself provides.
- g [64] Nobody now seeks to argue that the operations which were carried out at Prague Airport were in breach of art 33, even on the most generous interpretation that could be given to it. What the 1951 convention does is assure refugees of the rights and freedoms set out in Ch I–V when they are in countries that are not their own. It does not require the state to abstain from controlling
- h the movements of people outside its borders who wish to travel to it in order to claim asylum. It lacks any provisions designed to meet the additional burdens which would follow if a prohibition to that effect had been agreed to. The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the state’s frontier are not incompatible with
- j the acceptance of the obligations which arise when refugees have arrived in its territory. To argue that such steps are incompatible with the principle of good faith as they defeat the object and purpose of the treaty is to argue for the enlargement of the obligations which are to be found in the convention. For the reasons that I have given, I am not persuaded that this is the way in which the principle of good faith can operate.

## THE SALE CASE: REFOULEMENT

[65] Lord Lester sought to build on the criticism of the decision of the United States Supreme Court in *Sale, Acting Comr, Immigration and Naturalisation Service v Haitian Centers Council Inc* (1993) 509 US 155 in Report No 51/96 by the Inter-American Commission for Human Rights. The question in that case was whether an executive order directing the United States Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualified as refugees violated art 243(h)(1) of the Immigration and Nationality Act 1952 and art 33 of the 1951 convention. The Supreme Court held, Blackmun J dissenting, that the executive order was lawful. Stevens J, speaking for the majority said (at 187):

‘Even if we believed that Executive Order 12807 violated the intent of some signatory states to protect all aliens, wherever they might be found, from being transported to potential oppressors, we must acknowledge that other signatory states carefully—and successfully—sought to avoid just that implication. The negotiating history, which suggests that the Convention’s limited reach resulted from a deliberate bargain, is not dispositive, but it solidly supports our reluctance to interpret Article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the high seas.’

[66] The Inter-American Commission said that it preferred the dissenting opinion of Blackmun J for the reasons given in the amicus brief filed for the Office of the United Nations High Commissioner for Refugees. He rejected the view of the majority (at 180) that the word ‘return’ in art 33, reinforced by the word ‘refouler’ in parenthesis, had a narrower meaning than its common meaning. He said (at 191–193) that ordinary meaning of the word ‘refouler’ (which he took to mean to repulse, drive back or repel) strongly reinforced the straightforward interpretation of the duty of non-return, that the text of art 33 was clear and that, whether the operative term was ‘return’ or ‘refouler’, it prohibited the government’s actions. In the Court of Appeal [2003] 4 All ER 247 at [34] Simon Brown J said:

‘For present purposes I propose to regard *Sale* case as wrongly decided; it certainly offends one’s sense of fairness.’

[67] Blackmun J’s dissenting opinion was invoked by Lord Lester in support of his argument that the actions of the immigration officers at Prague Airport were contrary to the principle of non-refoulement as that principle was now recognised in customary international law. The executive order required the United States Coast Guard to drive back or repel the Haitian asylum seekers, forcing them to return to their country of origin. That, he said, was the effect of the pre-clearance scheme, which was another example of an act in breach of the principle. He recognised, of course, that those who were dealt with at Prague Airport were in a different position from those who were turned back in the Haitians’ case, who were undoubtedly refugees as defined by art 1A of the 1951 convention when they were intercepted on the high seas as, assuming the other conditions were satisfied, they were outside the country of their nationality. But he submitted that the application of the refoulement principle by Blackmun J to the Haitians’ case was directly comparable.



a [68] I do not, with respect, think that *Sale's* case was wrongly decided. The issue in that case was not as to what was or was not fair. The majority recognised (at 187) the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders: p 187. But in their opinion both the text and the negotiating history of art 33 affirmatively indicated that it was not intended b to have extra-territorial effect. Judicial support for this view is found in the opinion of Gummow J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273–274 and in the other authorities which Lord Bingham has referred to.

c [69] As for the word 'refouler', the dictionaries show both that there are many possible translations of it and that it is not an exact synonym for the English word 'return' to which it has been attached in parenthesis by art 33. *Le Trésor de la Langue Française informatisé*, in the version dated 10 December 2002, gives a variety of meanings of the word, depending on what one is talking about. Its use in the medical and military contexts is referred to, as also is a description of the movement achieved by shunting a train. Its meaning in international law, in the d context of 'refoulement des étrangers', is said to be: 'Acte par lequel la police des frontières s'oppose à l'entrée sur le territoire d'un État d'un ressortissant étranger qui cherche à y pénétrer.' This definition indicates an acceptance in contemporary usage of the wider meaning that Lord Lester was contending for. But the crucial question for present purposes is what the phrase 'expel or return e [refouler]' was understood to mean in 1951 when it was adopted by the convention.

[70] On this point I agree with the majority in *Sale's* case. The materials quoted in footnote 40 to their opinion ((1993) 509 US 155 at 183) provide ample support for the proposition that the word 'return' in art 33 is not an exact f synonym for the word 'refouler'. It refers to a refugee who is within the territory but is not yet resident there—to a person who has crossed the border and is on the threshold of initial entry, as it was put in *Shaughnessy v US, ex rel Mezei* (1953) 345 US 206 at 212. Grahl-Madsen *The Status of Refugees in International Law* (1972) p 94 states that the prohibition of non-refoulement may only be invoked in respect of persons who are already present in the territory of the contracting g state, and that art 33 does not oblige it to admit any person who has not set foot there.

[71] The majority in *Sale's* case concluded their discussion of the meaning to be given to the text of the 1951 convention with these words (see 183):

h 'The drafters of the Convention and the parties to the Protocol—like the drafters of Article 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose un contemplated extraterritorial j obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.'

I see no reason to disagree with this assessment.

**BARONESS HALE OF RICHMOND.**

[72] My Lords, on the asylum issue, I am in full and respectful agreement with the reasoning and conclusions of my noble and learned friend, Lord Bingham of Cornhill. A quite separate issue is whether the operation at Prague Airport was carried out in an unlawfully discriminatory manner, in that would-be travellers of Roma origin were treated less favourably than non-Roma were. In particular, it is alleged that they were subjected to longer and more intrusive questioning, they were required to provide proof of matters which were taken on trust from non-Roma, and far more of them were refused leave to enter than were non-Roma. The appellants seek a declaration to that effect.

[73] Since 1968, it has been unlawful for providers of employment, education, housing, goods and other services to discriminate against individuals on racial grounds. The current law is contained in the Race Relations Act 1976, which in most respects is parallel to the Sex Discrimination Act 1975. The principles are well known and simple enough to state although they may be difficult to apply in practice. The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are: (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds: see *Glasgow City Council v Zafar* [1998] 2 All ER 953, [1997] 1 WLR 1659, approving *King v Great Britain-China Centre* [1992] ICR 516. If the difference is on racial grounds, the reasons or motive behind it are irrelevant: see, for example, *Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501.

[74] If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.

[75] The complaint in this case is of direct discrimination against the Roma. Indirect discrimination arises where an employer or supplier treats everyone in

a the same way, but he applies to them all a requirement or condition which  
members of one sex or racial group are much less likely to be able to meet than  
members of another: for example, a test of heavy lifting which men would be  
much more likely to pass than women. This is only unlawful if the requirement  
is one which cannot be justified independently of the sex or race of those  
involved; in the example given, this would depend upon whether the job did or  
b did not require heavy lifting. But it is the requirement or condition that may be  
justified, not the discrimination. This sort of justification should not be confused  
with the possibility that there may be an objective justification for discriminatory  
treatment which would otherwise fall foul of art 14 of the European Convention  
for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out  
in Sch 1 to the Human Rights 1998) (the European Convention on Human  
c Rights).

[76] Discrimination law has always applied to public authority providers of  
employment, education and housing, and other services, as long as these services  
are of a similar kind to those which may be supplied by private persons. But a  
majority of this House held, in *Amin v Entry Clearance Officer, Bombay* [1983] 2 All ER  
d 864, [1983] 2 AC 818, that it did not apply to acts done on behalf of the Crown which  
were of an entirely different kind from any act that would ever be done by a private  
person, in that case to the application of immigration controls. This is still the case  
for sex discrimination, but the race discrimination law was changed in response to  
the MacPherson Report into the Stephen Lawrence case (1999 Cm 4262). It is now  
e unlawful for a public authority to discriminate on racial grounds in carrying out any  
of its functions. There are, however, a few exceptions and qualifications, one of  
which is relevant to this case.

[77] The amendments came into force on 2 April 2001. The relevant  
provisions of the 1976 Act, as amended by the Race Relations (Amendment) Act  
2000, at the material time (they have been further amended since) were as  
f follows:

1. *Racial discrimination.*—(1) A person discriminates against another in  
any circumstances relevant for the purposes of any provision of this Act  
if—(a) on racial grounds he treats that other less favourably than he treats or  
would treat other persons; or (b) he applies to that other a requirement or  
g condition which he applies or would apply equally to persons not of the same  
racial group as that other but—(i) which is such that the proportion of  
persons of the same racial group as that other who can comply with it is  
considerably smaller than the proportion of persons not of that racial group  
who can comply with it; and (ii) which he cannot show to be justifiable  
irrespective of the colour, race, nationality or ethnic or national origins of the  
h person to whom it is applied; and (iii) which is to the detriment of that other  
because he cannot comply with it ...

3. *Meaning of “racial grounds”, “racial group” etc.*—(1) In this Act, unless the  
context otherwise requires—

“racial grounds” means any of the following grounds, namely colour, race,  
j nationality or ethnic or national origins;

“racial group” means a group of persons defined by reference to colour,  
race, nationality or ethnic or national origins, and references to a person’s  
racial group refer to any racial group into which he falls ...

(4) A comparison of the case of a person of a particular racial group with  
that of a person not of that group under section 1(1) ... must be such that the

relevant circumstances in the one case are the same, or not materially different, in the other ...

**19B. Discrimination by public authorities.**—(1) It is unlawful for a public authority in carrying out any functions of the authority to do any act which constitutes discrimination ...

(2) In this section “public authority”—(a) includes any person certain of whose functions are functions of a public nature; but (b) does not include any person mentioned in subsection (3) ...

**19C. Exceptions or further exceptions from section 19B for judicial and legislative acts etc ...** (4) Section 19B does not apply to any act of, or relating to, imposing a requirement, or giving an express authorisation, of a kind mentioned in section 19D(3) in relation to the carrying out of immigration and nationality functions ...

**19D. Exception from section 19B for certain acts in immigration and nationality cases.**—(1) Section 19B does not make it unlawful for a relevant person to discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration and nationality functions.

(2) For the purposes of subsection (1), “relevant person” means (a) a Minister of the Crown acting personally; or (b) any other person acting in accordance with a relevant authorisation.

(3) In subsection (2), “relevant authorisation” means a requirement imposed or express authorisation given—(a) with respect to a particular case or class of case, by a Minister of the Crown acting personally; (b) with respect to a particular class of case—(i) by any of the enactments mentioned in subsection (5), or (ii) by any instrument made under or by virtue of any of those enactments.

(4) For the purposes of subsection (1) “immigration and nationality functions” means functions exercisable by virtue of any of the enactments mentioned in subsection (5).

(5) Those enactments are—(a) the Immigration Acts (within the meaning of the Immigration and Asylum Act 1999 but excluding sections 28A to 28K of the Immigration Act 1971 so far as they relate to offences under Part III of that Act) ...

[78] The effect, therefore, is to exempt an immigration officer from the requirement not to discriminate if he was acting under a relevant authorisation, that is a requirement or express authorisation given by a Minister of the Crown acting personally (or by the law itself, but that does not arise here). Shortly before the Prague operation began on 18 July 2001, the Minister had made the Race Relations (Immigration and Asylum) (No 2) Authorisation 2001, which came into force in April 2001, at the same time as the 2000 Act amendments. The operative parts are as follows:

#### **‘DISCRIMINATION ON GROUND OF ETHNIC OR NATIONAL ORIGIN Examination of passengers**

2. Where a person falls within a category listed in the Schedule and is liable to be examined by an immigration officer under paragraph 2 of Schedule 2 to the Immigration Act 1971 the immigration officer may, by reason of that person’s ethnic or national origin—(a) subject the person to a more rigorous examination than other persons in the same circumstances; (b) exercise powers under paragraphs 2(3), 2A, 4 and 21 of Schedule 2 to the Immigration



a Act 1971; (c) detain the person pending his examination under paragraph 16(1) of Schedule 2 to the Immigration Act 1971; (d) decline to give the person's notice of grant or refusal of leave to enter in a form permitted by Part III of the Immigration (Leave to Enter and Remain) Order 2000; and (e) impose a condition or restriction on the person's leave to enter the United Kingdom or on his temporary admission to the United Kingdom.

b **Persons wishing to travel to the United Kingdom**

c 3. Where a person falls within a category listed in the Schedule and is outside the United Kingdom but wishes to travel to the United Kingdom, an immigration officer or, as the case may be, the Secretary of State may, by reason of that person's ethnic or national origin—(a) decline to give or refuse the person leave to enter before he arrives in the United Kingdom; and (b) exercise the powers to seek information and documents under articles 7(2), 7(3) and 13(8) of the Immigration (Leave to Enter and Remain) Order 2000.

[79] Among the ethnic or national origins listed in the Schedule were Roma.

d [80] When these proceedings were begun on 18 October 2001, the claimants assumed that the immigration officers in Prague were operating under this Authorisation. The claim form therefore attacked the validity of the Authorisation. However, it is and has always been the respondents' case that the Authorisation did not apply to the Prague operation. Their case is not that the officers were discriminating lawfully but that they were not discriminating at all. e Burton J ([2002] EWHC 1989 (Admin), [2002] All ER (D) 127 (Oct), [2003] ACD 53) accepted that they were not. Some individual differences in treatment were explicable, not by ethnic difference, but by more suspicious behaviour. There were too few instances of inexplicable differences in treatment to justify a general conclusion. The difference between the proportion of Roma and non-Roma f refused entry was explicable by reference to the proportions of Roma and non-Roma who were likely to seek asylum.

[81] The Court of Appeal ([2003] EWCA Civ 666, [2003] 4 All ER 247, [2004] QB 811) accepted that the judge was entitled to find that the immigration officers tried to give both Roma and non-Roma a fair and equal opportunity to satisfy them that they were coming to the United Kingdom for a permitted purpose and not to claim asylum once here. But they considered it 'wholly inevitable' that, g being aware that Roma have a much greater incentive to claim asylum and that the vast majority, if not all, of those seeking asylum from the Czech Republic are Roma, immigration officers will treat their answers with greater scepticism, will be less easily persuaded that they are coming for a permitted purpose, and that h '[g]enerally, therefore, Roma are questioned for longer and more intensively than non-Roma and are more likely to be refused leave to enter than non-Roma' (see [66]–[67] per Simon Brown LJ). Laws LJ (at [102]) referred to the last of these propositions as 'plainly true on the facts of the case'. Simon Brown LJ, with whom Mantell LJ agreed, held that nevertheless this was not less favourable treatment, or if it was, it was not on racial grounds. The Roma were not being j treated differently qua Roma but qua potential asylum-seekers. Laws LJ (at [102]) considered it 'inescapable' that this was less favourable treatment. He also concluded (at [109]) that this was discrimination:

'One asks Lord Steyn's question [in *Nagarajan v London Regional Transport* [1999] 4 All ER 65 at 80, [2000] 1 AC 501 at 521–522]: why did he treat the

Roma less favourably? It may be said there are two possible answers: (1) because he is Roma; or (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus, more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the rules, manifestly including covert asylum seekers, and his knowledge that the Roma is more likely to be a covert asylum seeker. But that is irrelevant to the claim under s 1(1)(a) of the 1976 Act.

[82] On the factual premises adopted by the Court of Appeal, this conclusion must be correct as a matter of law. The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officers know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant: see Lord Nicholls of Birkenhead in *Nagarajan's case* [1999] 4 All ER 65 at 71, [2000] 1 AC 501 at 511. The law reports are full of examples of obviously discriminatory treatment which was in no way motivated by racism or sexism and often brought about by pressures beyond the discriminators' control: the council which sacked a black road sweeper to whom the union objected in order to avoid industrial action (*R v Commission for Racial Equality, ex p Westminster City Council* [1985] IRLR 426, [1985] ICR 827); the council which for historical reasons provided fewer selective school places for girls than for boys (*Equal Opportunities Commission v Birmingham City Council* [1989] 1 All ER 769, [1989] AC 1155). But it goes further than this. The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But '[w]hat may be true of a group may not be true of a significant number of individuals within that group' (see Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 at 722–723 (para 86), High Court of Hong Kong). The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. As Laws LJ observed ([2003] 4 All ER 247 at [108]):

'The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But that cannot be right. If it were, it would imply that direct discrimination can be justified ...'

[83] As we have seen, the legislation draws a clear distinction between direct and indirect discrimination and makes no reference at all to justification in relation to direct discrimination. Nor, strictly, does it allow indirect discrimination to be justified. It accepts that a requirement or condition may be justified *independently* of its discriminatory effect.

[84] The question for us, therefore, is whether the factual premise is made out. The appellants mount essentially the same argument before us as they did before both Burton J and the Court of Appeal. But, greatly to their credit, the respondents have made a further search and produced further evidence which

a casts a rather different light upon the case than was cast by their evidence in the courts below.

[85] The appellants' case is, first, that the Prague operation carried with it a very high risk of racial discrimination. Its avowed object was to prevent people travelling from the Czech Republic to this country in order to seek asylum or otherwise overstay the limits of their leave to be here. The vast majority of those  
b who have done this in the past are Roma. Many Roma have good reason to want to leave. For some, this may amount to persecution within the meaning of the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171) (the Refugee Convention). The operation was targeting all potential asylum seekers, with or without a good claim. The object was not only to prevent the would-be travellers at the airport. It was also to deter others from  
c even getting that far. Given the high degree of congruence between the object of the exercise and a particular ethnic group, which was recognised in public statements by the Czech Prime Minister and his deputy, the risk that the operation would be carried out in a racially discriminatory manner was very high.

[86] That risk was exacerbated by the very existence of the Authorisation.  
d This sanctioned discriminatory treatment of the very ethnic group to which the vast majority of the people against whom the Prague operation was targeted belonged. The evidence is that the immigration authorities responsible for the operation did not intend the officers in Prague to act on the Authorisation: its main object was to speed up processing at ports of entry to the United Kingdom when particular problems arose. So there was no instruction to the Prague  
e officers to implement it. Nor do the records of individual cases give any indication that the officers thought that they were operating it. But the Authorisation was annexed to the Immigration Directorate's Instructions, Ch 1, s 11 of which is headed 'Race Relations (General)'. This seeks to explain the effect of this Authorisation, dealing with discrimination on grounds of *ethnic or national*  
f *origin*, and an earlier one, which authorised discrimination on grounds of *nationality* if there was statistical or intelligence information of breach of immigration laws by persons of that nationality. Having set out the various ways in which officers might discriminate under either Authorisation, it contains the following passage about the later one with which we are concerned:

g 'The fact that a passenger belongs to one of these ethnic or national groups will be sufficient to justify discrimination—without reference to additional statistical or intelligence information—if an immigration officer considers such discrimination is warranted.'

[87] This is under the heading of 'Examination of passengers', which relates to  
h people arriving at United Kingdom ports of entry; but under the heading 'Persons wishing to travel to the UK' the following passage appears:

'From May 2001, immigration officers may also discriminate in similar ways in relation to persons wishing to travel to the UK on the grounds of ethnic or national origin but only in relation to the groups listed ...  
j Additional statistical or intelligence evidence is not required as Ministers authorised the discrimination in respect of the listed groups.'

[88] Also available now are the slides and accompanying briefing for the training which all staff received on the 2000 Act and the ministerial authorisations under it. These stress the importance of the authorisations to the work of the

Department, point out that discrimination against the listed groups is permissible without statistical or intelligence information, and advise of the need to be familiar with the list, to be able to identify passengers belonging to those groups, and to use their experience, knowledge of groups and local intelligence to assist in identification. They do point out that 'discrimination is likely to be exercised primarily in relation to specific port exercises', but do not suggest that these are the only circumstances in which it can be done. The briefing stresses that 'personnel need to be alert to the ways in which the integrity of the control function might be detrimentally affected if staff chose to disengage by not subjecting certain people/groups to extra scrutiny where appropriate'.

[89] The combination of the objective of the whole Prague operation and a very recent ministerial authorisation of discrimination against Roma was, it is suggested, to create such a high risk that the Prague officers would consciously or unconsciously treat Roma less favourably than others that very specific instructions were needed to counteract this. Officers should have been told that the Directorate did not regard the operation as one which was covered by the Authorisation. They should therefore have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone.

[90] It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001, when the operation with which we are concerned began, the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than a quarter of a century.

[91] It is against this background that such evidence as there is of what happened on the ground at Prague Airport needs to be assessed. The officers did not make any record of the ethnic origin of the people they interviewed. The respondents cannot therefore provide us with figures of how many from each group were interviewed, for how long, and with what result. This, they suggest, makes it clear that the officers were not relying on the Authorisation: if they had been, they would only have had to record their view of the passenger's ethnicity. If correct, that would have been enough to justify refusal of leave. But what it also shows is that no formal steps were being taken to gather the information which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner. It also means that the only information available is that supplied by the claimants, and in particular the European Roma Rights Centre (ERRC) which was attempting to monitor the operation. The respondents can cast doubt on the reliability of this, but they cannot contradict it or provide more reliable information themselves. Indeed the figures gathered were used by both sides before Burton J as a 'useful working basis' (see [2002] All ER (D) 127 (Oct) at [27]).



a [92] Mr Vasil, a Czech Roma working for the ERRC, observed most flights  
leaving for the United Kingdom on 11 days in January, 13 days in February,  
14 days in March and 13 days in April 2002. He was able to identify the Roma  
travellers by their physical appearance, manner of dress and other details which  
were recognisable to him as a Roma himself. His observations showed that 68  
b out of 78 Roma were turned away whereas only 14 out of 6,170 non-Roma were  
rejected. Thus any individual Roma was 400 times more likely to be rejected  
than any individual non-Roma. The great majority of Roma were rejected. And  
only a tiny minority of non-Roma were rejected. It is, of course, entirely  
unsurprising that a far higher proportion of Roma were turned away. But if the  
c officers began their work with a genuinely open mind, it is more surprising that  
so many of the Roma were refused. If all or almost all asylum seekers are Roma,  
it does not follow that all or almost all Roma are asylum seekers. It is even more  
surprising that so few of the non-Roma were refused. One might have expected  
that there would be more among them whose reasons for wanting to travel to  
the United Kingdom were also worthy of suspicion. The apparent ease with  
d which non-Roma were accepted is quite consistent with the emphasis given in  
the instructions and training materials to the sensible targeting of resources at  
busy times. The respondents have not put forward any positive explanation for  
the discrepancy.

e [93] Mr Vasil also observed that questioning of Roma travellers went on  
longer than that of non-Roma and that 80% of Roma were taken back to a  
secondary interview area compared with less than 1% of non-Roma. The  
observations of Ms Muhic-Dizdarevic, who was monitoring the operation on  
behalf of the Czech Helsinki Committee, were to much the same effect. She also  
points out: 'It was very obvious from their appearance which travellers were  
Roma and which were not. Firstly, at least 80% of the Roma could be readily  
f identified by their darker skin and hair ...' Aspects of her evidence have been  
attacked but not this.

[94] These general observations are borne out by the experience of the  
individuals whose stories were before the court. The ERRC conducted an  
experiment in which three people tried to travel to the United Kingdom for a  
short visit. Two were young women with similar incomes, intentions and  
g amounts of money with them, one non-Roma, Ms Dedikova, and one Roma,  
Ms Grundzova; the third, Ms Polakova, was a mature professional married Roma  
woman working in the media. Ms Dedikova was allowed through after only five  
minutes' questioning, none of which she thought intrusive or irrelevant. Her  
story that she was going to visit a woman friend who was also a student was  
h accepted without further probing. Ms Grundzova was refused leave after longer  
questioning which she found intrusive and requests for confirmation of matters  
which had been taken on trust from Ms Dedikova. Ms Polakova was questioned  
for what seemed to her like half an hour, was then told to wait in a separate room,  
and was eventually given leave to enter. She felt that the interview process was  
very different from that undergone by the non-Roma passengers travelling at the  
j same time as her and that the only reason she was allowed to travel was that she  
had told them that she was a journalist interested in the rights of the Roma  
people. All three of these people were to some extent acting a part, in that their  
trips had been provoked and financed by the ERRC, but they were genuinely  
intending to pay a short visit to a friend or relatives living here. Czech television  
also conducted a similar experiment with a Roma man and a non-Roma woman

wishing to pay a short visit to the United Kingdom. The non-Roma was given leave while the Roma was refused after a much longer interview. Unlike the ERRC test, we have a transcript from which one can see what it was about the Roma's answers which might have made the official suspicious even if he had not been a Roma. But the question still remains whether a non-Roma who gave similar answers would have been treated the same. The tiny numbers of non-Roma refused may suggest otherwise.

[95] Then there are the claimants in the case. Three of them made no secret of their intention to seek asylum on arrival in the United Kingdom. They do not therefore complain of discrimination, because their less favourable treatment was on grounds other than their ethnic origin. Two of the claimants also intended to claim asylum but pretended that they did not. It is difficult therefore for them to complain of more intensive questioning which revealed their true intentions. The last claimant, HM, was refused entry in circumstances which again invite the question whether a non-Roma in similar circumstances would have been refused. She was of obviously Roma appearance, aged 61 at the time, living with her husband and children, but travelling alone. Her husband was recovering from a heart attack and she was awaiting spinal surgery. Both were unemployed and living on social security because of ill health, which might not be thought surprising given their age. She planned to visit her grandson-in-law in England, and was carrying a sponsorship letter from him, together with a return ticket and £100 cash. These facts do not suggest someone who is planning to abandon her husband and five children and move to England. On the other hand, the file note records that the grandson-in-law states that he has been awarded refugee status but provides no evidence of this, is currently living on benefits though seeking employment, and makes no mention of the grand-daughter to whom he was presumably married.

[96] These are judicial review proceedings, not a discrimination claim in the county court. No oral evidence has been heard or findings of fact in the individual cases made. The question is not whether HM was indeed intending to claim asylum on arrival, although it seems somewhat unlikely in the circumstances. The question is whether a non-Roma grandmother would have been treated in the same way. Again, the ERRC figures and the outcome of their test are some evidence that she would not.

[97] It is not the object of these proceedings to make a finding of discrimination in any individual case. The object, as Burton J pointed out ([2002] All ER (D) 127 (Oct) at [53](iv)), is to establish a case that the Prague operation was carried out in a discriminatory fashion. All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed, the Court of Appeal considered it 'wholly inevitable'. This may be going too far. But setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.

a [98] In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction of any kind such as race, colour, sex and the like: see, for example, art 2 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226); art 2 of the International Covenant on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmd 6702) (ICCPR); art 14 of the European Convention on Human Rights; and the Refugee Convention itself in art 3 provides: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

b [99] But the ICCPR goes further, in art 26:

c 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

d [100] The International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966; TS 77 (1969); Cmd 4108). provides in art 2:

e '(1) States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation ...'

f [101] Racial discrimination is defined in art 1 in terms of distinctions which have the—

g 'purpose or effect of nullifying or impairing the recognition, or enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

h Article 1(2) states that the convention does not apply to distinctions, exclusions, restrictions or preference made between citizens and non-citizens, but this certainly does not mean that states parties can discriminate between non-citizens on racial grounds.

i [102] It was the existence of these and other instruments, some only in draft at the time, together with the principle of equality enshrined in the Charter of the United Nations (San Francisco, 26 June 1945; TS 67 (1946); Cmd 7015) and emphasised in numerous resolutions of the General Assembly, which led Judge Tanaka and the dissenting minority of the International Court of Justice in the *South West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa) (second phase)* [1966] ICJ Rep 6 at 293 to conclude that 'we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law ...'.

[103] The General Assembly has 'urged all States to review and where necessary revise their immigration laws, policies and practices so that they are free of racial discrimination and compatible with their obligations under international human rights instruments' (UNGA Resolution 57/195, para 16, adopted 18 December 2002; see also UNGA Resolution 58/160 adopted on 22 December 2003). The UN Committee on the Elimination of Racial Discrimination has expressed its concern at the application of s 19D, which it considers 'incompatible with the very principle of non-discrimination' (UN doc CERD/C/63/CO/11, para 16, 10 December 2003). A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination. a

[104] As to remedy, the conclusion is that discrimination is inherent in the operation of the scheme itself. It is therefore more appropriate to make a general declaration, rather than the more specific one sought by appellants. The refusal of leave to enter to far more Roma than non-Roma is only objectionable if some Roma were wrongly refused or some non-Roma were wrongly given leave. That we do not know. But the differential is further evidence of a general difference in approach between the two groups, which may have had other aspects than those to which our attention has specifically been drawn. Hence the following declaration meets the case: b

'United Kingdom immigration officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the United Kingdom by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom, contrary to s 1(1)(a) of the Race Relations Act 1976.' c

[105] I would therefore allow the appeal on this ground and make the above declaration. d

#### LORD CARSWELL.

[106] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Baroness Hale of Richmond, and I too would allow the appeal and make a declaration in the terms proposed by Lady Hale. e

[107] Two main issues fall to be decided on the arguments presented to the House: (a) the asylum issue, whether the procedures applied to the appellants were incompatible with the obligations of the United Kingdom under the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171) and Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906) and under customary international law; and (b) the discrimination issue, whether those procedures involved unjustifiable discrimination on racial grounds. f

[108] On the asylum issue, I agree entirely with the reasons and conclusions contained in the opinion of Lord Bingham. g

[109] On the discrimination issue, it is claimed that persons of Roma origin wishing to travel from Prague to the United Kingdom were subjected to longer and more intrusive questioning than persons not of that origin, that they were required to provide proof of matters which other persons were not required to h



a prove and that persons of Roma origin were refused leave to enter the United Kingdom in circumstances in which other persons would have been given it.

[110] The last allegation has not on the facts established been borne out, nor, as Burton J pointed out ([2002] EWHC 1989 (Admin) at [53], [2002] All ER (D) 127 (Oct) at [53], [2003] ACD 53) was it the immediate object of the proceedings to prove such an allegation in any individual case. It is important therefore to  
b appreciate that the complaint is one of a discriminatory system, not of discrimination which prevented any specified individual from travelling to the United Kingdom. The evidence in relation to the individual claimants is, as the judge said, adduced in order to establish or support a case that the Prague operation has been carried out in a discriminatory fashion. It is also important to  
c appreciate that on the judge's findings the evidence does not go so far as to prove that that operation did in fact have the result that Romani passengers were as a class refused leave to enter the United Kingdom where others would not have been. Naturally one cannot fail to suspect that that was the case and to scrutinise the facts with some care, in the light of the 'massive differential' (at [59] per Burton J) between the numbers and proportion of Romani applicants refused  
d leave by comparison with non-Romani persons. Burton J set out in detail (at [74]) his reasons for concluding that it had not been proved that such a discriminatory result occurred. In the Court of Appeal Simon Brown LJ (with whom the other members of the court agreed on this issue) upheld his conclusions ([2003] EWCA Civ 666 at [65], [2003] 4 All ER 247 at [65], [2004] QB 811). Notwithstanding one's natural concerns, I have not been persuaded by anything in the admirable  
e arguments presented to us that those conclusions were incorrect.

[111] I do, however, find myself in agreement with Laws LJ concerning the stereotyping of Roma in the manner in which the immigration officers at Prague Airport examined the would-be passengers. It was accepted by the members of the Court of Appeal, who themselves raised the point and requested argument  
f upon it, that immigration officers brought a greater degree of scepticism to bear on applications from Roma for leave to enter than on applications from other persons, and that they consequently tended to question them for longer periods and more intensively. The correctness of this proposition was not disputed before your Lordships.

[112] That may well be understandable in light of the experience of the  
g officers, that a large preponderance of asylum claims came from Roma and that there was a propensity among those people to make false claims. As Lady Hale has mentioned in para [90] of her opinion, many people would regard it as nothing more than an application of ordinary common sense to treat Romani applicants in that way, given the officers' regular experience of dealing with them  
h (and assuming in the officers' favour that they were doing no more than attempting conscientiously to ascertain which applications were genuine).

[113] But it is at that very point that discrimination law as it has been developed requires particular care in the approach to a class of persons whose members are strongly suspected of advancing large numbers of false claims. As  
j Hartmann J said in the High Court of Hong Kong in a regularly quoted sentence in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 at 722–723 (para 86): 'What may be true of a group may not be true of a significant number of individuals within that group.' It is not legitimate to apply a stereotype and commence with the assumption that applicants from Roma may be making false claims and that for that reason their claims require more

intensive investigation. An officer who does so has, as Laws LJ, in my opinion correctly, said (at [109]), 'applied a stereotype; though one which may very likely be true'. The point is that it may not be true, and it is in law discriminatory to subject all applicants from Roma to longer and more intensive questioning because so many of them have been known in the past to merit such treatment. What the officers must do is treat all applicants, whatever their racial background, alike in the method of investigation which they carry out until in any individual case sufficient reason appears to prolong or intensify the examination.

[114] I accordingly cannot agree with the reasoning of the majority of the Court of Appeal on this issue and prefer that of Laws LJ. I would agree with the terms of the declaration proposed by Lady Hale, but I would emphasise that it is on the limited basis that it is directed to the discriminatory treatment of Roma in the length and method of interrogation.

*Appeal allowed.*

Dilys Tausz Barrister.

**Sowden v Lodge**  
**Crookdake v Drury**  
[2004] EWCA Civ 1370

COURT OF APPEAL, CIVIL DIVISION  
PILKES, LONGMORE AND SCOTT BAKER LJ  
15 JUNE, 22 OCTOBER 2004

*Damages – Personal injury – Amount of damages – Private arrangement for claimant's accommodation and care – Test to be applied when determining whether tortfeasor should pay for such arrangement – National Assistance Act 1948, s 21.*

In one of two conjoined appeals to the Court of Appeal from assessments of damages in personal injury actions, the claimant had suffered severe brain damage in a road accident. By the time of the trial, she had lived in a residential home for several years and no longer had any contact with her mother and sisters, with whom she had lived before the accident. There was only tenuous evidence of the claimant's own wishes as to where she should live. It was nevertheless contended on her behalf that there should be a private arrangement for her accommodation and care, with the claimant living in her own home, and that her damages should therefore include a sum to cover the costs of that arrangement. The defendant contended that the crucial question was whether it had been shown that the claimant's best interests reasonably required such an arrangement. After accepting that submission, the judge held that it was in the interests of the claimant to have a residential arrangement, ie living with other disabled people in sheltered accommodation arranged by a local authority pursuant to its duty under s 21<sup>a</sup> of the National Assistance Act 1948. Accordingly, the judge assessed damages on the basis of a residential rather than a private arrangement, but awarded a 'top-up' sum in respect of additional care that the claimant would require for a significant part of the day. That sum had been proposed by the defendant as a concession towards the end of the trial, and there was a paucity of evidence as to the feasibility of augmenting residential provision in the manner proposed. On the claimant's appeal, the Court of Appeal was required to determine, inter alia, whether the 'best interests' test applied by the judge was the correct test.

**Held** – When the court was determining whether the claimant in a personal injury action was entitled to recover as damages the cost of proposed private care and accommodation, the test to be applied was whether the care and accommodation chosen and claimed for by the claimant was reasonable. There was a difference between what a claimant could establish as reasonable in the circumstances and what a judge objectively concluded was in the claimant's best interests. In that context, paternalism did not replace the right of a claimant, or those with responsibility for him, to make a reasonable choice. In general terms, the approach was to compare what a claimant could reasonably require with what a local authority, having regard to the uncertainties which almost inevitably

<sup>a</sup> Section 21, so far as material, is set out at [4], below

were present, was likely to provide in the discharge of its duty under s 21 of the 1948 Act. If the second fell significantly short of the first, the tortfeasor had to pay, subject to the argument that s 21 provision augmented by contribution from the tortfeasor met the reasonable requirements. If the statutory provision met the claimant's reasonable requirements, as assessed by the judge, the tortfeasor did not have to pay for a different regime. In making the comparison, the court could have regard to the power to compel a local authority to perform its duties. In the instant case, the judge had not applied the correct test, but, in the circumstances, he had been entitled to treat what was in the claimant's best interests, as he assessed them, as the reasonable requirement in all the circumstances. The judge had also been entitled to conclude on the evidence that a residential arrangement was in the claimant's interests. However, given that the judge had stated that damages were to be assessed on the basis that the claimant was to have additional care for a significant part of the day, the absence of evidence of the practicability of such augmentation was troubling. The claimant should therefore be given an opportunity to go back to the judge and attempt to demonstrate that the proposed augmentation was impracticable and that, that being so, the balance was tipped towards a private arrangement. Accordingly, the appeal would be allowed to that limited extent (see [11], [38], [40], [41], [66], [68]–[73], [94]–[96], [98], [100], [101], [103], below).

*Rialas v Mitchell* (1984) 128 Sol Jo 704 and *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481 applied.

Per curiam. When dealing with cases involving very serious injuries, it is important to place before the court cogent evidence as to how the regimes proposed by the parties for the care and accommodation of claimants will operate. There is no legal burden on claimants to disprove that statutory provision will be adequate. While it is for a claimant to assert what are his reasonable needs, it is for a defendant who asserts that a claimant should be content with local authority residential care to set out in clear terms whether such reasonable needs can be met by such care and whether there is any respect in which he accepts that such care does not meet the claimant's reasonable needs, so that top-up will be appropriate. It will then be for the claimant to assert that top-up or further top-up in addition to that proposed by the defendant will be required. Whatever is proposed should be particularised and costed in the schedule (or counter-schedule) of damages before the trial begins (see [63], [85], [99], [100]–[101], below).

## Notes

For damages for care and accommodation, see 12(1) *Halsbury's Laws* (4th edn) paras 894–895.

For the National Assistance Act 1948, s 21, see 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 22.

## Cases referred to in judgments

*Avon CC v Hooper* [1997] 1 All ER 532, [1997] 1 WLR 1605, CA.

*Bell v Todd* [2002] Lloyd's Rep Med 12.

*Eagle v Chambers* [2004] EWCA Civ 1033, [2005] 1 All ER 136.

*Firth v George Ackroyd Junior Ltd* [2000] Lloyd's Rep Med 312.

*Hodgson v Trapp* [1988] 3 All ER 870, [1989] AC 807, [1988] 3 WLR 1281, HL.

*Howarth v Whittaker* [2003] Lloyd's Rep Med 235.



*Kelly v Stockport Corp* [1949] 1 All ER 893, CA.

*Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174, [1979] 3 WLR 44, HL.

*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL.

*Neale v Queen Mary's Sidcup NHS Trust* [2003] EWHC 1471 (QB).

*Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833, [2000] 2 AC 190, [1999] 2 WLR 518, HL.

*R (on the application of Batantu) v Islington London BC* [2002] 2 CCLR 445.

*R v North and East Devon Health Authority, ex p Coughlan* (Secretary of State for Health intervening) [2000] 3 All ER 850, [2001] QB 213, [2000] 2 WLR 622, CA.

*R (on the application of Wahid) v Tower Hamlets London BC* [2002] EWCA Civ 287, [2002] LGR 545.

*Rialas v Mitchell* (1984) 128 Sol Jo 704, CA.

*Ryan v Liverpool Health Authority* [2002] Lloyd's Rep Med 23.

*Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345, [1998] 3 WLR 329, HL.

*Woodrup v Nicol* [1993] PIQR Q104, CA.

## Appeals

### *Sowden v Lodge*

Louise Sowden, a patient suing by the Official Solicitor as her litigation friend, appealed with permission of Brooke LJ against the decision of Andrew Smith J ([2003] EWHC 588 (QB), [2003] All ER (D) 364 (Mar)) on 25 March 2003 assessing damages in her action for personal injury against the defendant, Joanne Lodge. The facts are set out in the judgment of Pill LJ.

### *Crookdake v Drury*

The defendant, David Leonard Drury, appealed with permission of Brooke LJ against the decision of Owen J ([2003] EWHC 1938 (QB), [2003] All ER (D) 563 (Jul)) on 31 July 2003 assessing damages in an action for personal injury brought against him by the claimant, Philip Andrew Crookdake, a patient suing by his litigation friend Deborah Crookdake. The facts are set out in the judgment of Pill LJ.

*Elizabeth-Anne Gumbel QC* and *Henry Witcomb* (instructed by *Irwin Mitchell, Sheffield*) for the claimants.

*Winston Hunter QC* and *Michael Rawlinson* (instructed by *Silverbeck Rymer, Chelmsford*) for the defendants.

*Cur adv vult*

22 October 2004. The following judgments were delivered.

## *PILL LJ.*

[1] These are appeals from the High Court, in one case by a claimant (*Sowden v Lodge*: judgment of Andrew Smith J dated 25 March 2003) ([2003] EWHC 588 (QB), [2003] All ER (D) 364 (Mar)) and in the other by a defendant (*Crookdake v Drury*: judgment of Owen J dated 31 July 2003 ([2003] EWHC 1938 (QB), [2003] All ER (D) 563 (Jul))), against the amount of damages awarded in personal injury

cases. The appeals have been heard together because they are thought to give rise to similar issues of general importance. a

[2] I have to say, however, that as the cases have developed and concessions have been made, the resolution of the appeals does not involve consideration of some of the points of law of general importance which may have been contemplated. Both cases turn primarily on the application of the law to the facts of the case though an issue as to the test to be applied by the judge when considering the adequacy of the proposed provision for the claimant does arise in the case of Sowden. b

[3] The general area of the law under consideration is the effect upon the liability of tortfeasors in personal injury cases of the duty upon local authorities under s 21 of the National Assistance Act 1948 (as now enacted and as interpreted by the courts), directions given under it and regulations limiting the right of the local authority to recover the cost of the provision from the injured person. It is not disputed that: (a) a judge is entitled to hold on appropriate evidence that the statutory provision for care and accommodation meets the claimant's reasonable requirements. In such circumstances the tortfeasor may not be required to pay for care and accommodation; (b) statutory provision for care and accommodation, augmented by payments on behalf of the tortfeasor for further care, may, on appropriate evidence, meet the reasonable requirements of a claimant; (c) if, in the present cases, the local authority provide under s 21 of the 1948 Act care and accommodation they cannot recover its cost from the claimants' damages. The extension of that principle has had the effect of increasing the potential burden on local authorities under s 21. (I add that it is strongly argued in *McGregor on Damages* (17th edn, 2003) pp 1285–1287 (paras 35-205 to 35-209) that the law should be amended to ensure that the tortfeasor pays.) I set out the statutory scheme at this stage. That appears to be more convenient because of the two cases involved. c  
d  
e

#### STATUTORY SCHEME

[4] Section 21(1) of the 1948 Act, as amended, provides, in so far as is material: f

'(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—(a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them ...' g

The words 'illness' and 'disability' were substituted by s 42(1) of the National Health Service and Community Care Act 1990.

[5] Section 47(1) of the 1990 Act provides: h

'... where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services [which includes services to be provided under s 21 of the 1948 Act] may be in need of any such services, the authority—(a) shall carry out an assessment of his needs for those services; and (b) having regard to the results of that assessment shall then decide whether his needs call for the provision by them of any such services.' j

Injured persons with a claim against tortfeasors are not excluded from the operation of this duty.

[6] Section 22 of the 1948 Act provides, in so far as it is material:

(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section ...

(5) In assessing as aforesaid a person's ability to pay, a local authority shall give effect to regulations made by the Secretary of State for the purposes of this subsection ...

Section 26 provides that, in specified circumstances, arrangements under s 21 may include arrangements made with a voluntary organisation or with any other person who is not a local authority.

[7] It is agreed that the effect of the National Assistance (Assessment of Resources) Regulations 1992, SI 1992/2977, the National Assistance (Assessment of Resources) (Amendment) Regulations 1998, SI 1998/497 and the Income Support (General) Regulations 1987, SI 1987/1967 is that personal injury trusts and compensation for personal injuries which is administered by the court are to be disregarded for the purposes of s 22 of the 1948 Act. Income from capital administered by the court is to be treated as capital and also to be disregarded (see *Bell v Todd* [2002] Lloyd's Rep Med 12). It is not disputed that the payment of damages in the present cases will bring the sums awarded within those provisions so that the cost of accommodation and care provided by a local authority under s 21 would not be recoverable, under s 22, out of damages awarded. The court has been told that even when a claimant is not under a disability, only if the claimant chooses to take damages as a lump sum and not to place it in a personal injury trust, is the sum not to be disregarded. The choice is that of the claimant.

[8] The relevant directions issued by the Secretary of State under s 21(1) of the 1948 Act are contained in the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, as amended (the 1992 directions). They were cited by Owen J in *Crookdake* but did not feature prominently in *Sowden*. Owen J cited paras 2, 3 and 4 of the 1992 directions, though para 4 was revoked by the National Assistance Act 1948 (Choice of Accommodation) (Amendment) (England) Directions 2001. The case did not turn on that paragraph. The 1992 directions provided, in so far as it is material:

*'Local authorities to provide preferred accommodation'*

2. Where a local authority have assessed a person under section 47 of the National Health Service and Community Care Act 1990 (assessment) and have decided that accommodation should be provided pursuant to section 21 of the National Assistance Act 1948 (provision of residential accommodation), the local authority shall, subject to paragraph 3 of these Directions, make arrangements for accommodation pursuant to section 21 for that person at the place of his choice within England and Wales (in these Directions called "preferred accommodation") if he has indicated that he wishes to be accommodated in preferred accommodation.

*Conditions for provision of preferred accommodation*

3. Subject to paragraph 4 of these Directions the local authority shall only be required to make or continue to make arrangements for a person to be accommodated in his preferred accommodation if—

(a) the preferred accommodation appears to the authority to be suitable in relation to his needs as assessed by them; a

(b) the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs;

(c) the preferred accommodation is available;

(d) the persons in charge of the preferred accommodation provide it subject to the authority's usual terms and conditions, having regard to the nature of the accommodation, for providing the accommodation for such a person under Part III of the National Assistance Act 1948.' b

The 1992 directions included a section headed 'GUIDANCE'. I cite the paragraphs cited by Owen J ([2003] All ER (D) 563 (Jul) at [25]): c

'5. If the individual concerned expresses a preference for particular accommodation ("Preferred Accommodation") within the UK, the authority must arrange for care in that accommodation, provided

- The accommodation is suitable in relation to the individual's assessed needs d

- To do so would not cost the authority more than it would usually expect to pay for accommodation for someone with the individual's assessed needs

- The accommodation is available

- The person in charge of the accommodation is willing to provide accommodation subject to the authority's usual terms and conditions for such accommodation. e

6. If a resident requests it, the authority must also arrange for care in accommodation more expensive than it would normally fund, provided there is a third party willing and able to pay the difference between the cost the authority would usually expect to pay and the actual cost of the accommodation. f

#### 7. Preferred accommodation

As with all aspects of service provision, there should be a general presumption in favour of people being able to exercise choice of the service they receive. The limitations on authorities' legal obligation to provide preferred accommodation set out in the direction are not intended to deny people reasonable freedom of choice, but simply to ensure that authorities are able to fulfil their obligations for the quality of service provided and for value for money. The terms of the direction are explained more fully below. Where for any reason an authority decides not to arrange a place for someone in their preferred accommodation it must have a clear and reasonable justification for that decision which relates to the criteria of the direction. g

#### Suitability for accommodation

7.1 suitability will depend on the authority's assessment of individual need. Each case must be considered on its merits.

7.2 Consequently accommodation will not necessarily be suitable simply because it satisfies registration standards. On the other hand accommodation will not necessarily be unsuitable simply because it fails to conform with the authority's preferred model of provision, or meet the letter of a standard service specification ... j

#### 7.9 Conditions



a In order to ensure they are able to exercise proper control over their funds authorities need to be able to impose certain technical conditions for example in relation to payment regimes, review, access, monitoring, audit, record keeping, information sharing, insurance, sub-contracting etc.

The guidance was updated as from September 2003, that is, after the judgments in both actions had been given.

b [9] In *R v North and East Devon Health Authority, ex p Coughlan* (Secretary of State for Health intervening) [2000] 3 All ER 850, [2001] QB 213, this court considered the extent of the duties of the Secretary of State for Health under the National Health Service Act 1977 and the duties of local authorities under s 21 of the 1948 Act. It was held that nursing services could be provided in connection with accommodation  
c provided under s 21 to a person in need of care and attention and, in general, nursing services could be provided under s 21 if they were merely incidental or ancillary to the provision of accommodation under the section and of a nature which it could be expected that a local authority whose primary responsibility was to provide social services could be expected to provide (see [2000] 3 All ER 850 at 862–863, [2001] QB 213 at 232–233 (para 30) per Lord Woolf MR, giving the  
d judgment of the court). The nature and extent of the duties of the local authority under s 21 of the 1948 Act were also considered in this court in *R (on the application of Wahid) v Tower Hamlets London BC* [2002] EWCA Civ 287, [2002] LGR 545, see particularly on this point the judgment of Hale LJ.

e DAMAGES AT COMMON LAW

[10] The basis on which damages are awarded at common law is not seriously in issue. Its history was traced by Stephenson LJ in *Rialas v Mitchell* (1984) 128 Sol Jo 704, beginning with the statement of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39:

f ‘... where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages you should as nearly as possible get that sum of money which will put the party that has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.’

g [11] The relevance of *Rialas’* case is that the issue was whether the tortfeasor was required to pay for a 12-year-old boy to be cared for at home or whether he should live in an institution. That is a question similar to those in the present cases. On the facts of that case, the cost of caring for him in an institution was lower. Stephenson LJ stated that ‘what has to be first considered by the court is  
h not whether other treatment is reasonable but whether the treatment chosen and claimed for is reasonable’. O’Connor LJ stated:

j ‘There may well be cases in which it would be right to conclude that it is unreasonable for a plaintiff to insist on being cared for at home but I am quite satisfied that this is not such a case and once it is concluded that it is reasonable for the infant plaintiff to remain at home then I can find no acceptable ground for saying that the defendant should not pay the reasonable cost of caring for him at home but pay only a lesser sum which would be appropriate only if it was unreasonable for him to live at home and reasonable for him to be in an institution.’

Sir Denys Buckley agreed with both judgments and added a postscript as to the criteria by which reasonableness should be assessed. a

[12] The general principle was affirmed in *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1999] 1 AC 345 where the main issue was as to the net discount rate to be applied when calculating damages (see [1998] 3 All ER 481 at 484, 500, 507, 512 and 519, [1999] 1 AC 345 at 363, 382, 390, 395 and 403 per Lord Lloyd of Berwick, Lord Steyn, Lord Hope of Craighead, Lord Clyde and Lord Hutton respectively). b

[13] In *Hodgson v Trapp* [1988] 3 All ER 870 at 874, [1989] AC 807 at 819, Lord Bridge of Harwich warned against double recovery and it was held that statutory benefits received by way of attendance and mobility allowances ought to be deducted from the sum awarded because they were available to meet the cost of care and mitigated damages recoverable in respect of the cost of that care. I agree with Miss Gumbel QC that the decision was intended to address that specific problem. An earlier statutory regime had been more tolerant to claimants in this respect. It is, however, conceded on behalf of the claimants in these cases that, if the compensatory principle requires only accommodation and care provided by the local authority under s 21 of the 1948 Act, damages cannot be awarded as if they were not so provided. c

[14] The present issue does not turn, subject to the point considered at [71]ff, upon an application of s 2(4) of the Law Reform (Personal Injuries) Act 1948 (the 1948 LR Act) which provides that in an action for damages for personal injuries there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available in the National Health Service. In *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910, [1980] AC 174, it was confirmed that the subsection does not prevent a submission by a defendant that the claimant will probably not incur expenses because he will be unable to obtain outside the National Health Service the domestic and nursing help which the claimant requires. In the present cases, private arrangements are available and have been costed and, if the arrangements are reasonably required in accordance with the compensatory principle, the need to pay for them will arise. d

LOUISE SOWDEN

[15] The claimant appellant is Louise Sowden. On 24 September 1992, when 13 years old, she sustained a catastrophic head injury in a road accident. She sued, by the Official Solicitor as her litigation friend. A receiver was appointed. On 18 February 1997, Smith J approved a settlement under which damages were to be assessed on the basis that the claimant was contributorily negligent to the extent of 50%. The issue of damages was heard by Andrew Smith J who gave a judgment on 25 March 2003 ([2003] All ER (D) 364 (Mar)). e

[16] The extent of the claimant's injuries, fully described by Andrew Smith J, needs only to be summarised for present purposes. The claimant has very severe brain damage which has brought about cognitive, emotional and behavioural disabilities. She suffers from post-traumatic epilepsy. f

[17] Andrew Smith J cited extracts from two reports (at [9]): g

‘... In a report which is undated but was also made about the middle of 1998, Ms Roslyn Wilson, a speech and language therapist, wrote:

“Louise’s linguistic skills are severely disrupted. She is unable to accurately process anything other than the most simple verbal instructions. Ability to h

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a understand very basic concepts as to shape and colour is affected. Reading comprehension is not accurate at the single word level and Louise is unable to write. She can communicate little other than very basic needs and desires. These problems coupled with marked distractibility and poor initiation have a devastating effect on Louise's ability to interact with others".

b ... Dr V Neumann reported in March 2000, following an examination in January 2000, that the claimant—

c "requires assistance or supervision for all aspects of personal care. Although able to walk for limited distances, she can only do so with support from two other people; this is because of her very poor balance and coordination. She has such severe problems with communication that, effectively, she is dependent upon others to ask her the right questions in the right way (so that they have yes/no or simple choice answers) if she is to have any opportunity to express her views or wishes".

[18] Having cited those and other reports, the judge stated:

d '[10] Thus, the claimant is able to understand simple statements. She cannot speak, but she can indicate the responses "yes" or "no" to straightforward questions by looking up or down, and she can communicate by pointing. So, for example, she is able, if presented with alternatives, to choose the clothing that she wishes to wear, and whether she would prefer a bath or a shower.

e [11] The claimant can finger-feed herself. She has also managed to hold a two-handled plastic cup or beaker, and can generally cope with food or thickened drinks. If she is to have unthickened drink, she needs to be supervised by a carer who knows her well and will prevent her taking too much into her mouth at once.

f [12] The claimant can only walk short distances if supported by two adults. She has a powered wheelchair, which she can propel for herself with a joystick. More recently the claimant has been learning to operate various "environmental controls", such as switches for lights, for the radio or for a hairdryer.

g [13] The claimant is continent of faeces, but on most days is incontinent of urine.

[14] Dr Neumann considers that as a result of the accident the life expectation of the claimant has been reduced by some three to five years because of post-traumatic epilepsy. Her opinion is not disputed, and I accept it.

h The judge described the care of the claimant since the accident. After a prolonged period in hospital and at a rehabilitation unit, the claimant spent four years at a residential school, Holly Bank School, in Mirfield, West Yorkshire. In September 1998 she became a resident at a residential home in Mirfield known as Rooftops. It comprises three bungalows each of which has six residents. She is expected to have to move because Rooftops accommodates disabled young people aged up to 25 years. Since about 2000, the claimant has had no contact with her mother or sisters, with whom she lived before her accident, and has had little or no contact with her father for many years. The Holly Bank Trust has expressed willingness to house the claimant in a bungalow it is proposing to buy at Illingworth with the intention of converting it into a home for six residents. The

offer is conditional upon Doncaster Metropolitan Borough Council funding the placement. a

[19] As to care, the judge heard evidence from Miss Brook, a care worker, Mr Barker, the claimant's case manager and Ms A Bristow, a state registered occupational therapist. Expert evidence was obtained on behalf of the defendant but was not called at the hearing. The judge expressed reservations about the evidence of Miss Brook and considered (at [17]) that Ms Bristow's assessment 'was much influenced by a strong preference for disabled people to have a private arrangement'. b

[20] The judge concluded that no connection had been shown between the claimant's depression and anorexia and her living environment. He did not consider that the standard of care could properly be criticised. In relation to the claimant's wishes about where she should live, the judge concluded (at [44]): c

(i) The evidence about the claimant's wishes is tenuous, and in deciding what arrangement would most benefit her, should not be given undue weight.

(ii) The claimant has never expressed a wish not to continue to live in a residential arrangement with other disabled people. On the contrary, when asked, she has indicated that she would be content to do so. d

(iii) If she is to have a residential arrangement, the claimant has expressed a preference for living somewhere smaller and with fewer residents than Willow Court.

(iv) The claimant has on one occasion in the past expressed a preference not to have an independent arrangement, and this possibility has not been discussed with her as much as a residential arrangement has. However, when it has been mooted, she has usually indicated that she would be content with one. e

[21] The judge noted his approval of the agreed level of damages for pain, suffering and loss of amenity (£190,000) and past losses (£83,066). Damages for future losses had been agreed arithmetically at £5,419,849. This was subject to the important proviso that the judge found (at [6]): '... that they are to be assessed on the basis of a private arrangement financed by the claimant.' Some of the figures with respect to future losses have also been agreed or included 'on the basis of a residential arrangement', as ordered by the judge, and included a sum for augmented care, to which I will refer, of £1,238,540. f

[22] The issue was whether damages should be assessed on the basis of the cost of a private arrangement for the accommodation and care of the claimant or on the cost of what was described as a residential arrangement; living in sheltered accommodation with other people with disabilities. On behalf of the defendant, it was conceded that, if the finding was for a residential arrangement, the appropriate sum would need to be augmented, or 'topped-up', by further provision for care and attendance. The judge summarised the submission made on behalf of the claimant (at [46]): g

'It is submitted on her behalf that the claimant should be compensated so that she can live in her own home, carrying out activities that she wants to carry out in the way that she wants to carry them out, and that this would provide the most fulfilling life within the constraints necessarily resulting from her disability. Ms Gumbel [counsel for the claimant] acknowledged, however, that an award of damages on this basis would only be justified if h

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a the claimant has demonstrated that she would not be in an equivalent position in residential care, and that this private arrangement would bring the claimant benefits that a residential arrangement would not.'

b [23] The judge agreed (at [49]) with the submission made on behalf of the defendant that 'the crucial question is whether it is shown that the claimant's best interests reasonably require a private arrangement'. The vulnerability of the claimant and uncertainties inherent in relying on local authority provision were stressed on her behalf. Concessions made on behalf of the defendant were summarised (at [53]):

c 'The defendant accepted that, if the claimant is to be cared for under a residential arrangement, she would need, by way of additional support and care over that which the local authority would provide, a carer dedicated to looking after her for seven hours a day (or 49 hours per week), and also a second carer to provide further support for five hours on five days each week (25 hours per week); and that the assessment of damages should reflect this. (The defendant also accepted that provision should be made in the assessment of damages for the cost of transport for outings, for holidays and for a case manager to supervise the claimant's care.) Mr Stewart QC [then counsel for the defendant] submitted that this additional support would ensure that the claimant has individual attention for much of the day and sufficient care to enable her to be taken on frequent outings with two people to help her.'

e [24] In answering the question he had posed, the judge set out, as it seems to me with great care, what were in the best interests of the claimant. The judge dealt with the existing standard of care (at [32]):

f 'I do not accept on the basis of this or other evidence that the claimant has not been properly looked after while she has been at Rooftops, still less that I should infer on this basis that the standard of care that the claimant would receive under a residential arrangement would be inadequate.'

g [25] In reaching his conclusion, the judge stated (at [63]) that he bore in mind that 'damages are to be assessed on the basis that under a residential arrangement the claimant is to have the additional care for a significant part of the day'. He also noted that the claimant's condition was not such that required 'particularly skilful nursing or care of an especially high standard'. That statement was not in my view intended to minimise the effect of the injuries sustained, as found by the judge, but to underline that it was not primarily medical or nursing care which was required. Mr Hunter QC, for the defendant, described the requirement as

h for social or welfare care. [26] As to the future, the judge stated (at [54]) that '[i]t would be too speculative to make any assumption about what accommodation would be provided by the local authority when the claimant has to leave Rooftops ...' He concluded:

j 'What I can assume, and I do assume, is that the local authority would fulfil its duty under [the 1948 Act] and provide accommodation appropriate to the claimant's needs, together with other support that falls within the extended statutory definition of accommodation ...'

The judge referred to *Ex p Coughlan*.

[27] The judge concluded (at [72]) that it was 'in the interests of the claimant to have a residential arrangement'. He gave three reasons: first, the opportunity for a variety of company which a residential arrangement afforded, secondly, there was likely to be more space at a residential home than in a private bungalow and, thirdly, that the claimant has for ten years lived in a residential arrangement and has not been discontented with her living arrangements. a

[28] Having reached that conclusion, the judge went on to consider the effect on an award of the fact that the claimant would receive only 50% of the assessed sum, described in the judgment as 'the "50% damages" point'. The judge made no express finding on the point, describing it as a 'marginal consideration'. I will return to it. b

[29] The judge then considered the alternative submission made on behalf of the defendant that, if the judge had reached a different conclusion about a private arrangement, the local authority would be under a duty to provide the claimant with her own accommodation, and the assessment of damages should be made on the basis that they would do so from their own resources. Reference was made to s 21 of the 1948 Act, to the extent of the local authority's duties under it, and to cases in the High Court, the correctness of which is not challenged in this appeal. The judge expressed his conclusion as to the duty of the local authority under the section: c  
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[85] ... Mr Stewart argued that, if the local authority failed to provide accommodation for a private arrangement in these circumstances, the claimant would not need to demonstrate unreasonableness because under s 21, the local authority has specific duties, and if the local authority failed to fulfil them, judicial review proceedings could be brought on that basis. This does not seem to me to answer the crucial point: what would be the claimant's position if the local authority determined that there were various ways in which they could properly provide for her needs, including a private arrangement and a residential arrangement, and they proposed to provide a residential arrangement? I do not consider that simply because it is in the claimant's interests to have a private arrangement, the local authority would ipso facto be in breach of its duty if it provided residential accommodation, or that it could necessarily be compelled to provide accommodation for a private arrangement. There are two reasons for this: the first is that the requirement under s 21 is that the accommodation be appropriate to meet the needs of the claimant. This, as it seems to me, is a less demanding criterion than that the accommodation should be in the claimant's best interests and that which most nearly restores her to the position in which she would be but for the accident. Secondly, it seems to me that at the fourth stage of the statutory inquiry, the local authority does have some margin of appreciation as to what accommodation should be provided. If I had concluded that on balance a private arrangement is in the claimant's best interest, I would not have considered that a local authority could be criticised if it came to the decision that a residential arrangement met her needs, and provided her with accommodation accordingly. e  
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[86] Had I decided that damages were to be awarded on the basis of a private arrangement, I would not have upheld the defendant's argument that damages should be assessed on the basis that the local authority would provide accommodation for that purpose.'

a [30] Miss Gumbel, for the claimant, makes two submissions. The first is that, even applying the test he did, the judge's conclusion that a residential rather than a private arrangement was in the best interests of the claimant was perverse. It is submitted that the judge had insufficient regard for the uncertainties inherent in relying on local authority arrangements even when substantial further provision was to be made for their augmentation. The evidence as to what the local authority would provide was insufficiently clear. b Moreover, the judge has had insufficient regard for the greater amenity afforded by a private arrangement by way, for example, of giving greater opportunity for privacy. Further, the judge has in effect imposed a duty on the claimant to look first at local authority provision when the victim of a tort has no such duty.

c [31] The second submission is that the judge has in any event applied the wrong test; the task of the court is to consider, applying long-standing tests affirmed in the House of Lords in *Wells v Wells* [1998] 3 All ER 481, [1999] 1 AC 345, the sum to which the claimant is entitled and not to impose what the court regards as in the best interests of the claimant.

d [32] The third question, which bears upon the other two, is whether, on the evidence, the judge was entitled to conclude that the augmented residential arrangement met the common law test. Emphasis is placed by Miss Gumbel on the paucity of evidence as to whether the augmentation considered necessary was practicable and feasible in the context of a residential arrangement provided by the local authority. Moreover, the inclusion in the e award of a sum by way of augmentation demonstrated the inadequacy of the statutory provision.

[33] The parties were given an opportunity to consider the cost of the augmentation found to be necessary upon acceptance of a residential arrangement. A further report was obtained on behalf of the claimant from f Ms Bristow. Instructions were received by her on 20 March and the report is dated 21 March 2003, that is four days before judgment was given. The terms of reference were:

g 'The purpose of this report is to assist the Court to agree the additional costings that would be required to support Louise within a residential care setting over that which the local authority would provide.'

That cost was agreed arithmetically at £1,238,540, a sum which was included (subject to the 50% deduction) in the damages awarded.

h [34] For the defendant, Mr Hunter seeks to uphold the finding of the judge that damages should be assessed on the basis that a residential arrangement provided by the local authority, augmented as agreed, is appropriate. That being so, and subject to the augmentation, the claimant has suffered no loss, which the defendant is obliged to meet, under this head. Under current regulations, the local authority cannot, provided the claimant is properly advised, have recourse to the fund of damages paid.

j [35] Mr Hunter accepts that the tortfeasor is liable to make good losses he has caused. However, if the losses will in fact be met from a source other than the tortfeasor, the claimant has no claim to the extent that the losses are made good from that other source. Double recovery is to be prevented. Local authorities are under the statutory duty imposed by s 21 of the 1948 Act and regulations provide that they cannot charge for facilities provided. The

claimant, and those responsible for the claimant's welfare, such as a receiver, are under a duty to secure and maximise funding available from public funds. They must ensure that such benefits as are available are obtained. To the extent that needs are met by local authorities, and it is reasonable for support from the local authority to be sought, there is no loss for the tortfeasor to make good. a

[36] Under s 47 of the 1990 Act, the local authority has a duty to assess needs and, in cases such as the present, the receiver is under a duty to investigate what is available from welfare services, it is submitted. The court cannot shut its eyes to the duties of public authorities. The uncertainties in predicting public provision may be taken into consideration but if the court comes to the conclusion that the local authority is under a duty to fund accommodation and care and that the provision they make will avoid expense which the individual would otherwise have had to incur, the court must take that provision into consideration. b  
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[37] Mr Hunter makes the further point that in a substantial proportion of the cases in which damages are held in the Court of Protection the damages are to be paid by the National Health Service for clinical negligence so that the issue is whether the cost is met by that service (and hence the taxpayer) as tortfeasor or the local authority (and hence the council taxpayer) under statute. That consideration, which in any event does not apply in the present cases, cannot affect the approach to the point of principle involved. d

[38] The test to be applied is in my judgment that expressed by O'Connor and Stephenson LJ in *Rialas*' case. That is different from the test applied by the judge who repeatedly used the expression 'best interests' though he equated that with a position which 'most nearly restores her to the position in which she would be but for the accident'. The judge's good intentions with respect to the claimant's welfare are not of course in question and neither, in my view, is the perceptiveness with which he approached the medical evidence but there is a difference between what a claimant can establish as reasonable in the circumstances and what a judge objectively concludes is in the best interests of the claimant. In this context, paternalism does not replace the right of a claimant, or those with responsibility for the claimant, making a reasonable choice. It was when dealing with a somewhat different argument but the objective approach was rejected in *Rialas*' case (1984) 128 Sol Jo 704 per Sir Denys Buckley. e  
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[39] The question is more complicated in a case such as the present where the judge plainly had serious doubts about the evidence as to the claimant's wishes. That is a very different situation from *Rialas*' case where the trial judge had held that 'everyone agrees that for his own sake the plaintiff ought to be accommodated at home'. h

[40] The judge was entitled, in the circumstances, to conclude that 'undue weight' should not be given to the evidence as to the claimant's wishes and to have doubts about other evidence called on her behalf as to the appropriateness of a private arrangement. He was entitled to make his own assessment. A judicial assessment of what can be claimed and required does involve an assessment of the nature and extent of the claimant's needs. The claimant's family were showing no interest in her and life at home with her family was not an option. The difference between 'best interests' and 'the reasonableness of the treatment chosen and claimed for' is considerably reduced. This was a case j



a in which the judge in his analysis was entitled to treat what was in her best interests, as he assessed them, as what was the reasonable requirement in all the circumstances. The judge approached the evidence with great care. He considered the possibilities for the future. I find nothing perverse about his approach or his conclusion.

b [41] In general terms, the approach is to compare what a claimant can reasonably require with what a local authority, having regard to uncertainties which almost inevitably are present, are likely to provide in the discharge of their duty under s 21 of the 1948 Act. If the second falls significantly short of the first, as Owen J found in *Crookdake* it did, the tortfeasor must pay, subject to the argument raised in both cases that s 21 provision augmented by contribution from the tortfeasor meets the reasonable requirements. If it is the  
c statutory provision which meets the claimant's reasonable requirements, as assessed by the judge, the tortfeasor does not have to pay for a different regime. I accept that in making the comparison a court may have regard to the power to compel a local authority to perform its duties.

d [42] What has concerned me about the judge's award is his treatment of the sum offered by concession on behalf of the defendant to augment the s 21 provision contemplated and its effect on his conclusion. The judge stated that he bore in mind that augmentation, or topping up, was to be provided. He also concluded (at [85], [86]) that, had he found private provision appropriate, he would not have found that the local authority could have been required to provide it. That conclusion is not challenged in this appeal. It would be  
e resurrected on a finding that the judge was not entitled to conclude that the augmented residential regime was, on the evidence, acceptable and appropriate.

f [43] Before addressing the question further, I turn to the facts and reasoning in the case of *Crookdake* where the same question arose. In that case, the judge was not prepared to hold that augmented statutory provision was appropriate.

#### PHILIP CROOKDAKE

g [44] The claimant respondent is Philip Crookdake. On 14 September 2000, his thirty-sixth birthday, he sustained an extremely serious head injury when knocked from his bicycle by the defendant Mr Drury's motor vehicle. Liability to pay damages was admitted and on 30 May 2002 judgment was entered with an order that damages be assessed.

h [45] The claimant was serving in the Royal Marines and was described by Owen J, in his judgment, as 'an outstanding petty officer'. His intention when he had completed his career in the services was to pursue a career as a practice manager for general practitioners. He is a married man with a daughter Hannah, aged one year at the date of the accident. He and his wife lived with their daughter and his wife's two children by a former marriage in their own home in Street, Somerset.

i [46] The claimant suffered widespread damage to the brain and has been left with profound cognitive and intellectual deficits. The medical evidence need be summarised only briefly. It was agreed ([2003] All ER (D) 563 (Jul)):

'[9] [The claimant] must be regarded then as having profound and permanent cognitive and behavioural deficits as a result of his extremely severe head injury ... he will require constant care for the remainder of his life.'

[8] ... "Mr Crookdake has serious difficulties with regard to behavioural disturbance and will easily become verbally and physically aggressive" ... "Mr Crookdake needs constant prompting, guiding and supervision and needs a one:one carer regime."

A modest reduction in life expectancy was agreed.

[47] Professor MP Barnes and Dr NH Walton provided evidence as to the appropriate care regime. Professor Barnes was in no doubt that 'living in his own accommodation is in his best interests rather than living in a nursing home'. Accommodation should be in 'quiet and perhaps rural surroundings'. Having referred to the claimant suffering from temper outbursts in response to noise, frustration or stress, Dr Walton stated that 'the absence of irritations and stress caused by other inmates would lead to an improvement or at least a stabilising of his behaviour'.

[48] The judge concluded (at [12]):

'It is also now acknowledged on behalf of the defendant that the evidence as to the claimant's requirements is conclusively in favour of the provision of accommodation for him in his own home with 24-hour care.'

The judge stated (at [41]):

'... it is now common ground that residential accommodation would be unsuitable for the claimant, and that he needs to be accommodated in his own home with a regime providing 24-hour care. Not only is that conceded by the defence, but it is the conclusion at which the local authority arrived when making an assessment of his need under s 47 of the [1990 Act] in the spring of this year.'

[49] The agreement between the parties as to most heads of damage was mentioned by the judge: special damages £194,252, future loss of earnings £370,000, loss of terminal grant £6,295, loss of pension £49,941 and Mrs Crookdake's loss of earnings £30,000. The judge approved those figures and awarded general damages for pain, suffering and loss of amenity of £140,000 and costs of receivership at £80,000.

[50] The judge identified (at [22]) what he described as the central issue between the parties:

'It is the defendant's primary contention that the local authority, the Devon County Council, are under a statutory duty to provide both accommodation and ancillary services for the claimant. It is submitted (1) that the nature and standard of accommodation and ancillary services provided pursuant to that duty has to be appropriate to the claimant's individual needs, (2) that in reality the accommodation and ancillary services that the local authority is under a duty to provide are no different from the claimant's reasonable requirements as to accommodation and care assessed in accordance with the applicable legal principles, (3) that the local authority cannot charge the claimant for accommodation and ancillary services because his fund of damages and the income that it generates is to be disregarded in assessing his ability to pay, and (4) that in consequence the claimant has not sustained any loss with regard to accommodation and care.'

a [51] A sum of £1,950,000 was agreed for future care (and for present purposes a sum for future accommodation) 'subject to the overriding argument advanced on behalf of the defendant that the claimant's local authority is under a statutory duty to provide the requisite care' (see [2003] All ER (D) 563 (Jul) at [16]). That sum was based on an annual cost of £85,000. While those sums are subject to that dispute, a sum of £840,000 was offered to meet the difference  
b between local authority provision and the requirement of the claimant held to be reasonable. That sum would meet the need for care reasonably required which fell outside the scope of s 21(5) of the 1948 Act, as defined in *Ex p Coughlan*, it is submitted.

[52] The judge found for the claimant in relation to the future cost of accommodation and care. Having referred to the care and accommodation  
c which the local authority could provide, the judge concluded (at [45]):

'In the light of the available evidence it cannot in my judgment be said that there is no material difference between the provision that the local authority is obliged to make and the assessment of his requirements for the purpose of quantification of his claim for damages.'

d The judge identified (at [53]) the difference he was considering as that between—

'the accommodation and ancillary services that the local authority are obliged to provide, and the claimant's reasonable requirement as to accommodation and care assessed in accordance with the applicable legal principles.'

e [53] The four reasons given by the judge for his findings were:

f '[47] First it is submitted on behalf of the claimant that he reasonably requires a property that will not only accommodate him and his residential carers, but will also be large enough to accommodate his wife and daughter from time to time. He is entitled to enjoy as natural a family life as possible; and I am satisfied that that is one way in which that can be achieved. But the local authority is not under any obligation to provide a property capable of accommodating Mrs Crookdake and Hannah.

g [48] Secondly there is the question of the type and location of accommodation for the claimant. I am satisfied on the evidence that he requires a bungalow in reasonably close proximity to Mrs Crookdake's home in Ivybridge. The local authority's assessment identifies the need for the accommodation to be located in a quiet environment, but does not otherwise specify the type or location. Although the claimant, through  
h those representing his interests, would be able to express a preference under the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, the local authority is only required to make arrangements for a person to be accommodated in his preferred accommodation if it appears to be suitable in relation to his needs as assessed by them (see  
j para 3 of the directions "Conditions for provision of preferred accommodation"). As Andrew Smith J pointed out in *Sowden v Lodge* [2003] All ER (D) 364 (Mar) at [85], at the fourth of the stages of the statutory inquiry identified by Henriques J in *R (on the application of Batantu) v Islington London BC* [2002] 2 CCLR 445, the local authority has some margin of appreciation as to what accommodation should be

provided. There can be no certainty that provision by the local authority in the proper discharge of its duty, will match the accommodation that is the basis upon which his claim for future loss stands to be calculated. a

[49] Thirdly the claimant is entitled to be put into a position in which he, through the agency of those representing his interests, can make long-term arrangements for his accommodation and care, whereas it would be open to the local authority to discharge its obligations to him, subject only to the provisions of the preferred accommodation directions, by a series of short-term placements in rental accommodation. Had the accident not happened the claimant could have looked forward to a secure future. He is entitled to the same degree of security. b

[50] Fourthly his freedom of choice as to his domestic arrangements, albeit exercised through those responsible for the management of his care, would inevitably be circumscribed by being dependent upon the local authority for his accommodation. It may well be that in the future Mrs Crookdake would wish to move. In that event his dependence upon the local authority would curtail their freedom of action as a family, particularly if she wished to move out of the area of the Devon County Council. c  
d

The judge considered proposals which had been made on behalf of the defendant though he found one of them confusing. He added (at [51]):

‘But in either event the provision that the local authority is prepared to make in discharge of its duty falls far short of the cost of providing the care regime that on the evidence before me, the claimant reasonably requires. It is agreed that the appropriate care regime will cost approximately £85,000 per annum, over £1,600 per week.’ e

[54] Mr Hunter, for the defendant, accepts that the judge correctly identified the issue between the parties and correctly stated the law. The Devon County Council is under a statutory duty to provide accommodation and ancillary services for the claimant and, provided the nature and standard of accommodation and ancillary services provided pursuant to that duty is appropriate to the claimant’s individual need, the claimant has not sustained loss with regard to accommodation and care because the local authority cannot charge the claimant for accommodation and ancillary services. That is the position because the fund of damages and the income that it generates is to be disregarded in assessing the claimant’s ability to pay (see [2003] All ER (D) 563 (Jul) at [22], [35] per Owen J and cases referred to at [29]; *Firth v George Ackroyd Junior Ltd* [2000] Lloyd’s Rep Med 312, *Bell v Todd* [2002] Lloyd’s Rep Med 12 and *Ryan v Liverpool Health Authority* [2002] Lloyd’s Rep Med 23). f  
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[55] That analysis, and the correctness of those decisions, is not challenged on behalf of the claimant so that the issue is whether or not, on the evidence, the judge was entitled to reach the conclusion he expressed at [45], [51] and [53] of his judgment. The defendant’s case is that care and accommodation would be provided under s 21 of the 1948 Act. If this did not meet the reasonable requirements of the claimant, the defendant could be required to pay the sum of £840,000 for care to augment that provided by the local authority. While several calculations were put forward on behalf of the defendant, that sum was calculated on the basis of additional one-to-one support daily for ten hours a day. The defendant’s case is that on the evidence it was not established that the j



a claimant reasonably required something different from and of a higher standard than that which the local authority would provide under s 21 of the 1948 Act. Recourse to the local authority was appropriate and he should not be permitted to recover damages from the defendant.

[56] Mr Hunter attacks each of the four reasons given by the judge.

b Reason 1. It is submitted that the evidence did not support staying visits by members of the family. The claimant did not always know that he was married to his wife. There was little, if any, difference between what had been offered by the local authority and what the judge required. If there was a difference, that could be met by the proposed top-up payment.

c Reason 2. The judge ought to have concluded that the local authority in practice would have been obliged to provide suitable accommodation and in close proximity to Ivybridge. The consultation required by the 1992 directions would have been likely to produce appropriate accommodation and there was no evidence of differences in price between Ivybridge and elsewhere. Any difference in cost could, in any event, have been met by way of top-up.

d Reason 3. On the evidence, there was no real risk that the local authority would place the claimant in a series of short-term placements in rented accommodation. The court must accept that the local authority will meet its obligation to provide accommodation which meets identified needs.

e Reason 4. The evidence was that a later move would not be in the claimant's interest and there was no evidence that Mrs Crookdake might wish to move. A move could in any event be accommodated within the statutory framework.

The general point is made that the judge has either taken too limited a view of the duty upon the local authority or has assumed that the local authority will fail to discharge it.

f [57] On behalf of the claimant, Mr Witcomb makes the specific point that, while Mrs Crookdake accepted in evidence that the family could never live together, she added that she would continue to visit her husband. The judge was entitled to conclude that provision for overnight stays for members of the family, in rooms separate from that provided for carers, was appropriate. As to the need for single-storey accommodation, evidence from Professor Barnes that, because of the risk of stumbling and falling down stairs, single-storey accommodation would be preferable was not challenged. The judge was g entitled to draw the inference he did. Mr Witcomb makes the general point that neither the expert nor the non-expert witness statements disclosed by the defendant addressed the issue of top-up care. No analysis was provided of what care the local authority would provide under s 21 of the 1948 Act or what care was necessary to supplement that or how the supplementary provision would h be operated. There was no evidence from Devon County Council or any other source as to what the local authority would provide under s 21 and there was no expert assessment of how the proposed additional provision would be applied. In his third and fourth reasons the judge mentioned and had in mind care as well as accommodation.

j [58] Reliance is also placed on the conclusion of Elias J in *Howarth v Whittaker* [2003] Lloyd's Rep Med 235 at [29], that the claimant in that case 'should be allowed to have a single care regime in which the case manager can directly recruit the carers'. Mr Witcomb refers to the practical difficulties of attempting to manage and co-ordinate a care regime in which two different sets of carers, employed by separate employers, are expected to operate together.

Cox J adopted the same approach in *Neale v Queen Mary's Sidcup NHS Trust* [2003] EWHC 1471 (QB) at [62].

[59] While considering *Howarth's* case, I add that Elias J did give a separate reason (at [29]) for rejecting the double recovery argument. He raised the possibility that if some care is paid for privately, the local authority may claim that they no longer need to provide it because it is being provided in any event. I agree with Mr Hunter that, if the argument were to be raised by a local authority, it would not be a sound argument. The care is, by definition, additional to the s 21 provision and is funded by damages which are to be disregarded for the purposes of ss 21 and 22. The presence of the additional funding does not nullify the s 21 obligation.

[60] I have referred to the judge's general conclusions. He also referred ([2003] All ER (D) 563 (Jul) at [52]) to the fact that the claimant's care is 'particularly demanding' and that the claimant has to be handled 'with great sensitivity'. The judge concluded in that paragraph:

'Unless it could be assumed with confidence that the local authority would fund a care regime at a cost of the order of £85,000 per annum, then it cannot be said that there is no material difference in care to be provided by the local authority, and the requirement as assessed and agreed for the purposes of this claim. In my judgment it is not possible to make such an assumption on the material before me.'

The judge accepted the possibility of top-up payments to meet any shortfall between the claimant's reasonable requirements and an assessment of needs under s 47 of the 1990 Act but stated (at [54]) that the difficulty faced by the defendant in advancing that argument is 'that there is no sound evidential basis upon which to assess such shortfall'.

[61] While the differences identified by the judge were not of the most substantial kind, the judge was in my view entitled to reach the conclusion he did and it is one which is sufficiently supported, on the evidence, by the reasons given. The judge heard oral evidence and was in the best position to assess the reasonable requirements of the claimant and how they could appropriately be met. Strong reliance is placed on the substantial top-up offer which was made on behalf of the defendant but the judge was entitled to conclude that in this case it had 'no sound evidential basis'.

[62] In written submissions on behalf of the defendant, reliance was sought to be placed on the absence of 'proper evidence before the court as to how the local authority would in fact discharge its statutory duty in providing 24-hour care'. That absence does not assist the defendant. The judge must reach a conclusion on the evidence before him, drawing inferences where appropriate. That is what the judge did and I see no fault in the way in which he did it. The defendant did not call evidence of what the local authority would have, or would be likely to have, provided, evidence which might, I put it no higher, have undermined the claimant's case.

[63] While claimants, and those advising them, must be expected to co-operate with local authorities discharging their statutory duties, they claim in the action that to which they believe the claimant is entitled and there is no legal burden on them first to disprove that statutory provision will be adequate. It may of course be prudent to call evidence, as in any situation where a

a judgment upon the facts is to be made, as to why statutory provision is inadequate.

[64] I would dismiss the defendant's appeal.

#### CONCLUSION IN SOWDEN

b [65] The main issue between the parties throughout was whether a residential or a private arrangement was appropriate and the judge's finding on that issue is central to his judgment. Whether a residential arrangement required augmentation, if the common law standard was to be achieved, was also considered. In an updated counter-schedule of 18 December 2002, a modest augmentation was proposed by way of some assistance from a support worker, limited services of a case manager, additional physiotherapy if

c reasonably necessary, and additional holiday costs. At the hearing, a substantial additional offer was made as mentioned in [23], above.

[66] I have been troubled by the paucity of the evidence as to how the augmented portion of the residential provision would work and the absence of a detailed care scheme on behalf of the defendant incorporating the augmented

d element. Such evidence as there was came from Ms Bristow, including cross-examination. She gave lengthy evidence on 19 February 2003. The main topic under consideration was whether a private or a residential arrangement was appropriate. In re-examination, she raised a difficulty about the availability of carers in a local authority residential arrangement. That appears to have been related to limited resources and not to practical difficulties in

e supplementing, by means of additional support, a residential arrangement.

[67] In a supplementary cross-examination which the judge permitted, Ms Bristow was asked about the cost of the additional provision but, understandably, her evidence could not be precise. An opportunity was given for a further written report and the report mentioned at [33], above was

f obtained. The augmentation was costed at £1,238,540. The provision proposed overcame the difficulty considered in re-examination. Ms Bristow did not suggest on either occasion that top-up care was impracticable because of factors considered, for example, in *Howarth*, *Neale* or *Crookdake*, or otherwise. While the question of practicability had been raised in

g Miss Gumbel's closing submission, no request was made for an adjournment to allow the question to be considered.

[68] In my judgment the judge was entitled on the evidence to conclude that it was 'in the interests of the claimant to have a residential arrangement'. His assessment of the evidence was conspicuously clear and fair. His conclusion that a residential arrangement was appropriate was firmly stated and

h convincingly reasoned. He saw positive advantages for the claimant in living at a residential home. The judge was entitled to reach the conclusions he stated ([2003] All ER (D) 563 at [32], [54]) (cited at [24] and [26], above).

[69] The judge did however state (at [63]) that damages were to be assessed on the basis that, under a residential arrangement, the claimant was to have

j additional care for a significant part of the day. That is where the difficulty about the absence of evidence of the practicability of such augmentation arises. The judge should not have been put in a position in which the augmentation finally proposed emerged only towards the end of the trial and in cross-examination of a witness for the claimant, who may not have been fully aware of the considerations involved. Faced with the late and informal

introduction of such a scheme, it was difficult for practicability to be investigated. An adjournment could have been, but was not, requested, submissions on behalf of the claimant being devoted mainly to advocacy of a private arrangement. a

[70] The sum by way of augmentation was almost certainly offered on behalf of the defendant with a view to inclining the judge towards the residential solution. While it cannot be criticised on that ground, its incorporation with the award makes the result in the circumstances unsatisfactory. The judge was not given, and did not insist on, an opportunity to assess the feasibility of augmenting residential care in the manner proposed. Not without hesitation, I have come to the conclusion that the claimant should be given an opportunity to go back to the judge and attempt to demonstrate that the augmentation proposed was impracticable and, that being so, the balance is tipped towards a private arrangement. I bear in mind the reasons given by the judge for preferring the residential solution and his entitlement to stand by them even if augmentation to the extent offered is found to be impracticable. The defendant's case was presented in such a manner, however, that, having regard to the importance of the case to the claimant, she should be given that opportunity. b  
c  
d

[71] I would propose a limited remission to Andrew Smith J. On the basis of his findings as to the claimant's needs, which are not subject to review, the judge should give the parties an opportunity to call further evidence as to the practicability of the augmentation proposed and whether it is likely to be implemented. Having decided what is and what is not practicable, the judge should revisit his conclusion as to whether, in the circumstances as found, a local authority-based residential arrangement still meets the common law test. If, on analysis, the level of implementation found to be appropriate involves further costs, those can be taken into consideration. e

[72] If the judge remains of the view that a local authority residential arrangement is appropriate but the proposed additional expenditure, or a part of it, does not arise by reason of its impracticability, it will be for the judge to decide whether, and if so, to what extent, the defendant is entitled to resile from the concession in the sum of £1,238,540. f

[73] To that limited extent, I would allow this appeal. g

#### THE 50% DAMAGES POINT

[74] Mr Hunter takes the point mentioned at [28], above. It was taken by Mr Stewart at the trial and summarised by Andrew Smith J (at [73]):

'He argued that because the claimant is to recover only half of the damages for full liability, the claimant is unlikely, on any view, to be able to afford a private arrangement for the rest of her life. Accordingly, it is said, if the claimant has a private arrangement, she is likely to face a disruptive change at some time in the future. Mr Stewart submitted that I should take this into account in comparing the merits of a private arrangement and a residential arrangement.' h  
j

[75] Reliance was also placed, and the judge appears to have seen merit in the point (though not on the present facts), that, by analogy with s 2(4) of the 1948 LR Act, mentioned in [14], above:



a     '... if, on the balance of probabilities, private facilities [as distinct from National Health Service facilities] are not going to be used for whatever reason, the plaintiff is not entitled to claim for an expense which he is not going to incur.' (See *Woodrup v Nicol* [1993] PIQR Q104 at 114.)

b     [76] Miss Gumbel submits that the court assesses damages in the '100% world' and shuts its eyes to contributory negligence at that stage. The court has not been referred to authority directly on the point.

[77] Until 1945, contributory negligence was a complete defence to a tortious claim. Section 1 of the Law Reform (Contributory Negligence) Act 1945 provided, in so far as is material:

c     '*Apportionment of liability in case of contributory negligence.*—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that—(a) this subsection shall not operate to defeat any defence arising under a contract;

d     (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

e     (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.'

f     [78] Thus s 1 abolishes the common law rule that contributory negligence is a complete defence and provides a procedure for determining the size of the award where responsibility for the damages has been held to be shareable.

g     [79] I agree with Miss Gumbel's submission. Damages are to be reduced having regard only to the 'claimant's share in the responsibility for the damage'. That assumes an assessment of the sum recoverable prior to any reduction for contributory negligence. Section 1(2) points strongly in the same direction. The reduction takes account of share of responsibility for the damage but not how the damages are likely to be spent.

h     [80] In *Kelly v Stockport Corp* [1949] 1 All ER 893, when the maximum amount recoverable in the county court was £200, the judge assessed damages in a personal injury action at £300 and the claimant one-third to blame. The judge awarded £200.

[81] On appeal to this court, Tucker LJ stated (at 895):

j     'In the present action the damages recoverable were limited, by reason of the provisions dealing with the jurisdiction of the county court, to £200. It is, therefore, the £200 which has to be reduced. In other words, it is not the damage sustained, in fact, by the plaintiff, but the damages recoverable in respect thereof which must be taken into consideration in this connection.'

[82] Asquith LJ stated (at 895):

'The operation of s 1(1) of the Law Reform (Contributory Negligence) Act, 1945, seems quite plain. It raises two questions:—(i) What is the claim in respect of the damage suffered? and, (ii) What are the damages recoverable in respect of that claim? The claim was for £200 and the damages recoverable in respect of that claim cannot exceed £200 for two reasons:—(i) because a party cannot recover more damages than he claims in any civil court; and (ii) because he cannot recover more than £200 in the county court owing to the limits of its jurisdiction. £200 is the "damages recoverable," and it is this sum which, by sub-s (1), has to be reduced in the event of contributory negligence being established.'

[83] Thus the 'damages recoverable' are first to be assessed; in *Kelly's* case the county court maximum, in the present case damages applying ordinary tortious principles, and it is the sum so assessed which is to be reduced for contributory negligence. It is then for the claimant to decide how the sum awarded should be applied. This principle does not conflict with the different principle established by s 2(4) of the 1948 LR Act.

[84] The finding of contributory negligence has no bearing upon the manner of the assessment of damages in this case. A side effect of a contrary conclusion would be that, upon an appellate court altering the apportionment under the 1945 Act, a reassessment of the damages recoverable might be necessary. It is most unlikely that Parliament intended that result.

#### COMMENT

[85] What emerges from the present cases is the importance, when dealing with cases involving very serious injuries, of placing before the court cogent evidence as to how the regimes proposed by the parties for the care and accommodation of claimants will operate. I repeat my comments in [62] and [63], above in *Crookdake*. Judges trying this type of case should not be put in the position the judge, in *Sowden*, was. Whatever is proposed should be particularised and costed in the schedule (or counter-schedule) of damages. When issues arise, efforts should be made to define and narrow them in advance of the hearing.

[86] When local authority residential care with top-up is proposed, whether as a primary or a fall-back position, the basis on which it is put forward should be explained in writing as should any attack upon its feasibility and suitability. The issues raised in the present appeals have not turned on a detailed consideration of the 1992 directions but their effect, and that of guidance given with them, may well require consideration in future cases. The expression 'top-up' now appears in para 4 of the September 2003 guidance. The concept was present in para 8 of the 1992 guidance, though not cited by either judge; presumably because of concessions made.

#### LONGMORE LJ.

#### THE STATUTORY BACKGROUND

[87] It is common ground that if a person is negligently injured he can, in principle, claim from the tortfeasor the reasonable expenses of dealing with the consequences of that injury. It is, however, of interest for the purposes of these appeals to compare the differing legal position as to medical expenses and as to the expense of care claimed from such tortfeasor. In the former case it is no

- a defence for the tortfeasor to say that it was unreasonable for the claimant to have incurred, or to incur in the future, medical expenses provided privately (see s 2(4) of the Law Reform (Personal Injuries) Act 1948 (the 1948 LR Act)). But if on the balance of probabilities, a claimant is unlikely to avail himself of NHS treatment, he is not entitled to claim for an expense he is not going to incur (see *Woodrup v Nicol* [1993] PIQR Q104 at 114 and *Eagle v Chambers* [2004] EWCA Civ 1033, [2005] 1 All ER 136). Moreover, if the claimant is in fact treated on the National Health Service there is only limited provision for the National Health Service to recover the cost of treatment from the tortfeasor (see the Law Commission's report on *Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits* (Law Com no 262) (1999) pp 9–10 (paras 2.8–2.10)). The Law Commission has proposed that such a right of recoupment should exist (see pp 36–37 and p 42 (paras 3.22–3.25 and 3.43)) but the government has not implemented these proposals.

- [88] The position in relation to care expenses is different. Although local authorities have, since 1993, been obliged to give care to those in need of such care, there is no provision, equivalent to s 2(4) of the 1948 LR Act, enacting that a defendant tortfeasor cannot allege that it would be unreasonable for a claimant to have incurred, or to incur in the future, the cost of care provided privately. It is, therefore, always an issue in such cases whether private expenses of care which have been incurred have been reasonably incurred and whether it would be reasonable to incur such private expenses in the future. Moreover, if a claimant availed himself (or herself) of local authority care, the local authority was, pursuant to ss 22 and 29 of the National Assistance Act 1948 and s 17 of the Health and Social Services and Social Security Adjudications Act 1983 entitled to look to any of the claimant's resources (including any claim he might have for damages in negligence) in order to recoup the cost of the care provided (see *Avon CC v Hooper* [1997] 1 All ER 532, [1997] 1 WLR 1605). In 1998, however, it was for the first time enacted by the National Assistance (Assessment of Resources) (Amendment) Regulations 1998, SI 1998/497 that a local authority could not look to any award of damages for the purposes of such recoupment. Any such award was henceforth to be ring-fenced from such claims. It has been held, at first instance, that, as a consequence of these regulations, the tortfeasor cannot be made liable for the cost of such care since the cost of care paid for by a local authority is a cost which the claimant has not had to pay in the past and will not have to pay in the future (see *Firth v George Ackroyd Junior Ltd* [2000] Lloyd's Rep Med 312 and *Bell v Todd* [2002] Lloyd's Rep Med 12).

- [89] I did occasionally wonder during the hearing whether it was really the intention of the draftsman of the 1998 regulations not merely to ring-fence an award of damages, once made, so as to ensure that such award should be unavailable to local authorities providing or paying for care services to a claimant but also to achieve the result that, because no claim to recoup themselves from such an award could be made by local authorities, a defendant tortfeasor was to be under no liability to compensate a claimant for the cost of such care services. But Miss Gumbel QC for the claimants did not argue that *Firth* or *Bell* were wrongly decided. This was because once it had been enacted that an award of damages was not to be available for recoupment purposes, the common law, on ordinary principles as exemplified by the authorities in relation to the cost of medical care which will not be incurred as well as the

principle contained in *Hodgson v Trapp* [1988] 3 All ER 870, [1989] AC 807, would make no award in respect of costs which were not going to be incurred; thus *Firth* and *Bell* had to follow from the 1998 legislation. It might be thought that it would be more appropriate for legislation to provide that both national health trusts and local authorities could recover the costs of medical expenses and care respectively from the tortfeasor as the Law Commission recommended (at any rate in relation to medical expenses) in 1999. As Mr Harvey McGregor QC points out in his *McGregor on Damages* (17th edn, 2003) pp 1285–1287 (paras 35-205 to 35-209), this is an area of the law where it is doubtful whether there is any real utility in unravelling the intricacies which need to be resolved. That is a matter which cannot be taken further in these appeals.

#### THE PROBLEM

[90] This statutory background has, however, presented a particular problem for judges assessing awards for personal injury claimants. If they decide that it is reasonable for a claimant to incur costs of private care for the rest of their lives, awards are liable to be astronomically high; indeed the amount of such award might in itself become reason for holding that it is not reasonable for a claimant to use private care services. On the other hand experienced judges suspect that care provided or paid for by local authorities will not be of the same high quality as care paid for privately.

[91] The matter is further complicated by the fact that a local authority makes its own assessment in any particular case whether a person to whom they are obliged to give care needs care in his or her own home or only requires care in a local authority residential home. The mere fact that a judge has held that only a private arrangement will meet a claimant's reasonable needs does not compel a local authority to agree with that assessment even at the time when the judge so decides; still less will a local authority feel the need to be guided by any such decision as time goes by.

[92] Some judges also have an instinctive feeling that if no award for care is made at all, on the basis that it will be provided free by local authorities, the defendant and his insurers will have received an undeserved windfall.

[93] It is for these reasons that judges have sometimes acceded to invitations to make what may be called a 'top-up award' to enable a claimant to have available cash and buy with that cash extra care services, such as the services of carers to look after the claimant while he or she is on holiday or of carers to take the claimant out of the home on an outing once or twice a week. We now have two appeals to this court where 'top-up' submissions have been made; in the first case (*Sowden v Lodge*) the judge (Andrew Smith J) was persuaded that it was not reasonable for the claimant to incur the private expense of care but that he would make a 'top-up' award. This award seems to have been made at the suggestion of the defendant whose insurers were concerned to deter the judge from making an award of the cost of private care. The claimant appeals on the basis that the suggestion was 'bounced' on her during the trial and that a 'top-up' award is unworkable in principle. In the second case (*Crookdake v Drury*) the judge held that it was reasonable for the claimant to incur the expense of private care; the defendant appeals on the basis that the expense of private care is unreasonable and that, if local authority provision is insufficient, it can and should be 'topped-up'.



## SOWDEN V LODGE

a [94] I agree with Pill LJ that the correct question to be addressed in relation to the care element of the claim is: 'What is required to meet the claimant's reasonable needs?' This is not quite the same question as that which the judge asked himself, namely: 'What is in the best interests of the claimant?' But on the facts of Sowden's case it seems to me that the answers to the two questions are the same. The judge held the claimant's best interests required a residential placement but that she was also entitled by way of 'top-up' to the cost of  
b (1) 74 hours care a week over and above the number of hours for which the local authority would pay; (2) a personal care manager; (3) holidays; and (4) transport for outings from the residential home. These constitute the findings of the judge in relation to the claimant's requirements and are a  
c conclusion in respect of the claimant's reasonable needs, even if the judge did not quite say so in terms. I would not wish to disturb what I regard as the judge's conclusion in relation to the claimant's reasonable needs.

d [95] What is not clear is whether the judge, if he had not been able to utilise the top-up concept, would have still decided that a residential placement would meet the claimant's reasonable needs or whether he would have been driven to hold that the reasonable needs of the claimant required a private arrangement.

e [96] On any view the ability to require the defendant to pay the top-up payment was a factor of some importance in the judge's decision. The defendant, however, never pleaded the amount of top-up which they asserted was required to meet the claimant's reasonable needs, save to the extent of saying that there should be a mere nine hours of extra care, which is almost derisory in the context of the extent of the care which was eventually conceded by the defendant as being appropriate. As a result the feasibility of marrying substantial extra care with the care to be provided at the cost of the local authority was in my view never properly explored in the evidence or addressed  
f by the judge.

[97] None of this can be said to be the judge's fault in any way. He was encouraged by counsel to believe that the crucial issue in the case was what arrangement was in the best interests of the claimant; he was then initially encouraged by the defendant to believe that a comparatively small amount of extra care would resolve the difference between private accommodation and care on the one hand and accommodation and care paid for by the local  
g authority on the other. An increasing number of concessions was then made in the course of the trial which presented a moving target. Miss Gumbel was placed in an awkward position. She should probably have sought a further adjournment to examine the feasibility of the defendant's concessions once  
h their full extent was apparent. But I do not consider the fact that she did not ask for an adjournment should be a bar to the claimant's appeal in what is a difficult and developing area of the law. It is more important that justice be ultimately done.

j [98] In these circumstances I consider that the fair way for this court to dispose of the appeal is to remit the case to the judge as proposed by Pill LJ in [71] and [72], above.

[99] Permission to appeal was granted in these two cases so that the court could express a view about the propriety of the court awarding top-up damages in a case where a court feels that residential local authority accommodation does not of itself meet the reasonable needs of the claimant but that the

claimant does not need the stark alternative of privately-funded care or will not avail herself of such private care even if awarded a sum which will enable her to purchase such care. My own view is that, while a top-up award is not inappropriate in principle, a court of first instance should be alert to investigating the evidence adduced in favour of a top-up award in the particular case before him. The cost of a yearly holiday together with appropriate carers for such holiday might well be permissible without difficulty, but top-up arrangements in general may present problems, as Elias J said in *Howarth v Whittaker* [2003] Lloyd's Rep Med 235. Judges should normally be reluctant to let defendants raise possible candidates for top-up in the course of the hearing. This will mean that, while it is for a claimant to assert what are his or her reasonable needs, it is for a defendant who asserts that a claimant should be content with local authority residential care to set out in clear terms whether such reasonable needs can be met by such care and whether there is any respect in which they accept that such care does not meet the claimant's reasonable needs, so that top-up will be appropriate. It will then be for the claimant to assert that top-up or further top-up in addition to that proposed by the defendant will be required, if local authority residential accommodation is to be provided. This information must then be incorporated into the schedule of damages before the trial begins. Of course developments and recalculations in the light of such developments will continue to take place during the hearing, but they should be kept to a minimum.

[100] In all other respects I entirely agree with the judgment of Pill LJ including that part of his judgment which deals with the 50% damages point. *Kelly v Stockport Corp* [1949] 1 All ER 893 is decisive of the point. The recent decision of the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833, [2000] 2 AC 190 is entirely consistent with Pill LJ's judgment on this part of the case. It follows that I would, therefore, dismiss the appeal in the Crookdake case.

#### SCOTT BAKER LJ.

[101] I agree with both judgments and with the orders in each appeal proposed by Pill and Longmore LJ. These appeals illustrate dramatically the difficulties that nowadays arise in reconciling the principle that a tortfeasor must meet the claimant's reasonable expenses in coping with the injury he has caused with the ever increasing legislative burden on local authorities to provide care for those who cannot care for themselves and the ability (or otherwise) to recoup the cost thereof. It seems to me that only by legislation can any rationality be brought to this problem. Meanwhile the courts have to do their best to keep the anomalies to the minimum.

[102] As Longmore LJ has pointed out, private care awards are liable to be astronomically high where awarded on a full-life basis while care provided by the local authority may fall short of a claimant's reasonable needs. It is against this background that the principle of 'top-up' has emerged. For my part I can see nothing wrong with 'top-up' in an appropriate case. However, when there is an issue whether 'top-up' is appropriate and what it should amount to, the issue should be properly identified and supported by evidence, ordinarily well in advance of the trial.

[103] I too have reluctantly come to the conclusion that the case of Sowden should be remitted to the judge on the limited basis indicted by Pill LJ. I too

a emphasise the judge's entitlement to stand by his reasons for preferring the residential solution in the event that top-up to the extent offered is found to be impracticable.

*First appeal allowed to extent indicated. Second appeal dismissed.*

Kate O'Hanlon Barrister.

# R (on the application of X) v Chief Constable of the West Midlands Police and another

[2004] EWCA Civ 1068

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, MUMMERY AND LAWS LJ

26, 30 JULY 2004

*Police – Disclosure of information – Enhanced criminal record certificate – Provision of non-conviction information – Whether decision to disclose governed by common law and convention principles – Whether duty to act with procedural fairness requiring person affected to make representations – Whether decision to disclose information lawful – Police Act 1997, s 115 – Human Rights Act 1998, Sch 1, Pt I, art 8.*

The claimant, who was a social worker, applied for a job which would involve regularly caring for, training supervising or being in sole charge of persons aged under 18, and accordingly an application was made to the Secretary of State for the Home Department under s 115<sup>a</sup> of the Police Act 1997 for an enhanced criminal record certificate (ECRC) relating to him. An ECRC might contain information concerning offences which the person to whom it related was suspected of having committed even though his responsibility had not been and could not be proved. Section 115(7) provided that before issuing an ECRC the Secretary of State was to request the relevant chief constable to provide any information which in his opinion might be relevant and ought to be included. An applicant who believed that information contained in an ECRC was inaccurate could apply to the Secretary of State for a new certificate. The defendant chief constable approved the disclosure of information relating to two alleged incidents of indecent exposure, in the course of one of which a threat of rape had been made. Before the claimant's trial the police had conducted a covert identification in court and the complainant had identified someone other than the claimant. No evidence had been offered and the claimant had been acquitted. The claimant's application for judicial review of the chief constable's decision to disclose the information was allowed, and the chief constable appealed. The claimant contended, inter alia, (i) that the disclosure by the chief constable had been procedurally unfair in that he should have permitted the claimant to make representations in relation to what was proposed to be disclosed; and (ii) that the disclosure contravened his right to respect for private and family life guaranteed by art 8<sup>b</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**Held** – (1) Having regard to the language of s 115 of the 1997 Act, the chief constable had been under a duty to disclose if the information might be relevant, unless there were some good reason for not making a disclosure. The policy of the legislation, in order to serve the pressing social need to protect children and vulnerable adults, was that the information should be disclosed even if it only

a Section 115, so far as material, is set out at [7]–[15], below

b Article 8 is set out at [19], below



a might be true. If it might be true, the employer should be entitled to take it into account before the decision was made as to whether or not to employ the person. It imposed too heavy an obligation on a chief constable to require him to give an opportunity for a person to make representations prior to his performing his statutory duty of disclosure. In the instant case the claimant had had ample opportunity during the police interview to set out his account, and had not taken  
b advantage of his statutory opportunity to correct the certificate (see [36]–[38], [49], [55], [58], below); *R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310 and *R v a Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736 considered.

(2) Making available, in accordance with the law, information which a responsible employer would want to know before making a decision as to  
c whether to employ a person as a social worker, as had occurred in the instant case, could not be contrary to art 8(2) of the convention. The 1997 Act properly conferred the responsibility of forming an opinion on the chief constable and, he having properly formed the opinion that certain information might be relevant, it was not for the courts to interfere (see [44]–[48], [56], [58], below).

d Decision of Wall J [2004] 2 All ER 1 reversed.

## Notes

For enhanced criminal record certificates, see Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1572A.3, and for the right to respect for private and family life,  
e see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149–151.

For the Police Act 1997, s 115, see 33 *Halsbury's Statutes* (4th edn) (2003 reissue) 1545.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

## Cases referred to in judgments

*R v a Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736.

*R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310, sub nom *R v Chief Constable of the North Wales Police, ex p Thorpe* [1999] QB 396, [1998] 3  
g WLR 57, CA; *affg* [1997] 4 All ER 691, [1999] QB 396, [1997] 3 WLR 724, DC.

## Appeal

The defendant Chief Constable of the West Midlands Police appealed with permission of Kennedy LJ given on 24 March 2004 from the decision of Wall J on  
h 23 January 2004 ([2004] EWHC 61 (Admin), [2004] 2 All ER 1) granting the declarations and orders sought by the claimant, X, that (i) the information contained in an enhanced criminal record certificate issued on 3 March 2003 in relation to the claimant (the ECRC) had been unlawfully provided by the chief constable; (ii) that the chief constable should not in the future provide the  
j information relating to the indecent exposure allegations contained in the ECRC to the Criminal Records Bureau (the CRB) pursuant to ss 115(7) and 119(2) of the Police Act 1997; (iii) that the ECRC had been unlawfully issued by the CRB; and (iv) that the CRB should remove from the ECRC the details of the indecent exposure allegations made against the claimant. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the judgment of Lord Woolf CJ.

*Fiona Barton* (instructed by *John Kilbey*, Birmingham) for the chief constable.  
*Dan Squires* (instructed by *Public Law Solicitors*, Birmingham) for the claimant.  
*Rabinder Singh QC* and *James Strachan* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Cur adv vult*

30 July 2004. The following judgments were delivered.

### LORD WOOLF CJ.

[1] This is an appeal by the Chief Constable of the West Midlands Police from a decision of Wall J given on 23 January 2004 ([2004] EWHC 61 (Admin), [2004] 2 All ER 1). The appeal raises a point of some importance and difficulty in relation to the responsibility of chief police officers under s 115 of the Police Act 1997. The Secretary of State for the Home Department was originally a defendant to the proceedings, but when permission to proceed with the claim against the chief constable was granted on 3 July 2003, permission to proceed against the Secretary of State was refused. However, because of the importance of the issues raised on the appeal, Mr Rabinder Singh QC has been allowed to make submissions on behalf of the Secretary of State as to the legal issues involved, although he has not made submissions as to the merits of the decision of Wall J on the facts.

[2] The appeal relates to the enhanced criminal record certificates (ECRCs) which the Secretary of State can issue under s 115 of the 1997 Act. An ECRC contains information, in addition to that which is recorded in central records, about the person to whom the certificate relates, provided by the chief constable. The additional information may concern offences of which the person to whom the ECRC relates is suspected of committing even though his responsibility has not been and cannot be proved. The information must, however, be information of which the chief constable is of the opinion might be relevant to a position which involves regularly caring for, training, supervising or being in sole charge of persons under 18 or vulnerable persons aged 18 or over. The ECRC is, therefore, a form of protection for the young and/or vulnerable: the additional information contained therein is required so as to avoid unsuitable individuals being employed for looking after such persons. However, the information contained in the ECRC can be highly prejudicial and, as is suggested happened in the present case, can blight the individual's opportunity to obtain employment in his chosen field.

[3] The challenge to the ECRC is on three grounds, namely that: (1) the substantive criteria which have to be satisfied for the disclosure by the chief constable to be lawful under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and under the common law were not met; (2) the decision to disclose the information by the chief constable was procedurally unfair under both the common law and art 8 of the convention and not 'in accordance with the law' as required by the latter; and (3) the chief constable had unlawfully departed from the Association of Chief Police Officers' (ACPO) Code of Practice for Data Protection (October 2002) in relation to information held concerning the claimant.

[4] Wall J made no adverse finding as to the third ground. It has not featured in the argument before us and I do not refer to it further. Wall J did however find

a in favour of X, which is the name by which the claimant was known in the court below and in this court so as to protect his identity. The finding in X's favour was on the first and second grounds. The judge made an order that the decision of the chief constable to provide the information contained in the ECRC dated 3 March 2003 be quashed, and that the chief constable should not in the future provide information relating to the indecent exposure allegations currently  
b contained in that certificate to the Secretary of State pursuant to ss 115(7) and 119(2) of the 1997 Act. Wall J refused leave to appeal and helpfully recorded his reasons for refusing permission to appeal in the following terms:

c 'I recognise that this case deals with an issue of public importance, and one which is, moreover, topical in the light of events at Soham and the forthcoming inquiry into them. That said: (1) my decision depends on the particular facts of the case; (2) much of the applicable law was not in dispute, notably: (a) that art 8 of the convention was engaged and (b) that the approach to disclosure under the common law taken by Dyson J in *R v a Local Authority in the Midlands*, *ex p LM* [2000] 1 FCR 736 at 747–748 was correct;  
d (3) I decided that the common law principle that there was a presumption against disclosure (as identified and applied in *R v Chief Constable of the North Wales Police*, *ex p AB* [1998] 3 All ER 310, [1999] QB 396 and followed in *Ex p LM*) was to be disapplied in the instant case (at [91]); (4) it was conceded by the chief constable that as a consequence of section 8.4, para 14 (at [135]) of the ACPO code, retention of the information which was the subject of the  
e ECRC would have constituted a breach of the code. I deliberately made no ruling on whether or not the information was "criminal intelligence" within para 8.5 of the code (at [147]–[149]), and made it clear that nothing in the judgment was designed to inhibit the exchange of information between the police and other statutory authorities' action in the field of child protection  
f (at [151]); (5) the claimant's case both on identification and on procedural fairness seemed to me particularly strong on the facts. For example, the argument advanced by the chief constable that the claimant's police interview represented his opportunity to make representations on the material to be disclosed was, I thought, manifestly unsustainable. In these  
g circumstances it is a matter for the Court of Appeal to decide if the case raises a point of law of sufficient public interest to warrant its consideration. On the merits, I have to say that I do think that the balancing exercise required in the case falls firmly in favour of the claimant on the facts, and that an appeal directed against the outcome of the case would not, therefore, have any real prospect of success.'

h Notwithstanding these reasons, leave was granted by Kennedy LJ on 24 March 2004.

#### THE LEGAL FRAMEWORK

j [5] Part V of the 1997 Act creates a statutory scheme for access by prospective employers to the criminal records and, in limited circumstances, information held by the police relating to potential employees. In addition to the ECRC, with which we are concerned on this appeal, there is a criminal conviction certificate which gives prescribed details of every unspent conviction recorded against an individual or states that there is no such conviction. This certificate is governed by s 112 of the 1997 Act.

[6] There is also a criminal record certificate under s 113 of the 1997 Act. A criminal record certificate under s 113 includes cautions and spent convictions under the Rehabilitation of Offenders Act 1974. This is provided on the application of a prospective employee, although, under s 113(2) the application must be accompanied by a statement from the prospective employer that the certificate is required for the purposes of an 'exempted question'. By s 113(5) an 'exempted question' is defined as—

'a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) ...'

[7] Section 115 of the 1997 Act governs ECRCs. As with criminal record certificates, s 115(1) places a mandatory duty on the Secretary of State for the Home Department (a function delegated to the Criminal Records Bureau (the CRB)) to issue an ECRC to any prospective employee who makes an application 'in the prescribed form countersigned by a registered person' and pays the appropriate fee. Section 115(2) similarly requires the application to be accompanied by a statement from the prospective employer that the ECRC is required 'for the purposes of an exempted question' asked: (i) in the course of considering the applicant's suitability for a position (whether paid or unpaid) within sub-ss (3) or (4), or (ii) for a purpose relating to any of the matters listed in sub-s (5).

[8] A 'position' is within s 115(3) of the 1997 Act 'if it involves regularly caring for, training, supervising or being in sole charge of persons under 18', and within s 115(4) if it is of a kind specified in regulations made by the Secretary of State and involves regularly caring for, training, supervising or being in sole charge of persons aged 18 or over.

[9] The involvement of the 1974 Act is readily explained by the fact that it was necessary for the purposes of that Act to identify situations where the normal consequences of the passage of time in relation to the existence of previous convictions had to be changed; particularly in relation to employment, because the conviction although stale could appropriately be required to be revealed because of the sensitivity of the particular circumstances. This meant that there should be an exception to the provision of the protection which would normally be provided in relation to spent convictions.

[10] Who is a registered person is dealt with in s 120 of the 1997 Act. Subsections (4), (5) and (6) are relevant and are in the following terms:

(4) A person applying for registration under this section must be—(a) a body corporate or unincorporate, (b) a person appointed to an office by virtue of any enactment, or (c) an individual who employs others in the course of a business.

(5) A body applying for registration under this section must satisfy the Secretary of State that it—(a) is likely to ask exempted questions, or (b) is likely to countersign applications under section 113 or 115 at the request of bodies or individuals asking exempted questions.

(6) A person, other than a body, applying for registration under this section must satisfy the Secretary of State that he is likely to ask exempted questions.

(7) In this section "exempted question" has the same meaning as in section 113.'



a [11] The ECRC itself is defined in s 115(6) of the 1997 Act as a certificate which—

‘(a) gives—(i) the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and (ii) any information provided in accordance with subsection (7), or (b) states that there is no such matter or information.’

b [12] I now turn to the provision of s 115 with which we are primarily concerned, namely sub-s (7) that provides:

c ‘Before issuing an enhanced criminal record certificate the Secretary of State shall request the chief officer of every relevant police force to provide any information which, in the chief officer’s opinion—(a) might be relevant for the purpose described in the statement under subsection (2), and (b) ought to be included in the certificate.’

[13] It is also relevant to refer to sub-s (8) although it is not directly involved in this case. This subsection provides:

d ‘The Secretary of State shall also request the chief officer of every relevant police force to provide any information which, in the chief officer’s opinion—(a) might be relevant for the purpose described in the statement under subsection (2), (b) ought not to be included in the certificate, in the interests of the prevention or detection of crime, and (c) can, without e harming those interests, be disclosed to the registered person.’

[14] The contrast between sub-ss (7) and (8) is to be noted because in the case of sub-s (8), unlike sub-s (7), the information will be seen by the prospective employer (the registered person) but will not be seen by the person who is the subject of the certificate since it will not be set out in the ECRC.

f [15] Section 115(9) of the 1997 Act imposes a mandatory duty on the CRB to send to the registered person who countersigned the application (for present purposes, once again, the claimant’s prospective employer) a copy of the ECRC and any information provided in accordance with s 115(8) of the 1997 Act. By s 119(2), where the chief officer of a police force receives a request under s 115 of the 1997 Act, he is required to comply with it as soon as practicable.

g [16] An applicant for an ECRC is entitled to have it issued to him under s 115(1). If the applicant believes that the information contained in the certificate is inaccurate he may make an application in writing to the Secretary of State for a new certificate and the Secretary of State shall then consider any application under the section. Where he is of an opinion that the information on the h certificate is inaccurate he shall issue a new certificate (see s 117).

[17] In addition, the Secretary of State is required to publish a code of practice in connection with the use of information provided to registered persons. Furthermore, a member, officer or employee of a registered body can commit an offence if he makes a disclosure of any information provided which is not j authorised by the 1997 Act (see s 124).

[18] Having referred to the relevant legislation, it is useful to note the following significant aspects of the statutory scheme involving ECRCs. (i) The whole process of obtaining an ECRC is initiated by the person to whom the certificate will relate. The certificate is for his purposes to enable him to obtain employment which, at least in practical terms, will not be available to him unless he obtains a certificate. (ii) The certificate will only be seen by the applicant and

his prospective employer. (iii) The applicant has the opportunity to persuade the Secretary of State to correct the certificate. (iv) The chief constable is under a duty to provide the information referred to in s 115(7). This is subject to the requirement that the information *might* be relevant and ought to be included in the certificate. What might be relevant and what ought to be included is a matter for the opinion of the chief constable. (v) The applicant is in a position to provide additional information if he wishes, whether in conflict with the certificate or not, to the prospective employer and it is the prospective employer who will make the decision as to whether he should or should not be employed.

#### ARTICLE 8 OF THE CONVENTION

[19] Having set out the statutory structure, it is convenient to consider whether s 115 of the 1997 Act is compatible with art 8. Article 8 provides:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

[20] It is helpful to note that while it is accepted by both parties that the information which is included in the ECRC might offend against art 8(1), it is not suggested that the legislation itself contravenes art 8. No doubt this is because disclosure of the information contained in the certificate would be ‘in accordance with the law’ and ‘necessary in a democratic society’, in the interests of public safety and for the prevention of crime and for the protection of the rights and freedoms of others. This country must, through its legislature, be entitled to enable information to be available to prospective employers, where the nature of the employment means that particular care should be taken to ensure that those who are working with the appropriate categories of persons can be relied on to do so, without those in their care coming to harm if they are under the age of 18 or vulnerable adults.

#### THE FACTS

[21] The ECRC with which we are concerned contained the following information provided by the chief constable in accordance with s 115(7):

‘It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], who was employed by a child care company at the time of the alleged offences, was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued.’

[22] The claimant is of good character so there were no convictions referred to in the ECRC. He is Afro-Caribbean and is aged 44. He obtained a diploma in

a social work in about 1990 and was employed as a social worker until 9 July 2002 when he was dismissed by the agency which employed him.

[23] The remainder of the facts are based on those set out with meticulous care by Wall J in his judgment. They are not challenged by the parties and are as follows:

b [25] On 16 May 2002 the claimant was interviewed by the police and then charged in relation to two alleged incidents of indecent exposure, which had occurred in the early hours of the morning on 12 December 2001 and on 7 May 2002 at a local garage. The complainant, Ms R, was the cashier at the garage, and on each occasion Ms R was on duty on her own.

c [26] On the first occasion, Ms R says she saw a man whom she identified as a regular customer pass by the newspaper rack, which was directly under the window next to the counter. At that point she could only see his head and shoulders. For obvious security reasons, the door to the garage shop within which Ms R was situated was locked, and customers were served through a hatch. The man appeared to be on foot, and had not driven a car onto the garage forecourt.

d [27] Ms R says she recognised the man because he had been in the night before and had purchased a Mars bar and a bottle of water. She says that because he was a regular customer, she pressed the button behind the counter, which unlocked the door of the shop in order to let him in. She says that as soon as he entered the shop she saw that he was naked from the waist e down. His genitals were plainly visible, although he did not have an erection. She says he purchased a Mars bar with a £10 note and said to Ms R: "I'll be back later to rape you." After standing by the door and opening and closing it several times, the man asked Ms R the time. She told him it was f 2.50 am. He then walked out of the shop and left the garage on foot. Ms R does not appear herself to have telephoned the police, but says she later mentioned the matter to her manager.

[28] Ms R says the shop was well lit. She was plainly able to have a clear view of the man, whom she identified as a regular customer. She gives a description of him in which, among other details describes him as about g 36 years of age, 5 ft 8 in in height, black, but not very dark skinned, more of a mixed race appearance.

h [29] Ms R says that the same man came to the garage in the early hours of 27 February 2002, 27 March 2002, and 10 and 24 April 2002. On each of these occasions he was driving a car, the make and number of which Ms R noted (the car). On the first occasion the man made as if to draw petrol, but did not do so: on the remaining occasions he did draw petrol; he then paid for his purchases normally and left the garage without incident. On each of the last three occasions he paid through the hatch; on all four occasions the man was normally dressed, and apart from taking out the pump but not drawing petrol on the first occasion, behaved normally.

j [30] Although Ms R noted the number and make of the car on 27 February, she does not appear to have informed the police at that stage.

[31] At about 3.15 am on 7 May 2002, Ms R says she heard somebody tapping on the window of the shop. She says it was the same man, who was naked from the waist up, and said he wanted to buy a Mars bar. He then began to walk backwards, and Ms R saw that he was completely naked. She refused to serve him: he pointed his finger at her and said: "I'll fucking sort

you out.” He then turned round and walked off. Once again, there was no car on the forecourt, and the man appeared to have arrived on foot. a

[32] Ms R made a statement to the police, which is dated 9 May 2002, which she supplemented on 8 June 2002. At the conclusion of the latter statement she said: “I can say 100% that it is the same man that drove [the car]. I would recognise him anywhere and this was confirmed during the second incident. There is no doubt in my mind that it is him.” In the light of subsequent events, these three sentences are, in my judgment, significant.’ b

[33] The car, which Ms R had observed on the garage forecourt, was traced by the police to the claimant’s employers, who had hired it for his use. There was no suggestion that anybody but the claimant had been driving the car at the relevant time.’ c

[24] Wall J then considered the interview which the claimant had with the police on 16 May 2002. Wall J then states:

[34] As will be apparent from the content of the disclosure set out at [3], above reliance was placed by the chief constable on the claimant’s police interview. The claimant declined the opportunity to obtain legal advice prior to being interviewed, and did not want a solicitor to be present during the interview itself. He was interviewed by two women police officers. At no time did he make any admissions, and at other times he specifically denied that he was the man who had exposed himself to Ms R. d

[35] The main point, which appears to have persuaded the interviewing officers that the claimant was the man who had exposed himself to Ms R, was his initial reluctance categorically to deny that he was the man. He said he could not remember the incidents put to him, and that he did not think it was him. One of the officers said in terms during the interview that she thought the claimant needed help, that it was the claimant who exposed himself and that he was not telling the whole truth. e

[36] No criticism is made of the interview, and it is always difficult, when reading a transcript, to get the full flavour of it. It was plainly a robust interview, and the officers’ scepticism about the claimant’s answers emerges very clearly. However, I feel bound to say that in my judgment, a fair and objective reading of it does not warrant the reliance placed on it. f

[37] Firstly, although it was by his own choice, the claimant did not have a solicitor’s advice before and during the interview. Judging by his statements in these proceedings, which contain a forthright denial of any form of involvement, the interview might well have taken a different course had the claimant received such advice or had his solicitor been present. g

[38] Secondly, however, although criticism is made of the claimant’s apparent lack of memory, and the improbability of his being unable to remember walking around naked, the interview is largely conducted by the officers by means of asking him whether or not he remembered relevant events and dates. When Ms R’s version of the first alleged indecent exposure is put to him, he is asked: “Do you remember anything about that incident?” and he answers: “Not really. I cannot remember that.” One of the officers then continues: h

“Q. ... I think I would remember if I went into a petrol station and I had nothing else underneath, I think I would remember that, it would stick out in my mind. A. Well, I cannot remember that. j

Q. Is it possible that you’ve done it? A. I don’t think so.



a Q. Right, you see it does not make sense to me because I'd know for a fact if I had done something like that."

b [39] Any question about any incident which begins with the words: "Do you remember doing x?" contains within it the implication that the person questioned has something to remember, and was, accordingly, the person who committed the act about which he or she is being questioned. In my judgment it is unsafe then to treat the answer "No" or "I can't remember" as incredible and to give it the same implication. As Mr Squires points out, there are four occasions in the interview where the claimant categorically denies that he was the man who exposed himself to Ms R. If (a) Ms R's version of the events had been put to him; (b) had the claimant been asked: "Was that you?"; and (c) had the claimant then said: "I can't remember" or "I don't think so" the passages in the interview might, I think, have had more force.

d [40] There is much in a similar vein to the exchange I have set out at [38], above. As I have already stated, later in the interview the claimant denies in terms that he swore or was violent, or that he had threatened anybody. At this point he also denies in terms that he had gone into the garage naked at any time. He also makes the perfectly sensible point that since this was a garage, which he acknowledged he went to regularly, and since he could be traced by his car, why would he then go back naked and on foot? The questioning officer accepts that she cannot explain why somebody would go in naked and then go back as a normal customer.

e [41] Having now read the interview several times, I have come to the clear view that the summary of it in the "Other Relevant Information" section of the ECRC is partial, and carries with it an implication that the claimant was guilty, or at the very least the author of the summary believed him to be guilty. For reasons, which I will develop in due course, I agree with Mr Squires that it would be wrong to place weight on the interview as reliable evidence tending towards the guilt of the claimant. In my judgment it is, putting the matter at the highest from the police perspective, neutral.'

g [25] Like Wall J, I have also read the interview several times. And the picture that I draw from the transcript is not as favourable to the claimant as that of Wall J. I recognise that his view is just as likely to be as correct as my own, but, at least in my judgment, it was not unreasonable for the police to come to the conclusion that the claimant had been identified by the police officers because of Ms R having taken the number of the car she thought the person who had exposed himself had used. In the interview, which was certainly conducted robustly, X did not initially categorically deny that he was the person who was involved, as emphatically or as promptly as I would myself have expected having regard to the nature of the accusation. However, if the outcome of this appeal were to depend upon whether Wall J's or my assessment of the evidence was correct, I would certainly not interfere with a judgment based upon his impression of the evidence. However, I emphasise that it was the chief constable who, under the statutory provisions, had to form the 'opinion' as to the relevance of the material which he considered.

#### EVENTS AFTER THE POLICE INTERVIEW

j [26] As to the events after the interview, the position is as follows:

[42] On 9 July 2002 the claimant was dismissed from his employment. The reasons for his dismissal are currently the subject of proceedings instituted by the claimant in the employment tribunal which have not yet been determined. a

[43] In the interview, the claimant agreed to take part in an identification parade. Parades were arranged for 16 August and 12 September 2002, but each time they could not proceed due to a lack of suitable participants. The claimant also agreed to take part in two other forms of identification testing, but these also could not be conducted due to the witness not being present or a lack of participants. b

[44] No identification parade was ultimately held before the claimant's trial, which was due to commence in the magistrates' court on 25 September 2002. Immediately prior to the hearing, however, it appears that the police conducted a covert identification in court and asked Ms R to identify the perpetrator. She picked out someone who was not the claimant. Thereupon the Crown Prosecution Service offered no evidence against the claimant and the claimant was acquitted. c

[45] The person whom Ms R identified as the perpetrator was pointed out to the claimant by his solicitors. According to the claimant, the man identified was considerably lighter skinned than the claimant. He was perhaps of middle-eastern origin, while the claimant is Afro-Caribbean. He was also considerably shorter than the claimant (who is 6 feet tall) and did not resemble him in appearance. d

[46] When he was charged, the claimant was told he would receive a copy of the CCTV footage from the petrol station taken at the time of the alleged incident. This was not received, and the matter was pursued by the claimant through his solicitors. He was subsequently told that the footage had been displaced or lost during the course of the case. It thus remains unclear what, if any, information the CCTV footage contained. e

#### THE MAKING OF THE ECRC

[47] Following his dismissal from his employment as a social worker on 9 July 2002, the claimant applied for another social work position to a different social work agency. That agency sought information from the CRB about the claimant, and on 14 February 2003 the head of the West Midlands Police Central Information Unit, Ms S, received an electronically transmitted request from the CRB to supply any "approved information" about the claimant. She instructed researchers to carry out standard checks of the local designated force computer systems. f

[48] The result, Ms S says, was information relating to an offence of indecent exposure, which included an alleged threat to rape. Ms S took the view that this clearly required further investigation, and sent for the crime file. She recites the facts she obtained from the file, noting that the record of the claimant's interview stated: g

"He states that he cannot recall doing what has been alleged. He is asked if it is possible that he had done it and he states that he does not think so. [The claimant] is asked if there is any reason why he would not remember doing it and [the claimant] states that he cannot remember doing it and [he] would not remember doing it because he was suffering from stress and anxiety at this time and he went to see his doctor." h

j

a [49] The claimant complains that this is also a misrepresentation of the interview. In relation to the final sentence of the extract cited at [48], above he cites what he is recorded as actually saying in the interview, which was: "I cannot remember doing that, I mean I was under a bit of stress at that time, I had been to my doctor around that time you know."

b [50] Ms S refers to "aborted identification parades following objections from the claimant through his legal representative" and to the fact that it was nearly four months after she last saw the claimant that Ms R was asked to identify him. She also makes reference to a previous incident in June 2001 when the claimant had been arrested following complaints by several teenage girls that a man had been running around naked in public. The claimant had been found in a clothed state by the police: the girls' evidence had been inconsistent, and no further action had been taken.

c [51] Ms S then describes the exercise through which she went in preparing her advice for the deputy chief constable about the disclosure of relevant information in the ECRC. She says she balanced the claimant's rights under art 8 of the convention with any potential risks posed to those with whom the claimant may have had contact in the course of his new employment. She points out (as I have already found) that there is no guidance on what "might be relevant" under s 115(7) of the 1997 Act. However, in order to undertake the balancing exercise, she carried out what she describes as "a risk assessment and a relevance test". The mental checklist of factors she applied were as follows:

e "(a) the timeliness of any previous event to this disclosure; (b) the seriousness of the event; (c) the source and reliability of the non-conviction information held on the local system; (d) the age and details known about any victims; (e) if proceedings were instigated, why they were not continued; (f) does the information add anything to the PNC information already provided? (g) the [subsequent actions of the applicant]; (h) the retention of Pt V material on local systems and weeding procedures; (i) the likely impact on the applicant if this information was disclosed; (j) the potential impact on any vulnerable group if this information was not disclosed."

g [52] As to relevance, Ms S says she "restricted information to that which had a direct bearing on the potential risk posed by the claimant to the safety of children and vulnerable adults". She eliminated information of a more general nature and says she would never disclose any information that was not already known to the claimant.

h [53] Having applied her risk assessment and relevance test to the claimant's case, Ms S then sent a memorandum to the deputy chief constable, in a standard format, requesting his approval to disclose the information stated in the memorandum. She adds that she did not include details of the earlier arrest of the claimant on 24 June 2001 (see [50], above) but that this clearly featured in her decision-making "when the disclosure relating to the offences between 11 December 2001 and 7 May 2002 was made".

j [54] I do not wish to be critical of Ms S. She was plainly doing her best in difficult circumstances and without the benefit of any proper guidelines. The factors, which she identifies, seem to me to be a creditable attempt to identify relevant considerations to be taken into account. It is, however, in my judgment, unfortunate that Ms S's affidavit does not explain how she

balanced the various factors she identifies; nor does it give her reasons for reaching her conclusion that the non-conviction material should be disclosed. It is equally significant, in my view; she does not appear to have given the deputy chief constable any reasons for the decision she had reached. All her memorandum to the deputy chief constable does is to present him with the information in the form in which it ultimately appeared on the ECRC, and to ask him to approve its disclosure.

[55] The deputy chief constable received the memorandum and the accompanying file of papers, which he read. He records that he was required to balance the claimant's art 8 rights against any potential risks posed to those with whom the claimant may have future contact. He approved the disclosure in the identical terms put forward by Ms S. His reasons for making the disclosure are stated as follows:

"This decision was based on the fact that the information was relatively recent, it involved an allegation of threats to rape, there had been sufficient evidence to charge and the complainant was believed to be reliable and credible. I noted the duration of time that had elapsed between the last sighting of this suspect by the complainant and the unsuccessful covert identification procedure that led to the discontinuance of the case by the CPS. Before arriving at my final decision I weighed the likely impact on the claimant if this information was disclosed, against the potential impact on any vulnerable group if this information was not disclosed."

[27] Here again I have the misfortune to differ from Wall J in relation to the efforts made by Ms S. I was myself impressed by the obvious care which was taken to prepare the matter for the deputy chief constable who decided the question of disclosure on behalf of the chief constable. The chief constable was right to place before the court the process by which the memorandum was prepared.

#### THE DETERMINATION OF THE ISSUES

[28] There are a number of separate issues to be determined and I will now seek to consider those issues, referring in so far as it is necessary to do so, to the reasoning of Wall J which was set out with conspicuous clarity.

#### THE EFFECT OF THE STATUTORY FRAMEWORK ON THE COMMON LAW REQUIREMENT OF FAIRNESS

[29] This issue as to the relevance of the common law requirement of procedural fairness is less an issue before us than it was in the court below. My view, is that in this case, there is no difficulty in coming to the conclusion that the statute has not excluded the requirement of procedural fairness. The issue is as to what form that requirement should take, having regard to the statutory framework and the facts of this case. Wall J came to the conclusion that the duty to act fairly on the part of the chief constable included an obligation to permit the claimant to make representations in relation to what was proposed to be disclosed. In coming to his conclusion, Wall J accepted that the need to protect children and vulnerable adults from abuse by those employed to care for them, is a pressing social need. He added, however:

[90] ... the nature and extent of the need will depend on the facts of the individual case. It is, moreover, precisely because the stakes are so high that



a the balancing exercise required by art 8 of the convention and the application of the common law principles must be rigorously carried out.'

He also approached the question of disclosure on the facts of the instant case—

b 'on the basis that there is no presumption against disclosure under s 115, and that the circumstances identified in s 115 identify, in general terms, a pressing social need for disclosure.' (See [2004] 2 All ER 1 at [91].)

However, he added that—

c 'this does not mean that disclosure of additional, non-conviction information under s 115 is automatic, or that it is not surrounded by the stringent conditions of natural justice and procedural fairness.'

d [30] Wall J also surveyed many of the relevant authorities in this area. In particular he received assistance from *R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310, [1999] QB 396 and *R v a Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736.

e [31] As to *Ex p AB*, the present situation is very different, because the disclosure in that case had not been made in a statutory framework such as exists under s 115. He referred ([2004] 2 All ER 1 at [71]) to the fact that in the Divisional Court, Lord Bingham of Cornhill CJ had accepted a submission made by the Secretary of State, that there was a strong presumption in that case that information should not be disclosed and that:

f '(1) ... such a presumption being based on a recognition of (a) the potentially serious effect on the ability of the convicted people to live a normal life; (b) the risk of violence to such people; and (c) the risk that disclosure might drive them underground. (2) There is a strong public interest in ensuring that police are able to disclose information about offenders where that is necessary for the prevention or detection of crime, or for the protection of young or other vulnerable people. (3) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender; the vulnerability of those who may be at risk; and the impact of disclosure on the offender. In making such assessment, the police should normally consult other relevant agencies (such as social services and the probation service).' (See [1997] 4 All ER 691 at 698, [1999] QB 396 at 409.)

g [32] Wall J then referred ([2004] 2 All ER 1 at [72]) to the fact that Lord Bingham CJ had added ([1997] 4 All ER 691 at 698, [1999] QB 396 at 409–410):

h 'When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty.'

j [33] He also referred ([2004] 2 All ER 1 at [74]) to my judgment in the same case in the Court of Appeal where I said ([1998] 3 All ER 310 at 320, [1999] QB 396 at 427–428):

'On behalf of the Home Secretary, Mr Eadie advanced careful and well-balanced submissions as to how the duty (which he accepted existed) to

act fairly should be exercised. He agreed that there are cases where it would be desirable, so as to ensure as far as possible that the police are acting on accurate information and so as to ensure the necessary degree of fairness, to afford individuals in the position of the applicants some opportunity to comment. However whether such an opportunity should be afforded and the form that it should take depends on the particular circumstances of a particular former offender. In determining what should be done the overriding priority must remain to protect the public, particularly children and other vulnerable people. The time-scale involved may make it not possible to afford an opportunity to comment. The information in the police's hands may be of a category which means that it is unlikely that the subject could be expected to add anything of value. The information available to the police may be information upon which the subject has already had an opportunity to comment. The information may be of a nature which means it would be undesirable for it to be disclosed because of its confidentiality or sensitivity or on the grounds of public interest immunity. There is no formal procedure with which the police should be required to comply. The police should be allowed to act in a sensible pragmatic way. It should be remembered that they have to rely upon the advice of experts and they should not be required to test opinions which they have received from experts.'

[34] Having made those citations from *Ex p AB*, Wall J referred ([2004] 2 All ER 1 at [79]) to the helpful judgment of Dyson J in *Ex p LM* [2000] 1 FCR 736 at 747 where he stated:

'In my view, the guiding principles for the exercise of the power to disclose in the present case are those enunciated in (*R v Chief Constable of the North Wales Police, ex p AB* [1998] 3 All ER 310, [1999] QB 396). Each of the respondent authorities had to consider the case on its own facts. A blanket approach was impermissible. Having regard to the sensitivity of the issues raised by the allegations of sexual impropriety made against LM, disclosure should only be made if there is a "pressing need". Disclosure should be the exception, and not the rule. That is because the consequences of disclosure of such information for the subject of the allegations can be very damaging indeed. The facts of this case show how disclosure can lead to loss of employment and social ostracism, if not worse. Disclosure should, therefore, only be made if there is a pressing need for it ... What was required of the police and the social services department in this case was that they examine the facts, and carry out the exercise of balancing the public interest in the need to protect children against the need to safeguard the right of an individual to a private life. How should the balancing exercise be carried out? All relevant factors must be considered. It is not possible or desirable to attempt to provide an exhaustive list. It seems to me, however, that the following factors will usually have to be considered by the police and the local authority that is contemplating disclosure of allegations of child sex abuse to a third party.'

[35] Wall J then added ([2004] 2 All ER 1 at [80]):

'The first factor, which Dyson J then identified, was the authority's own belief as to the truth of the allegation. The greater the conviction that the allegation is true, he said, the more pressing the need for disclosure. The

a second factor was the interest of the third party in obtaining the information. The more intense the legitimacy of the interest in the third party in having the information, the more pressing the need to disclose is likely to be. The third factor was the degree of risk posed by the person if disclosure is not made.'

b [36] While the statements of Lord Bingham CJ, Dyson J and myself do indicate a general approach, in my judgment, to apply them to the present case, except with the utmost of caution, can be misleading. I am conscious that as a result Wall J may have been led astray by my judgment. First of all, as already indicated and as Wall J accepted, here there is no presumption against disclosure. On the contrary, the position is more positive in favour of disclosure than was c indicated by Wall J. Having regard to the language of s 115 of the 1997 Act, the chief constable was under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure.

d [37] This was obviously required by Parliament because it was important (for the protection of children and vulnerable adults) that the information should be disclosed even if it only might be true. If it might be true, the person who was proposing to employ the claimant should be entitled to take it into account before the decision was made as to whether or not to employ the claimant. This was the policy of the legislation in order to serve a pressing social need. In my judgment it imposes too heavy an obligation on the chief constable to require him to give an opportunity for a person to make representations prior to the chief constable e performing his statutory duty of disclosure.

f [38] Furthermore, whatever the shortcomings in the interview by the police, the interview was extensive and the claimant had had during that interview ample opportunity to set out his account. More importantly, under s 117 of the 1997 Act, the claimant is given an opportunity to correct the certificate. An opportunity which he has not taken advantage of. In addition, as already indicated, the claimant was in a position to give his account of what happened to the person who it was most important should hear that account, namely his proposed employer.

g [39] If he had had an opportunity to make representations to the chief constable, that would only have assisted him if he could have persuaded the chief constable that there was no truth in the allegations. I do not see how being in a position to make representations could have achieved such an outcome. Before this court and the court below, the claimant has had an opportunity to make all the representations he could possibly make, and the only matter as it seems to me of significance, to which he could draw attention, was the difference h between the features of the person whom he says Ms S identified, and his own features. For this information to be of any significant value, it would require objective confirmation and, as far as I am aware, that objective confirmation is not available. For it to be obtained would require further police investigations, and activities of that sort are outside the requirements of fairness in the case of j this statutory structure.

[40] While recognising fully how damaging the disclosure could be to the claimant, because of the public interest in the information being made available to the prospective employer, unless the chief constable was to be persuaded that there was a strong probability that this was a case of mistaken identity, the chief constable was entitled to be of the opinion that the information still might be relevant so that it had to be disclosed. This being the situation, even if the chief

constable was under an obligation to provide an opportunity for representations as contended, it is difficult to see how that opportunity could have achieved a situation where the need for disclosure did not still meet the 'might be relevant' requirement. a

THE EFFECT OF ARTICLE 8(2)

[41] Although it was the claimant who applied for the ECRC, it is accepted by the parties that art 8 still has a role to play in relation to the chief constable's decision. I therefore deal with this issue on that assumption. But on that assumption, how can the chief constable's decision to disclose be challenged under art 8? As already indicated, the chief constable starts off with the advantage that his statutory role is not in conflict with art 8, because the statute meets the requirements of art 8(2). It follows also, that as long as the chief constable was entitled to form the opinion that the information disclosed might be relevant, then absent any untoward circumstance which is not present here, it is difficult to see that there can be any reason why the information that 'might be relevant', ought not to be included in the certificate. I accept that it is possible that there could be cases where the information should not be included in the certificate because it is disproportionate to do so; the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct, that it again would be disproportionate to disclose it. These were not, in my judgment, the situations on the facts before the chief constable. b  
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[42] Accepting, as already indicated, there was no want of fairness upon the chief constable, I do not accept that there can be any valid criticism of the manner in which the deputy chief constable took the decision he did on behalf of the chief constable. He did consider the question of proportionality but remained of the opinion that there should be disclosure. e

[43] This conclusion of the chief constable is not surprising. If the claimant was guilty of the conduct which was alleged, then that conduct would be highly relevant to the question of his employment with children or vulnerable adults. It was information of which the prospective employer should be aware, together with any additional information which the claimant might want to place before him. However, I recognise that despite the claimant's ability to have the certificate corrected, and his opportunity to put forward his explanation, it is probable that he still would not obtain employment, as it is unlikely the employer would be prepared to take the risk. f  
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[44] If the information disclosed did not relate to him, this would be deeply regrettable, because I accept that it is likely that the claimant would never again obtain employment in the area in which he would like to work. However, while that is true, his position would be no worse (as was pointed out by Mummery LJ in argument) than it would be if the prospective employer had himself asked the question (which would be in accord with good employment practice to adopt for this class of employment), as to whether the claimant had ever been charged with any criminal offence. The claimant would have to answer this question honestly, and the position would have been revealed with the same result. h  
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[45] This, as it seems to me, goes to the heart of this case. The information which was disclosed, was information which a responsible employer in this field would want to know before making a decision as to whether to employ the claimant. The claimant is seeking to prevent that information being available. In



a my judgment, the making available of that information in accordance with the law, as occurred here, could not be contrary to art 8(2).

b [46] Wall J came to a different conclusion because he carefully reconsidered the material which was before the chief constable and, in addition, took into account material which was not before the chief constable. On that basis, he was prepared to conclude that this was not a case where the chief constable was entitled to rely on art 8(2) and furthermore that, in reality, this was not a case in which the chief constable could have formed the opinion that he did. In my judgment, however, Wall J was not required, either on the grounds of fairness or because of art 8(2), to, in effect, form his own opinion as to what might be the relevance of the disclosed information.

c [47] The statute properly conferred the responsibility of forming an opinion on the chief constable and, having formed that opinion perfectly properly that certain information might be relevant, it is not for the courts to interfere. The chief constable should consider questions of fairness and if he had come to the conclusion in this case that the claimant should have an additional opportunity to reconsider the matter, then that would be perfectly in order. However, not d having formed that opinion, there was no legal obligation on him to approach the claimant again and so he has to be judged on the material which was actually available to him.

[48] In my judgment this appeal should be allowed and the orders made by Wall J set aside and the claim dismissed.

e **MUMMERY LJ.**

[49] I agree that the appeal should be allowed for the reasons given by Lord Woolf CJ.

f [50] There are only two points on which I wish to comment. The first is the employment aspect of the context, in which the disclosure application form was completed and submitted by X, and in which the chief constable formed the opinion that the matters disclosed in the enhanced criminal record certificate (ECRC) 'might be relevant' for the specified purpose and 'ought to be included in the certificate' under s 115(7) of the Police Act 1997.

g [51] X applied for a position which would involve regularly caring for, training, supervising or being in sole charge of persons aged under 18. An ECRC was required for the purposes of an exempted question asked 'in the course of considering X's application for the position'. The person considering X's application was his prospective employer. He would make the critical decision whether to appoint X to a position, which would bring him into contact with the h vulnerable persons, whom the ECRC procedure is designed to protect.

j [52] The overall responsibilities of the prospective employer, including the responsibility for deciding the applicant's suitability for the particular position, were relevant to the disclosure decision. While the applicant had an interest in seeing that the information was not disclosed in the ECRC to the prospective employer, the prospective employer had a legitimate interest in receiving it. He had more immediate and direct interest than anyone else in the availability to him of any information about the job applicant, which 'might be relevant' to his decision whether or not to appoint him to a position of the kind described in s 115(3), and which he ought to know. The disclosure of the matters in the ECRC is not simply a matter between X and the police: prospective employers and the vulnerable people, towards whom the employer has heavy responsibilities, are

also potentially affected by the decision whether or not to disclose information in the ECRC. a

[53] The prospective employer is also a person with rights and freedoms, which it may be necessary protect under art 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[54] We have not seen X's completed application form for the post. We have been told by Mr Squires, on his client's instructions, that X had already informed the prospective employer of the matters disclosed in the ECRC. In so doing, he clearly appreciated its potential relevance from the employer's point of view. This is acknowledged by his own evidence in these proceedings that the provision of the information in the ECRC 'has had a devastating effect on me. It means that I have no hope of working in my chosen profession and career again'. Good practice would normally require a prospective employer, who is responsible for appointments to positions covered by s 115, to make inquiries about criminal charges, as well as about criminal convictions, as they 'might' be relevant to the decision whether or not to make an appointment. Common sense also suggests that a suitable applicant for such a position would, in any case, take the precaution of volunteering information about such matters to a prospective employer. There is nothing to prevent the applicant from also making full representations to the prospective employer about why the matters disclosed are, in fact, irrelevant, should be disregarded and do not affect his suitability for the position for which he has applied. b  
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[55] Before providing information in the ECRC, the chief officer was required by s 115(7) to form an opinion that the information (a) 'might be relevant' for the purpose of considering X's suitability for such a position, and (b) 'ought to be included in the certificate'. In the formation of his opinion on the possible relevance of the information, and whether there was a good reason for including it in the certificate, the pressing needs of prospective employers are relevant factors. In order to make properly informed decisions about appointments falling within the ECRC regime prospective employers need to have relevant information about the applicant seeking a position with the employer which would bring an applicant into contact with the people the ECRC procedure was designed to protect. e  
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[56] I agree with Lord Woolf CJ that the making available of the information in the ECRC was in accordance with s 115 of the 1997 Act and was not contrary to art 8 of the convention. The effect of the judge's order would be to deprive the prospective employer of information which he, as well as the chief officer, consider 'might be relevant' and 'ought to be included in the certificate'. That is an unacceptable state of affairs. If the information is disclosed, the prospective employer can evaluate it in the light of the applicant's representations denying involvement in the alleged offences, and about his arrest and subsequent prosecution, and any other relevant material. If the information is not disclosed, and the applicant is given a clear ECRC by the chief officer, the prospective employer may be making his decision about the appointment on incomplete information and on a false basis. g  
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[57] The second point is a short one. This case was argued before Wall J and this court on the basis that art 8(1) of the convention applied, and that the disclosure complained of in the ECRC violated X's right to respect for his private life. Wall J recorded (at [57]) that '[i]t was common ground between counsel in the instant case that art 8 ... is engaged on the facts of this case'. As the matter

*a* was common ground, we have heard no argument on it. I simply wish to state that I must not be understood as agreeing that art 8(1) applies to the information disclosed in the ECRC relating to a criminal charge and a prosecution, which was discontinued. I would need to hear full argument on the point before reaching a conclusion on it.

*b* **LAWSON LJ.**

[58] I agree with both judgments.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Re Ballast plc (in administration) and other companies a

[2004] EWHC 2356 (Ch)

CHANCERY DIVISION

BLACKBURNE J

11, 21 OCTOBER 2004

*Company – Administration order – Administrator – Statutory provisions by which administrator might send certain notices to registrar of companies – Appointment of administrator ceasing to have effect on registration of notice – Whether court order required – Insolvency Act 1986, Sch 1B, paras 79, 83, 84, 85.* b

Three companies entered administration under the regime introduced by the Enterprise Act 2002 into Pt II of the Insolvency Act 1986. It was the wish of the court-appointed administrators that two of the companies move from administration to creditors' voluntary liquidation in accordance with the procedure available under para 83<sup>a</sup> of Sch B1 to the 1986 Act. That paragraph provided that where the administrator of a company was likely to receive had been paid to him or set aside for him, and that a distribution would be made to unsecured creditors of the company, if there were any, he could send a notice to the registrar of companies under sub-para (3). The registrar was to register such a notice, and on registration the appointment of the administrator would cease to have effect and the company would be wound up as if a registration for voluntary winding up had been passed on the day on which the notice was registered. The wish of the appointed administrators in respect of the third company was that it move from administration to dissolution in accordance with the procedure available under para 84<sup>b</sup> of Sch B1. Under that paragraph, if the administrator of a company thought that the company had no property which might permit a distribution to its creditors he was to send a notice to that effect to the registrar of companies. The registrar was to register the notice, and on registration the appointment of the administrator was to cease to have effect and at the end of the period of three months beginning with the date of the registration of the notice would be deemed to be dissolved. Paragraph 79<sup>c</sup> provided that on the application of the administrator of a company the court could provide for the appointment of an administrator to cease to have effect and that an administrator was to make such an application if the administration was pursuant to an administration order and the administrator thought that the purpose of the administration had been sufficiently achieved. Paragraph 85<sup>d</sup> applied where the court made an order providing for the appointment of an appointed administrator to cease to have effect and provided that in that event the court was to discharge the administration order. The administrators considered that orders of the court c

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a Paragraph 83, so far as material, is set out at [7], below

b Paragraph 84 is set out at [8], below

c Paragraph 79 is set out at [11], below

d Paragraph 85, so far as material, is set out at [13], below



a under, inter alia, paras 79 and 85 of Sch B1 were required in order to take advantage of the provisions contained in paras 83 and 84 and applied for such orders or for directions.

b **Held** – It was open to the administrators to have recourse to paras 83 and 84 of Sch B1 to the 1986 Act without first applying to the court for orders under paras 79 and 85 of Sch B1 to the 1986 Act. The purpose of para 79 was to empower the court, in the applicable circumstances, to make an order which would bring the administrator's appointment to an end. By contrast, under para 83, it was the registration of a notice sent by the administrator under sub-para (3) that brought the administrator's appointment to an end. At the same time, c service of the notice caused the company to be wound up voluntarily. The consequence of serving the notice was to substitute one insolvency regime (a creditors' voluntary liquidation) in place of another (an administration) so that the one followed without interruption from the other. The effect was necessarily to bring the administration to an end. Nothing in para 79 required that, where an administrator was resorting to para 83, the court also had to make an order under d para 79(1) that the administrator's appointment was to come to an end. Paragraph 79 provided a separate exit from administration from that provided, and exclusively regulated, by para 83. Paragraph 84, like para 83, provided an exit from administration without distinguishing between administrations begun out of court and those begun by order of the court. As with para 83, the effect of e para 84 was, on registration of a notice sent by the administrator, to bring his appointment to an end. There was no need to have recourse to para 79. The fact that there was nothing in para 84 which provided expressly for the discharge of the administration order was as irrelevant to the proper operation of para 84 as it was to the proper operation of para 83. Paragraph 85 only applied where the court made an order under Sch B1 providing for the administrator's appointment f to cease to have effect and was not in point (see [15], [16], [18]–[21], below).

### Notes

For administration, see Supp to 7(3) *Halsbury's Laws* (1996 reissue), para 2146A.

g For the Insolvency Act 1986, Sch B1, paras 79, 83, 84, 85, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 1340, 1342, 1343.

### Cases referred to in judgment

*Norditrac (UK) Ltd (in admin)*, Re [2000] 1 All ER 369, [2000] 1 WLR 343.  
h *UCT (UK) Ltd (in admin)*, Re [2001] 2 All ER 186, [2001] 1 WLR 436.

### Case referred to in skeleton argument

*Designer Room Ltd*, Re [2004] EWHC 720 (Ch), [2004] 3 All ER 679.

### j Applications

Nicholas Edwards and Nicholas Dargan, the administrators of Ballast plc, Ballast Wiltshier Investments Ltd and Wiltshier Facilities Management Ltd applied for orders under paras 79, 85 and 98 of Sch B1 to the Insolvency Act 1986 with a view to taking advantage of the provisions contained in paras 83, 84 of Sch B1 or

alternatively for directions pursuant to para 63 of Sch B1 as to the appropriate manner to exit the administrations. The facts are set out in the judgment.

*Richard Fisher* (instructed by *Taylor Wessing*) for the administrators.

*Cur adv vult*

21 October 2004. The following judgment was delivered.

## BLACKBURN J.

### INTRODUCTION

[1] These are applications by the joint administrators of Ballast plc (Ballast), Ballast Wiltshier Investments Ltd (Investments) and Wiltshier Facilities Management Ltd (Management). They are the same persons in each case. They seek orders under paras 79, 85 and 98 of Sch B1 to the Insolvency Act 1986, with a view to taking advantage of the provisions contained in paras 83 and 84 of Sch B1, alternatively for directions pursuant to para 63 of Sch B1 'as to the appropriate manner in which to exit the administration'.

[2] All three companies entered administration under the new regime introduced by the Enterprise Act 2002 into Pt II of the 1986 Act in place of the existing provisions of that Part. The new regime became effective from 15 September 2003. The three companies entered administration on 15 October 2003. They did so in each case by order of Judge Norris QC (sitting as a judge of the High Court) upon the application of the directors of the company in question pursuant to para 12 of Sch B1.

[3] It is the wish of the joint administrators that Ballast and Investments move from administration to creditors' voluntary liquidation in accordance with the procedure available under para 83 of Sch B1 and that Management move from administration to dissolution in accordance with the procedure available under para 84 of Sch B1.

[4] In this judgment, references to paragraphs are to paragraphs of Sch B1 and references to sections are to sections of the 1986 Act.

[5] One of the defects of the original Pt II of the 1986 Act was (and, since the original Pt II continues to apply to administrations which began prior to 15 September 2003, remains) the absence of any statutory procedure, equivalent to what is available in the case of a company in administration proceeding to a compulsory liquidation, enabling a company to move straight from administration to a creditors' voluntary liquidation. There may be important reasons why such a move is desirable, for example, the need or wish to preserve as 'the onset of the insolvency' for the purposes of s 238 (transactions at an undervalue) or s 239 (preferences) the date when the company entered administration, or to ensure that the existence and amount of any preferential debts for the purpose of s 386 are ascertained as at the date that the company entered administration, rather than (in each example) the date when the company goes into voluntary liquidation. Under the old Pt II, procedures have been devised, some of them quite involved in nature, to overcome this omission in the statutory machinery so that creditors may have the benefit of a voluntary

a winding-up (which, on grounds of cost, creditors frequently prefer to the usually costlier compulsory winding-up) while not forfeiting the advantages (as set out in the examples above) that may accrue if, instead, the company moves straight from administration to a compulsory winding-up (see, for example, *Re Norditrack (UK) Ltd (in admin)* [2000] 1 All ER 369, [2000] 1 WLR 343 and *Re UCT (UK) Ltd (in admin)* [2001] 2 All ER 186, [2001] 1 WLR 436).

b [6] Paragraph 83 provides what the old Pt II of the 1986 Act lacks, namely a simple mechanism for moving straight from administration to a creditors' voluntary liquidation. Together with amendments to provisions elsewhere in the 1986 Act, this new procedure enables the advantages described earlier to be preserved (see, for example, s 240(3)(d), concerned with the meaning of 'onset of insolvency' for the purpose of establishing the 'relevant date' in connection with transactions at an undervalue and preferences, and s 387(3)(ba), concerned with the ascertainment of the 'relevant date' for the purpose of establishing the existence and amount of preferential debts).

c [7] So far as material, para 83 provides as follows:

d '(1) This paragraph applies in England and Wales where the administrator of a company thinks—(a) that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him, and (b) that a distribution will be made to unsecured creditors of the company (if there are any) ...

e (3) The administrator may send to the registrar of companies a notice that this paragraph applies.

(4) On receipt of a notice under sub paragraph (3) the registrar shall register it.

f (5) If an administrator sends a notice under sub paragraph (3) he shall as soon as is reasonably practicable—(a) file a copy of the notice with the court, and (b) send a copy of the notice to each creditor of whose claim and address he is aware.

g (6) On the registration of a notice under sub paragraph (3)—(a) the appointment of an administrator in respect of the company shall cease to have effect, and (b) the company shall be wound up as if a resolution for voluntary winding up under section 84 were passed on the day on which the notice is registered.

h (7) The liquidator for the purposes of the winding up shall be—(a) a person nominated by the creditors of the company in the prescribed manner and within the prescribed period, or (b) if no person is nominated under paragraph (a), the administrator.'

Paragraph 83(8) disapplies various provisions of the 1986 Act and modifies others so as, broadly, to adapt the provisions set out in the 1986 Act for placing a company in creditors' voluntary liquidation to the new method of bringing about a creditors' voluntary liquidation provided by the paragraph.

j [8] Paragraph 84 introduces a wholly new procedure which appears to some extent to mirror the early dissolution provisions contained in ss 202–203 (applicable to companies which are the subject of a compulsory winding-up order). In the circumstances set out in it, the paragraph enables a company in administration to move straight to a dissolution with a minimum of formality. The paragraph is as follows:

(1) If the administrator of a company thinks that the company has no property which might permit a distribution to its creditors, he shall send a notice to that effect to the registrar of companies. a

(2) The court may on the application of the administrator of a company disapply sub paragraph (1) in respect of the company.

(3) On receipt of a notice under sub paragraph (1) the registrar shall register it. b

(4) On the registration of a notice in respect of a company under sub paragraph (1) the appointment of an administrator of the company shall cease to have effect.

(5) If an administrator sends a notice under sub paragraph (1) he shall as soon as is reasonably practicable—(a) file a copy of the notice with the court, and (b) send a copy of the notice to each creditor of whose claim and address he is aware. c

(6) At the end of the period of three months beginning with the date of registration of a notice in respect of a company under sub paragraph (1) the company is deemed to be dissolved.

(7) On an application in respect of a company by the administrator or another interested person the court may—(a) extend the period specified in sub paragraph (6), (b) suspend that period, or (c) disapply sub paragraph (6). d

(8) Where an order is made under sub paragraph (7) in respect of a company the administrator shall as soon as is reasonably practicable notify the registrar of companies. e

(9) An administrator commits an offence if he fails without reasonable excuse to comply with sub paragraph (5).'

#### THE QUESTION

[9] The question raised by Mr Fisher, appearing on behalf of the joint administrators, is whether in the case of companies such as Ballast, Investments and Management which have entered administration pursuant to an administration order the new procedures contained in paras 83 and 84 are available without first obtaining an order of the court which provides for (1) the termination of the administrator's appointment and (2) the discharge of the administration order. He submitted that such an order is probably necessary and invited me to make orders accordingly. It was because I entertained a doubt about whether this was correct that I said that I would reflect on the matter. To enable me to do so, I extended for 14 days the term of office of the joint administrators in respect of each of the three companies. I did that under para 76(2). Had I not done so their appointments would have ceased by effluxion of time on Friday 15 October—the anniversary of their appointments—under para 76(1) and the ability to resort to paras 83 and 84 would have been lost. f

#### BALLAST AND INVESTMENTS: PARA 83

[10] The availability of the procedure under para 83 is not dependent upon the method of appointment of the administrator seeking to invoke it. It is not expressed to be available only to an administrator appointed under para 14 (by the holder of a qualified floating charge) or to an administrator appointed under para 22 (by the company itself or by its directors). Nor does it lay down any g



a particular procedural step to be taken when the administrator seeking to invoke it has been appointed by an administration order.

[11] The argument that, in the case of an administrator appointed by an administration order, if para 83 is to be invoked it is necessary that the court should first make an order providing for the appointment of the administrator to cease to have effect, turns on para 79, in particular para 79(3). That paragraph  
b reads:

‘(1) On the application of the administrator of a company the court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.

c (2) The administrator of a company shall make an application under this paragraph if—(a) he thinks the purpose of administration cannot be achieved in relation to the company, (b) he thinks the company should not have entered administration, or (c) a creditors’ meeting requires him to make an application under this paragraph.

d (3) The administrator of a company shall make an application under this paragraph if—(a) the administration is pursuant to an administration order, and (b) the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company.

e (4) On an application under this paragraph the court may—(a) adjourn the hearing conditionally or unconditionally; (b) dismiss the application; (c) make an interim order; (d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for).’

[12] The argument was as follows. Having concluded that the second limb of the objective set out in sub-para 3 (the provision concerned with the purpose of  
f administration, applicable generally to all administrations under the new regime) has been sufficiently achieved in that (inter alia) better realisations have been achieved than if Ballast and Investments had been wound up without first being in administration, the joint administrators wish to bring those two  
g administrations to an end and move directly in each case to a creditors’ voluntary liquidation. However, para 79(3) provides that an administrator who thinks (as the joint administrators think in respect of each of these two companies) that the purpose of administration has been sufficiently achieved in relation to the company shall make an application under the paragraph, ie for an order under  
h para 79(1) that his appointment as such administrator should cease to have effect from a specified time. Mr Fisher submitted that, being appointed by an order of the court, the joint administrators should therefore apply to the court for an order under that paragraph before filing a para 83 notice and that it is probably not open to them simply to file a para 83 notice.

[13] Mr Fisher also pointed to para 85. That paragraph is expressed, by  
j sub-para (1), to apply ‘where—(a) the court makes an order under this Schedule providing for the appointment of an administrator of a company to cease to have effect, and (b) the administrator was appointed by administration order’. In that event sub-para (2) provides that ‘The court shall discharge the administration order’. That paragraph, he submitted, makes clear that where an administrator is appointed by an administration order, the court must discharge the order. While therefore a notice filed under para 83 may have the effect that the

administrator's appointment ceases to have effect, there is nothing in that paragraph which leads to the discharge of the order. In order therefore to take advantage of the provisions of para 83, while observing the requirements of paras 79 and 85, the administrators seek, as Mr Fisher submitted that they are required to do, orders (in relation to both Ballast and Investments) (1) that pursuant to para 79, the appointment of the administrators ceases to have effect upon the registration of a notice in accordance with para 83 or such other date as specified by the court; and (2) that pursuant to para 85 the administration order shall be discharged upon the registration of the notice in accordance with para 83 or such other date as specified by the court.

[14] He also seeks an order that the administrators be discharged pursuant to para 98 upon their appointment ceasing to have effect. The discharge of the administrators from liability under para 98 is appropriate, said Mr Fisher, since, in contrast to administrators appointed under paras 14 and 22 (where the creditors can specify the time at which the administrator is discharged from liability), an administrator appointed by an administration order can only obtain his discharge at a time specified by the court (see para 98(2)).

[15] I am not persuaded that Mr Fisher's argument is correct. The purpose of para 79 is to empower the court, if the circumstances are as set out either in para 79(2) or in para 79(3), to make an order which will bring the administrator's appointment to an end (otherwise than on the date that it otherwise would). By contrast, under para 83 it is the registration of a notice sent by the administrator in accordance with sub-para (3) of that provision stating that the paragraph applies that brings the appointment to an end (see sub-para (6)(a)). (At the same time, service of the notice causes the company to be wound up voluntarily: see sub-para (6)(b).) The decision whether to send such a notice rests entirely with the administrator in that, by sub-para (3), he has a discretion whether to send the notice ('The administrator *may* send ...' (my emphasis)). He must therefore 'think' that the circumstances specified in sub-para (1) are present before he sends such a notice. Whether those circumstances are present is a matter for him, not the court. The consequence of serving the notice in accordance with this paragraph is to substitute one insolvency regime (a creditors' voluntary liquidation) in place of another (an administration) so that the one follows without interruption from the other. The effect is necessarily to bring the administration to an end. I see nothing in para 79 which requires that, where an administrator is resorting to para 83 to enable the company to move from administration to a creditors' voluntary liquidation, inter alia by providing for the administrator's appointment to cease to have effect, the court must also make an order under para 79(1) that the administrator's appointment is to come to an end. That seems to me to be an unnecessary duplication. Properly understood, para 79 provides a separate exit from administration from that provided (and, in my view, exclusively regulated) by para 83.

[16] Nor do I consider that para 85 compels a contrary conclusion. That paragraph only applies where the court makes an order under Sch B1 providing for the administrator's appointment to cease to have effect. Where para 83 is resorted to, the cessation of appointment is effected as a consequence of the registration of the notice sent by the administrator to the registrar of companies in accordance with para 83(3), not by force of any order of the court under para 79. In short, para 85 is not in point.

- a [17] Nor am I persuaded that para 98 is of any relevance. An administrator is not obliged to obtain his discharge from liability. It is a matter for him whether he seeks such an order. If, as administrators invariably do, he wants such an order and if (as here) he has been appointed by an administration order, he must apply to the court for that relief. But the fact that his discharge may conveniently be sought at the same time as he obtains an order terminating his appointment and
- b discharging the administration order is irrelevant to the question whether such an order is needed.

MANAGEMENT: PARA 84

- c [18] Like para 83, para 84 provides an exit from administration (so that the company moves directly to dissolution) without distinguishing between administrations begun out of court and those begun by order of the court. In contrast to para 83, however, para 84 obliges the administrators ('he shall send a notice') to have recourse to it if he 'thinks that the company has no property which might permit a distribution to its creditors'. Like para 83, para 84 makes
- d no mention of any need for the administrator to apply to the court for an order under para 79(1) where the requirements of para 79(3) are fulfilled. Mr Fisher nevertheless submitted, essentially for the same reasons as apply to the joint administrators' wish to have recourse (in the case of Ballast and Investments) to para 83, that it is appropriate that an order is made pursuant to para 79 and therefore that the joint administrators' appointment should cease to have effect
- e upon the registration of a notice in accordance with para 84 and further that pursuant to para 85 the administration order should be discharged upon the registration of such notice.

- [19] I cannot agree. As with para 83, the effect of para 84 (assuming that the circumstances exist for its application) is, on registration of a notice sent by the administrator under sub-para (1), to bring his appointment to an end (see
- f sub-para (4)). There is therefore no need to have recourse to para 79. The fact that there is nothing in para 84 which provides expressly for the discharge of the administration order (over and above the cessation of the administrator's appointment) is, in my view, as irrelevant to the proper operation of para 84 as it is to the proper operation of para 83. Paragraph 85 is likewise irrelevant. As with the operation of para 83, the operation of para 84 has the effect of discharging the
- g administration order, necessarily so since the result of para 84 is, by dissolving the company, to bring the company's very existence to an end.

- [20] Moreover, it might be thought that where, as para 84 presupposes, there is no property which might permit a distribution to creditors (by which I understand no property available at any time during the administration which
- h might permit a distribution to creditors, including, apparently, secured creditors) it would seem pointless if nevertheless the administrators must incur the cost of applying to the court for orders under paras 79 and 85.

RESULT

- j [21] In the circumstances, I am of the view that it is open to the joint administrators to have recourse to paras 83 and 84 without first applying to the court for orders under paras 79 and 85. Whether the circumstances are present which entitle the administrators to have recourse to paras 83 (in the case of Ballast and Investments) and 84 (in the case of Management) is for the administrators. The court is not asked for a declaration that those circumstances

are present. Be that as it may, having read the joint administrators' evidence, I am satisfied that they are and therefore that it is entirely appropriate that Ballast and Investments move straight from administration to a creditors' voluntary liquidation under para 83 and that Management moves straight from administration to dissolution under para 84. The evidence discloses that the creditors have been informed of the joint administrators' wish so to proceed; none has objected.

*Orders accordingly.*

Gareth Williams Barrister.



**Firstdale Ltd v Quinton**

[2004] EWHC 1926 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

COLMAN J

25 JUNE, 8 JULY, 5 AUGUST 2004

*Claim form – Service – Service on defendant's solicitors – Whether rules requiring claimant to serve claim form on solicitors instructed to accept service at time when potential claim brought by person later assigning debt from which claim arising to claimant – CPR 6.4, 6.5.*

The defendant was a self-employed stockbroker working pursuant to a contract with a firm, B&G, which was a subsidiary of the claimant. After his contract was terminated, B&G claimed that moneys were due from him under the contract.

The defendant resisted the claim. Before proceedings were issued, B&G went into compulsory liquidation. The liquidators appointed FW as solicitors. In correspondence between FW and the defendant's solicitors, the latter confirmed that they had instructions to accept service. After a considerable delay, FW wrote directly to the defendant enclosing 'by way of service' a deed of assignment by which B&G assigned to the claimant the debt allegedly due under the contract.

On the same day, the claimant instructed FW as its solicitors. It later instructed FW to serve a claim form on the defendant. FW did so by sending the claim form by first class post to the defendant's residential address. The defendant applied to set aside service. He contended, inter alia, that the effect of CPR 6.4<sup>a</sup> and 6.5<sup>b</sup> was that the claim form could only have been validly served on his solicitors at their

address and not on him personally. Rule 6.4 provided that '(1) a document to be served may be served personally, except as provided in paragraph (2). (2) Where a solicitor (a) is authorised to accept service on behalf of a party; and (b) has notified the party serving the document in writing that he is so authorised, a document must be served on the solicitor, unless personal service was required by an enactment, rule, practice direction ...' CPR 6.5 provided: '(3) Where a

party (a) does not give the business address of his solicitor as his address for service ... (b) ... he must give his residence or place of business as his address for service. (4) Any document to be served (a) by first class post; (b) by leaving it at the place of service; (c) through a document exchange; or (d) by fax or other means of electronic communication, must be sent or transmitted to or left at, the address for service given by the party to be served.'

**Held** – The scope of a solicitor's authority to accept service of a claim form was to be defined not only by reference to the claim which had already been indicated by the potential claimant, but also by reference to the identity and capacity of that claimant. An affirmative response to an inquiry whether a solicitor was

<sup>a</sup> CPR 6.4 provides, so far as material: 'Personal service (1) A document to be served may be served personally, except as provided in paragraph (2). (2) Where a solicitor—(a) is authorised to accept service on behalf of a party; and (b) has notified the party serving the document in writing that he is so authorised, a document must be served on the solicitor, unless personal service is required by an enactment, rule, practice direction or court order.'

<sup>b</sup> CPR 6.5, so far as material, is set out at [19], below

authorised to accept service of a particular claim for a debt by X was not ordinarily notification that he was also authorised to accept service of a claim brought by Y in relation to the same debt and certainly not if Y claimed not as creditor but as assignee. In the instant case, the party to whom the address for service was given was B&G through its liquidators, not the claimant. The notification to FW was therefore one confined to service of a claim form under which B&G through its liquidators were sole claimants. It followed that at the time when the claim form was served, neither the defendant nor his solicitors had given an address for service within rr 6.4 or 6.5. It therefore also followed that service of the claim form at the defendant's residential address had not rendered service defective. Accordingly, the application would be dismissed (see [24]–[29], below).

*Nangleman v Royal Free Hampstead NHS Trust* [2001] 3 All ER 793 considered.

## Notes

For address for service, see 37 *Halsbury's Laws* (4th edn reissue) para 320.

## Cases referred to in judgment

*Anderton v Chwyd CC* [2002] EWCA Civ 933, [2002] 3 All ER 813, [2002] 1 WLR 3174.

*Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.

*Harrison (W F) & Co Ltd v Burke* [1956] 2 All ER 169, [1956] 1 WLR 419, CA.

*Holt v Heatherfield Trust Ltd* [1942] 1 All ER 404, [1942] 2 KB 1.

*Kaukomarkkinat O/Y v Elbe Transport-Union GmbH, The Kelo* [1985] 2 Lloyd's Rep 85.

*Marchant v Morton, Down & Co* [1901] 2 KB 829.

*Nangleman v Royal Free Hampstead NHS Trust* [2001] EWCA Civ 127, [2001] 3 All ER 793, [2002] 1 WLR 1043.

*Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1968] 3 All ER 824, [1969] 1 QB 607, [1968] 3 WLR 1141, CA.

*Wilkey v BBC* [2002] EWCA Civ 1561, [2002] 4 All ER 1177, [2003] 1 WLR 1.

## Application

The defendant, Gerald Joseph Quinton, applied for an order that a claim form, issued by the claimant Firstdale Ltd, and served on him by sending it by first class post to his private residential address, had not been validly served, and/or for an order that the claim be struck out. The facts are set out in the judgment.

*Stephen Nathan QC* and *Victoria Windle* (instructed by *Sebastians*) for the defendant.

*Ian Clarke* (instructed by *Fox Williams*) for the claimant.

*Cur adv vult*

5 August 2004. The following judgment was delivered.

**COLMAN J.**

## INTRODUCTION

[1] This is an application by the defendant for an order that there has not been valid service of the claim form and/or that the claim has been struck out. There

a is an application by the claimant that pursuant to CPR 6.9(1) the court do dispense with service of the claim form. That application is made in case it be held that there has not been valid service of the claim form.

[2] These applications arise in the following circumstances.

b [3] Up to 15 December 1997 the defendant was a self-employed stockbroker working at Branston & Gothard Ltd (B&G). He was party to a contract for services dated 1 July 1997 under which he assumed a liability jointly with another stockbroker working there—a Mrs Mehta—for the default of any client which either he or she introduced to B&G. The latter company terminated the defendant's contract on 15 December 1997.

c [4] A claim was made against the defendant for £356,333 plus interest. It was said that these moneys were due from clients in default. The defendant contends that the defaulting clients were those of Mrs Mehta, that B&G were in breach of contractual warranties and representations made to him as to how they would allow her to conduct business with her clients and that the claims had arisen because B&G had wrongfully permitted the defaults to occur.

d [5] On 12 August 1998 B&G went into compulsory liquidation. No proceedings against the defendant had yet been started. PricewaterhouseCoopers (PwC) were appointed liquidators. They appointed Fox Williams (FW) to act as solicitors on behalf of the liquidators and B&G. The estimated deficiency was between £5.3m and £6.4m. B&G were a subsidiary of the claimant.

e [6] Following correspondence between FW on behalf of the liquidators and Sebastians on behalf of the defendant commencing in August 2000 and continuing to 1 March 2001, in the course of which the defendant rejected the claim, then put at a provisional balance of £258,308.15, FW by their letter of 1 March 2001 invited Sebastians to confirm that they were instructed to accept service of proceedings. On 27 March 2001 Sebastians replied in some detail, asking for documents and further information. Their letter concluded with these words:

g 'Nothing in your letter of 1 March convinces us that you have a sound case against our client. In fact, the reverse is true and our instructions are to continue to deny liability on behalf of our client. Any proceedings issued will be vigorously opposed. We confirm that we have instructions to accept service.'

h [7] Nothing then happened until 9 October 2001 when FW replied explaining the delay by reference to difficulties in locating certain documents. Further research had led the liquidators to include an additional £95,619.11 in the claim, producing a total of £356,333.52. The letter stated that 'we have been instructed to prepare proceedings' and thanked Sebastians for confirming that they were instructed to accept service.

j [8] On 21 February 2002 FW called for substantive comments in relation to the issue of the balance of £95,619.11 'in order that we can finalise proceedings'. After Sebastians had replied querying the date of the letter referred to as dated 19 October 2001, there was no further word from FW for 21 months. Then on 26 November 2003 FW wrote direct to the defendant, and not to Sebastians, enclosing 'by way of service' a deed of assignment dated 22 October 2003 whereby B&G assigned to the claimant a debt defined as the amount of £356,333.52 owed pursuant to the defendant's agreement with B&G.

[9] On the same day the claimant confirmed to FW instructions as its solicitors to send the executed deed of assignment to the defendant. FW then opened a

new client file and allocated a new client reference number. The solicitor in FW who had been handling the claim by the liquidators against the defendant left the firm in May 2002. After that John Greager of that firm took over charge of the matter. From the date of the deed the claim by the claimant was taken over by Sarah Pooley, a solicitor, employed by FW.

[10] On 1 December 2003 FW received instructions from the claimant to issue proceedings against the defendant. That was done on the same day.

[11] On 14 December 2003 the period of six years from the termination of the claimant's agreement with B&G expired.

[12] On 24 March 2004 the claimant instructed FW to serve the claim form on the defendant and this was done by sending it by first class post on 24 March. The validity for service of the claim form expired on 31 March 2004.

[13] On 8 April 2004 Sebastians, the defendant's solicitors, wrote to FW drawing their attention to the fact that the claim form ought to have been served on them, as the solicitors instructed to accept service and that the service was therefore invalid. By that time the validity for service of the claim form had expired.

#### THE DEFENDANT'S APPLICATIONS

[14] It has been submitted by Mr Stephen Nathan QC that the defendant is entitled to an order as identified in his original application on the following grounds. (1) The effect of CPR 6.5(4) is that the claim form could only validly be served on Sebastians at their address and could not validly be served on the defendant personally at his private address. (2) There was no valid notice of assignment because the notice incorrectly stated the date of the relevant assignment.

[15] By a draft amended application, for which amendment the defendant required permission and which was served only one clear day before the date fixed for the hearing of the original application, the defendant added the following party to the grounds relied upon. (3) The deed of assignment was not validly executed by the claimant as it purported to be. (4) The claim form did not comply with the requirement under CPR 16.2(1)(a) and CPR PD 16, para 2.1 that it 'must ... contain a concise statement of the nature of the claim'.

[16] These additional grounds were objected to by Mr Ian Clarke, on behalf of the claimant, particularly in view of its last-minute introduction into the application. As it happened, the length of time estimated for the hearing (two hours) which commenced on 25 June was seriously deficient, even for the defendant's original application and the claimant's application, and consequently the hearing had to be adjourned to 8 July. That gave enough time for the claimant to prepare its case on the additional grounds. Consequently, all grounds were carefully argued and permission to amend the application was given.

[17] The procedural basis for the defendant's application differs according to the ground in question.

[18] Grounds (1) and (4) go to 'failure to comply with a rule, practice direction or order' within CPR 3.4(2)(c) and grounds (2) and (3) go to r 3.4(2)(a)—'that the statement of case discloses no reasonable grounds for bringing or defending a claim'. Since grounds (1) and (4) go to the formal validity of the claim and its service, it is convenient to consider these grounds first. And since the claimant's application is designed to cure any such invalidity, that can be considered at the same time.



## FAILURE TO SERVE THE DEFENDANT AT HIS SOLICITOR'S ADDRESS

a [19] It provided in CPR 6.5 as follows:

(2) A party must give an address for service within the jurisdiction.

b (3) Where a party—(a) does not give the business address of his solicitor as his address for service; and (b) resides or carries on business within the jurisdiction, he must give his residence or place of business as his address for service.

(4) Any document to be served—(a) by first class post; (b) by leaving it at the place of service; (c) through a document exchange; or (d) by fax or by other means of electronic communication, must be sent or transmitted to, or left at, the address for service given by the party to be served.

c [20] In *Nanglegan v Royal Free Hampstead NHS Trust* [2001] EWCA Civ 127, [2001] 3 All ER 793, [2002] 1 WLR 1043 it was held by the Court of Appeal that once a party has given an address for service, be it his residential address, the address of his place of business or the business address of his solicitor, service at any address other than the one given will be invalid. In that case, it was held that there had been no valid service on the defendant NHS trust by sending the claim form to the chief executive of a hospital when the trust's insurer had already notified the claimant's solicitor that the claim should be served on a particular firm of solicitors.

d [21] It is submitted by Mr Nathan for the defendant that once FW had been informed by Sebastians on 1 March 2001 that they were instructed to accept service of the liquidator's claim, valid service of the claim form could be effected only at Sebastians' business address and, accordingly, valid service could not be effected by sending the claim form to the defendant's private address.

e [22] No doubt, if the claim identified in the claim form were brought by B&G through its liquidators, this submission would be impregnable, subject always to the possible application of r 6.9. However, in this case, between the time when Sebastians had informed FW that they were instructed to accept service and the time when service was effected, the assignment to the claimant had taken place and the claim in question, although still founded on the allegation that the defendant was liable in respect of clients' defaults under the agreement between him and B&G, was no longer brought by B&G through its liquidators but by the claimant, its parent company, as statutory assignee.

f [23] Accordingly, the question arises whether CPR 6.4 and 6.5 have the effect that where a proposed defendant's solicitor has notified an anticipated claimant's solicitor that he is authorised to accept service of a document on behalf of the proposed defendant, and that document is a claim form, that solicitor is mandatorily obliged to serve on the defendant's solicitor a claim form in respect of a claim by another client as assignee of the original claim.

g [24] The words of rr 6.4 and 6.5 are not drafted by reference exclusively to a claim form or, indeed to a claim, but to a document. That document need not therefore be a claim form. It is, however, clearly intended that 'the document' the subject of the solicitor's notification under r 6.4(2) and the 'address for service' under r 6.5(2) must have been in some way defined in advance by reference to its essential characteristics. Thus, an indication by a potential defendant's solicitor that he is authorised to accept service of proceedings which have already been the subject of discussion or which raise a claim which has already been put forward cannot ordinarily be taken to have indicated his authority to accept service of a document relating to different proceedings or to



a 3174. In particular, the claim was brought to the defendant's attention by means of the claim sent directly to his residential address within the period of validity for service. The making of an order under r 6.9 would not circumvent the rules about the retrospective granting of extensions of time made necessary by the claimant's failure to effect valid service within time.

b [32] It is clear from the recent authorities on the utilisation of r 6.9, namely *Anderton's* case and *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441 that r 6.9 can be applied with retrospective effect in exceptional circumstances even where the making of such an order has the same effect as if an order had been made extending time for service of the claim form or providing for an alternative method of service. What facts are necessary to render the circumstances exceptional cannot be pre-defined, but in general the starting point will normally be that within the time for service the defendant has been as fully informed of the claim against him as if service of the claim form had been properly effected. The provision of effective service would therefore not have provided the defendant with anything of substance he did not already have except a formal document.

d [33] If, as held by the Court of Appeal in *Nangle v Royal Free Hampstead NHS Trust* [2001] 3 All ER 793, r 6.8 cannot be used retrospectively to circumvent the mandatory service requirements of r 6.5(4) by providing for the ineffective service to be treated as effective by virtue of an order for service by alternative means actually used, it is hard to see how in principle r 6.9 can be deployed retrospectively to circumvent those mandatory service requirements by an order that service be dispensed with. However, in *Wilkey v BBC* [2002] EWCA Civ 1561, [2002] 4 All ER 1177, [2003] 1 WLR 1 the Court of Appeal indicated (at [18], [19] per Simon Brown LJ) that in post-*Anderton* cases, of which this is one, 'the dispensing power should ... ordinarily not be exercised in the claimant's favour'. It is to be observed that it was exercised in *Wilkey's* case in circumstances in which the claim had been received by the defendant within the time for service specified by the rules, but had not been received in the correct form. He was therefore provided with everything that he ought to have had in time except the original form. Simon Brown LJ stated (at [26]) that if the same facts occurred in future in a post-*Anderton* case, a stricter approach should be adopted and the claimant could fail to obtain dispensation of service.

g [34] The facts in the present case are that, the claim form was served on the defendant personally and thereby provided him personally with all the information as to the claim that he would have had if the solicitor had sent it on to him following service on the solicitor. However, the method of service mandatorily required was that the solicitor should first receive it and thereby be given notice of the claim form before the defendant, as well as within the period for service. Dispensation with service by that method would not retrospectively lead to the solicitor being first in receipt of the claim form, as the defendant required him to be. Given that that feature of the service being ineffective and having regard to the observations in *Wilkey's* case, as to the strictness with which the service requirements should now be enforced, I would have refused the application by the claimant to dispense with service in this case.

h WAS THE CLAIM FORM DEFECTIVE?

j [35] Under CPR 16.2(1)(a) the claim form must 'contain a concise statement of the nature of the claim' and under r 16.2(1)(d) it must 'contain such other matters as may be set out in a practice direction'. The claim form did not include

particulars of claim but, in accordance with r 16.2(2) stated that such particulars would follow. a

[36] The claim form stated under the heading 'Brief details of claim':

'(1) Damages or an assessment of damages for breach of contract in the sum of not less than £356,333.52.

(2) Interest pursuant to s 35A of the Supreme Court Act 1981, in such amount or at such other rate as the court deems just. b

(3) Costs.'

[37] It was signed against 'claimant's solicitor' with the name of the claimant's firm, FW, but not by John Greager, the member of that firm dealing with the Greager case, whose name was printed in the space for claimant's or claimant's solicitor's address. c

[38] It is submitted on behalf of the defendant that this claim form is seriously defective in the following respects. (i) It failed to identify the contract said to have been broken by date or parties. (ii) It failed to identify the claimant as assignee of B&G's rights or to give the date of the assignment or state that notice of that assignment had been given to the defendant. (iii) It was not signed by the claimant's solicitor personally. Mr Nathan also raised the issue as to whether the claim form properly stated the claimant's place of business by reference to 'c/o Martineau Johnson'. That point was raised for the first time in the course of the hearing and could not be dealt with by the defendant's counsel without further instructions. It should have been raised in advance upon service of the application but was not. That point could not be fairly dealt with and was disallowed. d

[39] As to (i) and (ii) it is accepted quite properly by Mr Clarke on behalf of the claimant that the claim form was deficient in those respects relied on by the defendant. However, Mr Clarke submits that these defects are not such as to render the claim form a nullity unless the court so orders. e

[40] I interpose that CPR 3.10 provides as follows: f

'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.' g

[41] The service of the claim form was preceded by the following relevant events. (i) On 9 October 2001 FW, then acting for the liquidators, wrote informing Sebastians that B&G's claim under the contract of 1 July 1997 was in the amount of £356,333.52. (ii) On 26 November 2003 FW sent direct to the defendant the deed of assignment from B&G in liquidation to the claimant. The deed stated that B&G assigned to the claimant 'the Debt' which was defined as— h

'the Amount owed pursuant to the Account Executive Agreement between Branston & Gothard Limited (in Liquidation) and Gerald Joseph Quinton dated 1 July 1997 in the sum of £356,333.52.' j

It also stated:

'3.1 By an order of the Court dated 12 August 1998 it was ordered that the Vendor be wound up under The Insolvency Act 1986, and by a winding up petition dated 17 April 1998 the Liquidators be appointed as liquidators in respect of the winding up.'



a 3.2 The Assignor has agreed with the Assignee for the absolute assignment to it of the Debt which assignment is made pursuant to section 136(1) of the Law of Property Act 1925.'

[42] The claim form was issued four days later and was served on 26 March 2004.

b [43] Eventually, on 30 June 2004, particulars of claim were served.

[44] The claim was put in damages and alternatively for £356,333.52 in debt.

c [45] Accordingly, at the moment of service of the claim form the defendant must at once have appreciated that here was a claim brought by the claimant as assignee under the deed of assignment of the amount alleged to be due from the defendant under the 1 July 1997 agreement. In other words, he knew everything that ought to have been included in the brief description of the claim in the claim form.

d [46] If the court is to strike out the claim form on the grounds of defect by omission of such descriptive detail it will be bringing to an end proceedings on the grounds of formal defects in the form which have not in any way been prejudicial to the defendant's understanding of the nature of the proceedings started against him. In these circumstances the striking out of the claim form on these grounds would in my judgment be an excessively strict response by the court in circumstances where nothing in the overriding objective calls for such a draconian sanction.

e [47] The claim form should have been signed by the solicitor personally in charge of the claim. However, his name was clearly printed underneath the name of the firm and he had therefore in effect put his name to the proceedings. There is here no real prejudice to the defendant and there is certainly nothing so serious as to justify striking out the claim.

f [48] Mr Nathan, on behalf of the defendant, also argued that the claim form was defective in another respect. What was assigned by the deed of assignment was a debt said to be due from the defendant to B&G, yet the claimant identified a claim for 'damages' in the claim form. In the draft particulars of claim exhibited to the first witness statement of Sarah Pooley of the claimant's solicitors the claim is put exclusively in debt. In the particulars of claim actually served on 30 June 2004 after the first day of the hearing of these applications, the claim is put in damages for breach of contract and alternatively in debt. It is argued that in as much as the claim form refers only to a claim for damages and the assignment is of a debt, the claim form is further defective inasmuch as it did not accurately describe the claim.

g [49] This was not a ground relied on in the application and it should not have been raised at the hearing. However, as in my judgment it has no substance, the following can be said.

h [50] The question whether, having regard to the terms of the assignment the claimant has title to sue as assignee of B&G's claim against the defendant is one which goes to the substance of the claim and not to whether the claim form was defective. The assignment was clearly of the right to sue the defendant on the agreement for the amount of relevant client defaults. That is completely obvious from the definition of 'the Debt'. Whether that claim would be a claim in debt or a claim for unliquidated damages for breach of contract is a question of law. The reference to the '[a]mount owed' under the agreement and its express quantification as £356,333.52 does not lead to the conclusion that if the claim under the contract is one for unliquidated damages quantified in that sum,

nothing has been assigned. It simply means that the parties have misdescribed as a debt the cause of action covered by the deed. As it happens, this claim was, when correctly analysed, one for unliquidated damages, but that does not invalidate the deed as a vehicle which effectively transferred such claim to the claimant. Similarly, the claim form reflected the substance of the assignment by referring to 'damages for breach of contract'.

[51] There is thus no defect in this respect in relation to the claim form. If the defendant seeks to challenge the efficacy of the assignment of a claim for damages under the agreement it can raise that point at the trial. Equally, if it wishes to challenge the inclusion in the particulars of claim of a claim in debt, because no such claim has been described in the claim form and any such claim was time-barred on 30 April 2004, it can do so by applying to strike out the relevant passage in the particulars of claim. What is not open to it is to run these points in the course of the present applications.

#### THE ASSIGNMENT: THE DATE

[52] It is argued on behalf of the defendant that there was no valid notice of assignment due to the fact that when notice was given this was by means of the sending of a copy of the deed of assignment, with a backsheet showing the words 'DATED 22 OCTOBER 2003' and further down the page in small print the words 'Version date: 23 Oct 03'.

[53] No other date appeared on the assignment. It included by cl 5:

'The signature or sealing of this document by or on behalf of a party shall constitute an authority to its solicitor to date it and delivery [sic] it as a deed on behalf of that party.'

And ended with the words: 'IN WITNESS of which this document has been signed and sealed as a deed and delivered the date and year first before written.'

[54] The appearance of two dates is explained by Ms Pooley of FW as follows.

[55] The deed was first signed by Mr Waterhouse, the liquidator of B&G, and witnessed on 22 October. The deed was then sent to the claimant's offices where it was signed by Mr Silcock, a director of the claimant assignee, and witnessed on the same day. It was then sent to FW who received it on 23 October. The date at the top of the backsheet was then inserted by Ms Pooley as 22 October, that being the date by which both Mr Waterhouse and Mr Silcock had executed it. It was of course printed by computer and the computer automatically, but completely superfluously, printed out 'version date 23 October' on the backsheet because that happened to be the date on which the backsheet was printed off in its final form. Ms Pooley ought to have caused this to be deleted but failed to do so.

[56] It is submitted that the effect of cl 5 was that once both Mr Waterhouse and Mr Silcock had signed, FW had authority to date it and deliver it as a deed on behalf of that party. That was what Ms Pooley did.

[57] Mr Nathan argues that under s 36A of the Companies Act 1985 the claimant never executed the deed because only one director signed it and not either two directors or one director and the secretary. That section provides:

(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by the company.

(2) A document is executed by a company by the affixing of its common seal.

a (3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

b (5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed ...'

c [58] Therefore cl 5 was never engaged and Ms Pooley never had authority to date it or deliver it on behalf of the claimant. It was therefore not validly executed as a deed. Further, Ms Pooley did not date the document that had been signed, but another document—the one bearing the two dates. Indeed, FW did not have authority to act for the claimant until 6 November 2003. Therefore, the notice given to the defendant on 26 November 2003 was not a valid notice of a valid assignment. The document in question had not been validly executed as a deed  
d and even if it were valid it bore two dates so that the defendant could not ascertain on which date the assignment had taken place.

[59] The defendant's argument proceeds on the basis that under s 136 of the Law of Property Act 1925, valid notice of an assignment can only be effected if the date of the assignment is stated in the notice. This is wrong as a matter of law:  
e see *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1968] 3 All ER 824, [1969] 1 QB 607. If the notice of assignment describes the assignment by reference to a wrong date, there is authority that the notice is invalid because it has described a non-existent document: see *W F Harrison & Co Ltd v Burke* [1956] 2 All ER 169, [1956] 1 WLR 419 as explained in the *Van Lynn Developments* case. Where a copy of the written assignment is sent to the debtor there is no question  
f of misdescription. That is what happened here. The deed was sent to Mr Quinton. That was valid notice of any assignment effected by it, however many dates appeared on its face.

[60] The notice of assignment was therefore valid or at least strongly arguably valid. Whether FW were formally engaged as the solicitors of the claimant at the  
g relevant time is of no relevance. They were clearly authorised to send the notice of assignment to the defendant.

#### DEED OF ASSIGNMENT: INVALIDITY

[61] It is submitted that because the deed which was agreed by the liquidator  
h and the claimant to be the vehicle for the assignment was not validly executed by the claimant and not therefore validly dated, it was consequently incapable of effecting a valid assignment so as provide the claimant with title to sue.

[62] It is reasonably clear that there was a failure by the claimant company to  
j comply with s 36A in as much as the deed of assignment was not executed by fixing the common seal of the company to the document or by means of signature by two directors or by one director and the secretary. However, that would go no further than invalidating the execution of the document as a deed by the assignee. It would not, however, render the signature of the liquidator on behalf of B&G ineffective. The result would be a document signed by the liquidator effecting an assignment to the claimant of the chose in action defined by the word 'debt' in the document. That would amount to an 'absolute assignment by writing under the hand of the assignor' of the right of action in

question within s 136(1) of the 1925 Act. It is unnecessary for this to be by way of deed, firstly because any signed writing will be enough (see *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832 and *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH, The Kelo* [1985] 2 Lloyd's Rep 85 at 89) and secondly, because consideration is not required to support a statutory assignment and lack of consideration therefore does not need to be made good by deed: see *Holt v Heatherfield Trust Ltd* [1942] 1 All ER 404 at 407–408, [1942] 2 KB 1 at 5.

[63] Accordingly, the defendant's argument that the claimant has no realistic prospect of establishing that it has title to sue as assignee or that there has been a valid assignment must be rejected. Indeed, on the materials before this court, it is very probable that the assignment was a valid statutory assignment of the right of indemnity under the agreement of 1 July 1997 and that the claimant therefore has title to sue the defendant.

[64] Accordingly, there is no basis for striking out the claim form and the defendant's applications are therefore refused. The claimant's application does not arise.

*Applications dismissed.*

James Wilson Barrister (NZ).



a **Hilton v Barker Booth and Eastwood  
(a firm)**  
[2005] UKHL 8

b HOUSE OF LORDS

LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE,  
LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

15 DECEMBER 2004, 3 FEBRUARY 2005

c *Solicitor – Duty – Conflict of interest – Acting for both parties in transaction – Liability of solicitor when assuming irreconcilable duties to different clients.*

The defendant firm of solicitors acted for B in criminal proceedings which resulted in his imprisonment for offences of participating in the management of a company while an undischarged bankrupt, fraudulent trading and obtaining credit while an undischarged bankrupt. A few months after his release, B contacted the claimant, a small-scale property developer, with a proposal for a development. The developer had never previously met B and was unaware of his convictions. Subsequently, several meetings took place at the firm's offices between the developer, B and a partner in the firm. The partner knew of B's bankruptcy and his prison sentence, but the developer remained ignorant of them. The developer eventually agreed to buy certain land that had been found by B, develop it by the erection of number of flats and then sell the developed property to B. Unbeknown to the developer, B agreed to sell on the flats to a sub-purchaser. The three contracts were exchanged on the same day with the firm acting for both the developer and B. The developer required a deposit from B which, again unbeknown to the developer, was advanced to B by the firm. B failed to complete, and the transaction proved disastrous to the developer who subsequently brought proceedings against the firm for damages for breach of contract. At trial, the judge concluded that the developer would have had nothing to do with the transaction if he had been informed of B's antecedents; that the firm had been in breach of its professional duty in acting for both B and the developer; that the firm could not have informed the developer of B's bankruptcy and convictions without breaching its professional duty to B; that the firm's breach of duty to the developer lay in continuing to act, not in failing to pass on the information; that the developer was therefore entitled to be placed in the position he would have been in if he had instructed an independent solicitor; that the claim had not been advanced on the basis that such a solicitor would have been aware of B's convictions or would have advised the developer to have a credit report; and that accordingly the firm's breach of duty had caused no loss to the developer. On that basis, the judge dismissed the claim. His decision was affirmed by the Court of Appeal which held that the contract between the developer and the firm contained an implied term excusing the firm from disclosing to the developer information that they were legally obliged to someone else to treat as confidential. On the developer's appeal to the House of Lords, their Lordships considered the position of a solicitor who had assumed irreconcilable duties to different clients and whether the firm had, on the facts, placed itself in such a position.

**Held** – If a solicitor put himself in a position of having two irreconcilable duties, it was his own fault. If he had a personal financial interest which was in conflict with his duty, he was even more obviously at fault. As a general rule, a solicitor who had conflicting duties to two clients could not prefer one to the other. He therefore had to perform both as best he could. That might involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. In any case, however, the fact that he had chosen to put himself in an impossible position did not exonerate him from liability. In the instant case, the firm was in the position, through its own fault, of having two irreconcilable duties, to B and the developer, and also of having a personal interest because of the undisclosed loan, which was likely to be recoverable only if B did well in his transaction with the developer. If, at an early stage, the firm had told the developer that it could not act for him and that he should go to other solicitors, it would have extricated itself from its dilemma. In the event, however, the firm had continued to act for both clients and it was inevitable that it would be in breach of the contractual duties it owed to one or the other. The unfortunate victim turned out to be the developer. The suggested implied term plainly did not satisfy any of the well-known tests for implied terms. It would have amounted to the developer agreeing that, because his solicitors had failed in their duty to tell him to take separate advice, and had instead proceeded to act for him as well as B, and (unknown to the developer) in a matter in which they had a personal financial interest, their duty to the developer had in some way to be curtailed in order to accommodate their first breach of duty. The notion that one breach of duty by the firm (failure to tell the developer that it could not act for him and that he should seek independent advice) should exonerate the firm in respect of a subsequent and more serious breach of duty (failure to disclose to the developer facts which would have saved him from ruin) seemed contrary to common sense and justice. It was also contrary to principles established by authority. Accordingly, the firm had no answer to the developer's claim for damages for breach of contract, and the appeal would therefore be allowed (see [1]–[3], [6], [8], [9], [37], [38], [41], [44], [47], [48], below).

*Moody v Cox* [1916–17] All ER Rep 548 applied.

## Notes

For solicitor acting for opposing interests, see 44(1) *Halsbury's Laws* (4th edn reissue) para 150.

## Cases referred to in opinions

*Bristol and West Building Society v Mothew* (t/a *Stapley & Co*) [1996] 4 All ER 698, [1998] Ch 1, [1997] 2 WLR 436, CA.

*Clark Boyce v Mouat* [1993] 4 All ER 268, [1994] 1 AC 428, [1993] 3 WLR 1021, PC.

*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, NZ CA.

*Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Aus HC.

*Kelly v Cooper* [1994] 1 BCLC 395, [1993] AC 205, [1992] 3 WLR 936, PC.

*Moody v Cox* [1917] 2 Ch 71, [1916–17] All ER Rep 548, CA.

*Mortgage Express Ltd v Bowerman and Partners (a firm)* [1996] 2 All ER 836, CA.

## Cases referred to in list of authorities

*Ablitt v Mills and Reeve* (1995) *Times*, 25 October.

*Akasus Enterprise Ltd v Farmar & Shirreff (a firm)* [2003] EWHC 1275 (Ch), [2003] All ER (D) 49 (Jun).

- a** *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.
- Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, [1982] QB 84, [1981] 3 WLR 565, CA.
- Awwad v Geraghty & Co (a firm)* [2000] 1 All ER 608, [2001] QB 570, [2000] 3 WLR 1041, CA.
- b** *Birmingham Midshires Services Ltd (formerly HYPO-Mortgage Services Ltd) v David PARRY & Co (a firm)* [1997] CA Transcript 1762, [1997] NPC 153, CA.
- Bolkiah v KMPG (a firm)* [1999] 1 All ER 517, [1999] 2 AC 222, [1999] 2 WLR 215, HL.
- Boyce v Rendells* (1983) 268 EG 268, CA.
- Brickenden v London Loan and Savings Co* [1934] 3 DLR 465, PC.
- c** *Bristol and West Building Society v Baden Barnes Groves & Co (a firm)* [2000] Lloyd's Rep PN 788.
- Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801.
- British American Tobacco Australia Services Ltd v Blanch* (20 February 2004, unreported), NSW SC.
- d** *Callachor and Gillroy (t/a Callachor Gillroy Solicitors) v Black* (27 November 2000, unreported), NSW SC (CA).
- Coldman v Hill* [1919] 1 KB 443, [1918–19] All ER Rep 434, CA.
- Credit Lyonnais SA v Russell Jones and Walker* [2002] EWHC 1310, [2003] Lloyd's Rep PN 7.
- e** *Darlington Building Society Abbey National plc v O'Rourke James Scourfield & McCarthy* [1999] Lloyd's Rep PN 33, CA.
- Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119, [1969] 2 QB 158, [1969] 2 WLR 673, CA.
- English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232.
- f** *Halewood International Ltd v Addleshaw Booth & Co* [2000] Lloyd's Rep PN 298.
- Halifax Mortgage Services Ltd v Stepsky* [1996] 2 All ER 277, [1996] Ch 207, [1996] 2 WLR 230, CA.
- Heywood v Wellers* [1976] 1 All ER 300, [1976] QB 446, [1976] 2 WLR 101, CA.
- Hines v Willans* [1997] CA Transcript 298.
- g** *Joyce v Merton, Sutton and Wandsworth Health Authority* [1996] PIQR P121, CA.
- Kitchen v Royal Air Forces Association* [1958] 2 All ER 241, [1958] 1 WLR 563, CA.
- Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, NSW CA.
- Livingstone v Rawyards Coal Co* (1880) 5 App Cas 24, HL.
- Maes Finance Ltd v Sharp & Partners* (1999) 69 Con LR 46.
- h** *Mahoney v Purnell and ors (Baldwin and anor, third parties)* [1996] 3 All ER 61.
- Mannesmann AG v Goldman Sachs International* (18 November 1999, unreported).
- Marsh & McLennan Companies UK Ltd v Pensions Ombudsman* [2001] IRLR 505.
- Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1978] 3 All ER 571, [1979] Ch 384, [1978] 3 WLR 167.
- j** *National Home Loans Corp plc v Giffen Couch & Archer* [1997] 3 All ER 808, [1998] 1 WLR 207, CA.
- National Westminster Bank plc v Bonas* [2003] EWHC 1821 (Ch).
- Nationwide Anglia Building Society v Lewis* [1998] 3 All ER 143, [1998] Ch 482, [1998] 2 WLR 915.
- Nationwide Building Society v Balmer Radmore (a firm)* [1999] Lloyd's Rep PN 241.
- Nocton v Lord Ashburton* [1914] AC 932, [1914–15] All ER Rep 45, HL.

*Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Bros (a firm)* [2003]

EWCA Civ 215, [2004] All ER (D) 458 (Feb), (2003) Times, 24 March.

*North & South Trust Co v Berkeley* [1971] 1 All ER 980, [1971] 1 WLR 470.

*O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204, NSW SC (CA).

*Omega Trust Co Ltd v Wright Son & Pepper (No 2)* [1998] PNLR 337.

*Pittalis v Grant* [1989] 2 All ER 622, [1989] QB 605, [1989] 3 WLR 139, CA.

*Rextraw v Johnson* [2003] NSWCA 87.

*Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66, [1959] AC 324, [1958] 3 WLR 404, HL.

*Spector v Ageda* [1971] 3 All ER 417, [1973] Ch 30, [1971] 3 WLR 498.

*Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354.

*Stewart v Canadian Broadcasting Commission* (1997) 150 DLR (4d) 24, Ont Ct (Gen).

*Supasave Retail Ltd v Coward Chance (a firm), David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] 1 All ER 668, [1991] Ch 259, [1990] 3 WLR 1278.

*Swain v Law Society* [1982] 2 All ER 827, [1983] 1 AC 598, [1982] 3 WLR 261.

*Swindle v Harrison* [1997] 4 All ER 707, CA.

*Target Holdings Ltd v Redferns* [1995] 3 All ER 785, [1996] AC 421, [1995] 3 WLR 352, HL.

*Tyrrell v Bank of London* (1862) 10 HL Cas 26, 11 ER 934.

*White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187.

## Appeal

The claimant, Ian Hilton, appealed with permission of the Appeal Committee of the House of Lords given on 17 June 2003 from the order of the Court of Appeal (Sir Andrew Morritt V-C, Judge and Jonathan Parker LJ) on 22 May 2002 ([2002] EWCA Civ 723, [2002] Lloyds Rep PN 500) dismissing his appeal from the order of Judge Maddocks, sitting as a judge of the High Court in Manchester on 28 September 2001, dismissing Mr Hilton's proceedings against the defendant firm of solicitors, Barker Booth and Eastwood (BBE), for damages for breach of duty. The facts are set out in the opinion of Lord Walker of Gestingthorpe.

*Timothy Dutton QC and Chloe Carpenter* (instructed by *John Budd & Co*, Blackpool) for Mr Hilton.

*Christopher Gibson QC and Ian Wood* (instructed by *James Chapman & Co*, Manchester) for BBE.

Their Lordships took time for consideration.

3 February 2005. The following opinions were delivered.

## LORD HOFFMANN.

[1] My Lords, for the reasons given in the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe I too would allow this appeal and make the order proposed.

## LORD HOPE OF CRAIGHEAD.

[2] My Lords, for the reasons given in the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe, which I have had the advantage of reading in draft, I too would allow this appeal and make the order which has been proposed by Lord Walker.



**LORD SCOTT OF FOSCOTE.**

[3] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Walker of Gestingthorpe and am in full agreement with the reasons he has given for allowing this appeal. I wish particularly to associate myself with my noble and learned friend's remarks at [10] and [47], below. Since, however, your Lordships are disagreeing both with the trial judge and a unanimous Court of Appeal ([2002] EWCA Civ 723, [2002] Lloyd's Rep PN 500), I want to add a few words of my own.

[4] The issue in this case is determined, in my opinion, by the principles expressed in *Moody v Cox* [1917] 2 Ch 71, [1916–17] All ER Rep 548. Lord Walker has cited the relevant passage from the judgment of Lord Cozens-Hardy MR. I would add to that citation a passage from the judgment of Scrutton LJ ([1917] 2 Ch 71 at 91, [1916–17] All ER Rep 548 at 558). Scrutton LJ referred to evidence given by the defendant Cox to the effect that he, Cox, knew that the price the client, Moody, was paying for the cottages was a good deal more than the value that had been placed on the cottages for probate purposes and that he, Cox, had not told the client the amount of the probate valuation. Scrutton LJ then continued:

'A man who says that admits in the plainest terms that he is not fulfilling the duty which lies upon him as a solicitor acting for a client. But it is said that he could not disclose that information consistently with his duty to his other clients, the cestuis que trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them.'

[5] The reasoning in *Moody v Cox* did not depend on the circumstance that actual misrepresentations might have been made by the solicitors to their client. It depended on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose. The fact that the disclosure of the information would, or might, have placed the solicitors in breach of duties they owed to others did not relieve them of the contractual duties they had undertaken or of the legal consequences of their breach of those contractual duties.

[6] The Court of Appeal in the present case recognised, I think, that in general it could be no answer to a claim for damages for breach of a contractual obligation that performance of the obligation would have constituted a breach of a contractual obligation owed to someone else. Hence the attempt by Sir Andrew Morritt V-C to identify an implied term in the contract between the appellant and his solicitors under which the solicitors would be excused from disclosing to the appellant information that they were legally obliged to someone else to treat as confidential (see [2002] Lloyd's Rep PN 500 at [32], [33] per Sir

Andrew Morritt V-C). I agree with Lord Walker that the proposed implied term cannot be justified by any of the various tests for the implication of terms into a contract. If, when instructing the respondent firm to act for him, the proposed implied term had been put to the appellant, it is inconceivable that he would have responded 'Yes, of course', or with words to that effect. He would have asked what sort of information his solicitors were talking about and to whom the duty of confidentiality was owed. He would surely have asked for guidance as to whether his assent to the proposed term would be prejudicial to his interests. The implied term route as a way of relieving the respondent solicitors of contractual obligations that they would otherwise have owed the appellant seems to me to be an impossible one. a  
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[7] In any event, the description of the information about Mr Bromage that ought to have been disclosed to the appellant as 'confidential' seems to me a red herring. I doubt whether a fact that is a matter of public record, such as a bankruptcy or a criminal conviction, can justify such a description. The reason why it would have been a breach of the solicitors' duty to Mr Bromage to inform the appellant of Mr Bromage's bankruptcy and criminal conviction was not because the information was 'confidential' but because it was their duty as Mr Bromage's solicitors to do their best to further Mr Bromage's interests in the transaction in respect of which Mr Bromage had instructed them. To have disclosed those facts to the appellant would surely have peremptorily frustrated the proposed transaction. It would, therefore, have been a breach of their duty to Mr Bromage to have done so. c  
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[8] So the conclusion seems to me inescapable that the solicitors had put themselves in a position in which they owed to their two clients, Mr Bromage on the one hand and the appellant on the other hand, contractual duties that were inconsistent with one another. If, at an early stage, they had told the appellant that they could not act for him and that he should go to other solicitors, they would have extricated themselves from their dilemma. In the event, however, they continued to act for both clients and it was inevitable that they would be in breach of the contractual duties they owed to one or the other. The unfortunate victim turned out to be the appellant and they have no answer, in my opinion, to his claim against them for damages for breach of contract. e  
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[9] So I would allow this appeal and make the order that Lord Walker has proposed. g

#### LORD WALKER OF GESTINGTHORPE.

[10] My Lords, the facts of this case need to be set out in some detail. The courts below do not seem to have found them particularly shocking. I have to say that I do. It adds to my dismay that if (as I would) your Lordships allow this appeal, it will still not achieve finality in the appellant's efforts to obtain redress for the wrong which was done to him nearly 15 years ago. h

#### THE FACTS

[11] The appellant Mr Ian Hilton started work in 1972, at the age of 17, as an apprentice bricklayer. He became an experienced sub-contractor in the house-building industry. In 1978 he became a client of the respondent, Barker Booth and Eastwood (BBE), a firm of solicitors practising in Blackpool. In the mid-1980s Mr Hilton began to trade as a developer in a small way of business, buying small sites in or around Blackpool. He traded in partnership with his wife, but he was the only one who was in any way active in the business. In 1988 the j

a partnership made a profit of over £100,000 from developing and selling two sites. In the course of that transaction he called on his solicitor, Ms Helen Lawson of BBE, and was introduced to her partner Mr Kevin Gorman. At that time Mr Gorman ranked fourth, and Ms Lawson fifth, out of the six partners in the firm.

b [12] In 1989 Mr Hilton separated from his wife. At that time they owned two undeveloped sites, one at Falmouth Road, Blackpool (acquired in 1985) and another larger site at Watson Road, Blackpool (acquired in 1988). The Falmouth Road site was developed by the erection of one house and was transferred into the sole name of Mrs Hilton. The Watson Road site was a larger area suitable for the erection of several flats. In 1990 it was still undeveloped. Mr Hilton put up a large sign carrying the words 'Hilton Homes' and his telephone number.

c [13] In June or July 1990 Mr Hilton received a phone call (perhaps as a result of the 'Hilton Homes' notice) from Mr Neil Bromage. Mr Bromage introduced himself as a cousin of Mr Hilton's estranged wife (and it is accepted that he was a cousin of hers) but Mr Hilton had never met him before and had no idea who he was. In the next few weeks Mr Hilton had a number of phone calls and visits d from Mr Bromage, all concerned with possible development plans. Mr Bromage expressed an interest in buying the flats at Watson Road, once they had been built. In his witness statement Mr Hilton described Mr Bromage as pestering him.

e [14] What Mr Hilton did not know, and did not discover until much later, was that Mr Bromage had only a few months before been released from prison on licence. On 30 October 1989 he was sentenced in the Crown Court at Preston to nine months' imprisonment after pleading guilty to three offences of participating in the management of a company while an undischarged bankrupt, one offence of fraudulent trading, and nine offences of obtaining credit while an undischarged bankrupt. He was released from prison on 16 March 1990.

f [15] These facts were however known to BBE since that firm had acted for Mr Bromage in the criminal proceedings. Mr Gorman had not himself acted in the criminal proceedings but he knew of Mr Bromage's bankruptcy and his prison sentence. In his witness statement he described Mr Bromage as an established client of the firm.

g [16] At the end of July and during August 1990 there were several meetings at BBE's offices between Mr Gorman, Mr Bromage and Mr Hilton. At trial there were conflicts of evidence about these meetings. BBE's pleaded case was that Mr Bromage and Mr Hilton instructed BBE jointly, and Mr Gorman in his witness statement stated that an agreement between them was already in place, and that he (Mr Gorman) was 'merely instructed to act for Bromage with regard h to conveyancing formalities'. That was the case which BBE ran at trial, asserting that no conflict of interest arose until much later in the retainer. But the judge did not accept that case. He preferred Mr Hilton's evidence, which was significantly different. The judge found Mr Hilton to be an honest witness. He specifically rejected the statement in Mr Gorman's witness statement that a deal j had already been concluded before BBE were instructed. It is accepted on this appeal that at these meetings Mr Gorman lent credence to Mr Bromage.

[17] Mr Hilton expected that at the first meeting at BBE's offices Mr Bromage would make an offer in respect of the Watson Road site. He did not do so on that occasion, although he did about two months later. The first transaction between Mr Hilton and Mr Bromage (and the only one which formed part of Mr Hilton's pleaded case) related to a site at 74 Waterloo Road, Ashton-on-Ribble, which had

been found by Mr Bromage. It had planning permission for the erection of six flats. a

[18] The outcome was that Mr Hilton agreed to buy the Waterloo Road site from its owners for £85,000. He agreed to develop it by the erection of six flats and to sell the developed property to Mr Bromage for £351,000. The procedure envisaged in the contract (which was far from a routine conveyancing document) was that as each flat was completed the purchaser would pay £58,500 (credit for the original £25,000 deposit being given on the sixth flat) and would be granted a 999-year lease of the flat, with the freehold eventually being vested in a management company. Mr Bromage (unknown to Mr Hilton) agreed to sell on the flats to a sub-purchaser, Mr John Riley, for £390,000. This third contract was in delphic terms and provided for no deposit. Mr Riley is a very shadowy figure in the story. His address was given as Mottram in Cheshire, but the judge recorded that he seemed to have spent much of his time in Mozambique, and that he proved of no more substance than Mr Bromage. b  
c

[19] All three contracts were exchanged on the same day, 10 September 1990. BBE acted for both Mr Bromage and Mr Hilton (there is no mention of any solicitors acting for Mr Riley). Mr Bromage had the professional services of Mr Gorman. Mr Hilton had the professional services of Mr Barry Scott, whom Mr Gorman described as a colleague but was in fact a solicitor employed by BBE. According to Mr Hilton's witness statement, he was told by Mr Gorman that Ms Lawson, a partner and his usual solicitor, was 'busy with probate'. Mr Gorman said that Mr Hilton himself suggested Mr Scott. The judge made no finding about that, but on any view it was professionally improper for BBE to act on both sides in a transaction of this sort. Rule 6 of the Solicitor's Practice Rules 1990 (replacing an earlier rule to the same effect) contained an unqualified prohibition on the same firm of solicitors acting for both sides 'if a conflict of interest exists or arises' or if the seller is selling or leasing as a builder or developer. Each of these is a free-standing prohibition which cannot be waived even by informed consent (and in any case any consent which Mr Hilton gave to these arrangements was plainly not his informed consent). d  
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[20] Not only was Mr Hilton selling as a builder and developer, but BBE had a direct and personal conflict of interest arising out of the deposit which Mr Bromage paid under his contract to purchase the Waterloo Road flats. Mr Hilton was well aware that he was embarking on a larger development than he had ever previously undertaken, and that he would need a large bank loan. He originally estimated this at £180,000 and Mr Gorman arranged that facility for him at Barclays Bank (the bank) (it was later increased to £220,000). Mr Hilton also estimated that he needed a cash deposit of 10% of the full development value (that is, £35,100). But at the last moment, Mr Scott told him that only £25,000 was available. As the judge laconically recorded: 'The deposit on the first contract was negotiated down to £25,000 and advanced by the firm.' Mr Hilton was not told that his own solicitors were advancing the entire deposit to a convicted fraudster so as to clothe him with the appearance of being a man of substance. They did the same (to the extent of £30,000) when (in or around December 1990) Mr Hilton agreed with Mr Bromage to develop the Watson Road site and sell it after development for £585,000. Mr Hilton did not discover these facts until much later, when BBE's files were disclosed. Neither Mr Gorman nor Mr Scott could bring himself to mention these highly relevant facts in his witness statement. g  
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a [21] As Sir Andrew Morritt V-C said in his judgment in the Court of Appeal ([2002] Lloyds Rep PN 500 at [5]), from Mr Hilton's point of view, the Waterloo Road transaction was a disaster. In brief summary, he built the six flats (with a secured bank facility which had increased to £220,000) and in August 1991 Mr Scott gave notice to Mr Gorman that flats 1-4 were ready for completion of the leases. Mr Gorman responded on Mr Bromage's behalf that the flats were not ready, and it is accepted that the first notice of readiness, and some subsequent notices, were premature. But the flats were ready by 20 November 1991. On 5 December 1991 Mr Hilton gave a notice to complete. Mr Bromage failed to complete, and also refused to vacate a caution which had been placed on the title. On 10 January 1992 Mr Hilton decided to rescind the contract. In his witness statement he gives an account of his last interview as a client of BBE:

c 'I was very disillusioned with Bromage because I was under pressure from both my ex-wife and from the bank. When I asked Barry Scott to rescind the contract, he told me to sit where I was and he called on the internal telephone to Kevin Gorman, who came into his room and told me that the firm should not have acted because there was a conflict of interest. He told me that I would have to go to a different firm of solicitors to take advice. He told me to get out of the office. I left.'

e [22] The next few years saw the collapse of Mr Hilton's business and a series of frustrations in his attempts to retain redress. The following summary is taken from Mr Hilton's witness statement and was not the subject of findings by the judge, but it appears only too credible. In January 1992 a bankruptcy petition was presented against him, but in the autumn of that year he put forward proposals for an individual voluntary arrangement (IVA) which were accepted. In April 1992 Mr Bromage offered to remove his caution if Mr Hilton returned his deposit with interest. Mr Hilton refused, partly because he did not have the money and partly because Mr Bromage had already persuaded Mr Hilton to advance him a total of £18,000 for commission which Mr Bromage claimed under an oral agreement. In October 1992 Mr Hilton issued a writ against Mr Bromage, with some modest financial backing from the bank. Mr Bromage seems to have been a very persuasive man; he later obtained waiver of a debt of £6,000 and a further f £17,000 from the bank as the price of vacating his caution. g

[23] Early in 1993 the bank proceeded to enforce its securities. Waterloo Road was sold for £180,000 and Watson Road for £32,000. There was still a large deficit. In April 1993 Mr Hilton was advised for the first time that he had a better prospect of obtaining redress by suing BBE. But he had difficulty both in h obtaining legal aid and in finding solicitors to act for him. Eventually, in December 1993 a writ was issued against BBE. During 1993 his estranged wife obtained a decree nisi of divorce but it was not made absolute because of Mr Hilton's uncertain financial position.

j [24] Mr Hilton's legal aid for his action against Mr Bromage was withdrawn and in August 1994 those proceedings were struck out. In November 1994 his IVA was determined by the supervisor. Mr Hilton had great difficulty in achieving progress in the proceedings against BBE. Nothing happened between March 1996 and June 1997, when the Law Society intervened in the practice of the solicitors then acting for Mr Hilton. In 1997 Mr Hilton was adjudicated bankrupt, but the bankruptcy was annulled. Somehow Mr Hilton and his present solicitors managed to get the action to trial.

## THE PROCEEDINGS BELOW

[25] The case was tried at Manchester before Judge Maddocks on three days during September 2001. The judge gave a reserved judgment on 28 September 2001. He made some findings of fact which I have already noted. He also made a clear finding that if Mr Hilton had been informed of Mr Bromage's antecedents, he would not have had anything to do with the Waterloo Road transaction. He found that BBE had been in breach of their professional duty but that the breach had caused no loss to Mr Hilton.

[26] There were three important steps on the way to that conclusion. The first (and uncontroversial) step was that BBE were in breach of their professional duty in acting for both Mr Bromage and Mr Hilton. The second was that the facts of Mr Bromage's bankruptcy and convictions although 'in the public domain and in that sense ... not confidential information' were information which BBE could not pass on to Mr Hilton without a breach of their professional duty to Mr Bromage. The third step was expressed as follows by the judge:

'... the breach of duty here lay in continuing to act, not in failing to pass on the information. Upon that footing, Mr Hilton was entitled to be placed, and is entitled to be placed, in the position he would have been if he had instructed an independent solicitor. The claim was not advanced that any such solicitor would have been aware or would have become aware of Mr Bromage's conviction, nor was it suggested that he should have advised Mr Hilton to have a credit report.'

So the judge dismissed the action with costs. Had he found liability, he would have awarded damages of £175,335. Mr Hilton appealed against the judge's conclusion on liability and quantum. BBE cross-appealed as to quantum.

[27] On 22 May 2002 the Court of Appeal (Sir Andrew Morritt V-C, Judge and Jonathan Parker LJ) unanimously dismissed Mr Hilton's appeal. The Vice-Chancellor recorded the parties' agreement that if the appeal were to be allowed, the assessment of damages should be remitted to be assessed by a judge. Before I examine the reasoning in the Court of Appeal's judgments, it may be useful to state some basic principles.

## THE SOLICITOR'S DUTY TO HIS CLIENT

[28] A solicitor's duty to his client is primarily contractual and its scope depends on the express and implied terms of his retainer. When a mortgage lender such as a building society or bank instructs a solicitor who is also acting for the borrower, the solicitor is invariably given detailed, standard-form written instructions and these define with some precision the solicitor's duties to the mortgagee. Mr Hilton, by contrast, gave no written instructions to BBE, and there seems to have been no other documentary evidence of the terms of the retainer.

[29] The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship. But not every breach of duty by a fiduciary is a breach of fiduciary duty: see the observations of Millett LJ in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 at 710–711, [1998] Ch 1 at 16–17. If a solicitor is careless in investigating a title or drafting a lease, he may be liable to pay damages for breach of his professional duty, but that is not a breach of a fiduciary duty of loyalty; it is simply the breach of a duty of care. This may have practical consequences, for instance in relation to causation, as in the *Mothew* case.

a [30] A solicitor's duty of single-minded loyalty to his client's interest, and his duty to respect his client's confidences, do have their roots in the fiduciary nature of the solicitor-client relationship. But they may have to be moulded and informed by the terms of the contractual relationship: see the well-known observations of Mason J in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 97, cited by Lord Browne-Wilkinson in giving the judgment of the Privy Council in *Kelly v Cooper* [1994] 1 BCLC 395 at 401, [1993] AC 205 at 215. In this case no such moulding is necessary, since there were no express terms agreed as to Mr Hilton's retainer of BBE. Mr Hilton did not expressly plead that BBE was in breach of any fiduciary duty. He did not need to, since at trial he was not seeking to take the sort of causation point that was raised in the *Mothew* case (in this House the appellant's printed case did seek to take points based on a fiduciary relationship but the House did not find it necessary to decide whether to consider those points). On this issue of liability both sides have been content for the case to be dealt with as a claim for breach of contract. However, the content of BBE's contractual duty, so far as relevant to this case, has roots in the parties' relationship of trust and confidence.

d [31] The solicitor's duty of single-minded loyalty to his client very frequently makes it professionally improper and a breach of his duty to act for two clients with conflicting interests in the transaction in hand. Lord Jauncey of Tullichettle, giving the judgment of the Privy Council in *Clark Boyce v Mouat* [1993] 4 All ER 268 at 273, [1994] 1 AC 428 at 435 said:

e 'There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.'

f Here 'disabled' plainly does not carry with it the meaning of 'exonerated'. Lord Jauncey then cited Richardson J in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 90:

g 'A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting ... And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both.'

h [32] I need not go further into this point because it is (since the judge's rejection of BBE's case that Mr Bromage and Mr Hilton came to Mr Gorman with their deal already done) common ground that BBE could not properly act for both vendor and purchaser on the Waterloo Road transaction. Their duty was to inform Mr Hilton (first) that they could not act for him and (second) that he should seek legal advice from other solicitors, starting afresh (and not relying on any advice that he might already have received from BBE). A bare refusal to act, without clear advice about going to new solicitors, would not have been

sufficient to discharge their duty. It is unnecessary to consider whether they should also have given the same advice to Mr Bromage.

#### CONFIDENTIALITY

[33] Two of the most important facts known to BBE, but unknown to Mr Hilton, were that Mr Bromage had been made bankrupt and that while an undischarged bankrupt he had committed numerous offences of dishonesty for which he was sentenced to a term of imprisonment. These facts were known to any journalist or member of the public who had been present in the Crown Court at Preston when Mr Bromage pleaded guilty and was sentenced. They were also probably reported in local newspapers. They were, as Sir Andrew Morritt V-C observed (at [11]), 'matters of public record and so not confidential in any strict legal sense.' Judge LJ's reference (at [36]), to legal professional privilege was, with respect, quite inapposite as regards the bare facts of the bankruptcy and the convictions.

[34] In my opinion the notion of confidentiality, as generally understood by lawyers, is not really relevant to the issues in this case. It is a solicitor's duty to act in his client's best interests and not to do anything likely to damage his client's interests, so far as this is consistent with the solicitor's professional duty. To disclose discreditable facts about a client, and to do so without the client's informed consent, is likely to be a breach of duty, even if the facts are in the public domain. Some of the references in the Court of Appeal judgments to confidential information must, I think, be understood in this looser sense. The appellant's counsel was right to concede in the Court of Appeal, that disclosure of Mr Bromage's past by BBE would have been a breach of their duty to him, and the appellant did not seek to withdraw the concession before your Lordships.

#### IRRECONCILABLE DUTIES

[35] If a house owner contracts to sell his house to one purchaser for £240,000 and then a week later contracts to sell it to another purchaser for £250,000, he assumes two contractual duties which are on the face of it irreconcilable, unless the seller has grounds for rescinding either contract, or can persuade one or other purchaser to release him from his obligation. That is so whether he enters into the second contract with his eyes open, in the hopes of making a larger profit, or whether (rather improbably) he does so inadvertently. It is no answer for him to say to either purchaser: I am sorry, I am obligated to another. His dilemma is his own fault (the phrase used by Lord Cozens-Hardy MR in *Moody v Cox* [1917] 2 Ch 71 at 81, [1916-17] All ER Rep 548 at 551, a case to which I shall return).

[36] Mr Gibson QC (who appeared for BBE in this House and argued a difficult case with brevity and tact) did not accept that the man who sells his house twice was a fair analogy. He supported the reasoning in Sir Andrew Morritt V-C's judgment that the decision of the Court of Appeal in *Moody v Cox* was distinguishable, and that the only breach of duty on the part of BBE was their failure to refuse to act for Mr Hilton and to advise him to consult another solicitor. He did not accept that BBE's failure to disclose the facts about Mr Bromage's past was a second and more serious breach of duty, which did cause Mr Hilton actionable loss.

[37] Sir Andrew Morritt V-C reasoned as follows:

[32] I do not accept that BBE were also in breach of a duty to disclose to Mr Hilton what they knew of Mr Bromage. Just as the retainer of BBE by Mr Bromage in connection with his prosecution was not subject to some



a implied limitation by reference to disclosure to later clients so the retainer of BBE by Mr Hilton must be subject to an implied exclusion from any general duty of disclosure of that which they are legally obliged to treat as confidential. In my view such an exclusion satisfies all the well-known tests for the implication of contractual terms. Such an exclusion does not impinge on the solicitor's duty to do the best for his client; rather it demonstrates the importance of performing that duty promptly by informing the client that he cannot act for him.

b [33] Thus it is not a question of two irreconcilable duties, to which the principles of *Moody v Cox* would apply, but of one being modified to take account of another.

c Sir Andrew Morritt V-C did not explain how this implied term (which was never pleaded) satisfied the well-known tests for implied terms. In my respectful opinion the suggested term plainly did not meet those tests, whether formulated by reference to the officious bystander or by reference to business efficacy. The suggested term would no doubt have been very convenient for BBE. But from Mr Hilton's point of view it would have amounted to his agreeing that because his solicitors had failed in their duty to tell him to take separate advice, and had instead proceeded to act for him as well as for Mr Bromage, and (unknown to Mr Hilton) in a matter in which they had a personal financial interest, their duty to Mr Hilton must in some way be curtailed in order to accommodate their first breach of duty.

e [38] The notion that one breach of duty by BBE (failure to tell Mr Hilton that they could not act for him and that he should seek independent advice) should exonerate BBE in respect of a subsequent and more serious breach of duty (failure to disclose to Mr Hilton facts which would have saved him from ruin) seems contrary to common sense and justice. It is also in my opinion contrary to the principles stated by the Court of Appeal in *Moody v Cox*, a decision which has often been cited and followed both in England and in Commonwealth jurisdictions.

#### MOODY v COX

g [39] *Moody v Cox* [1917] 2 Ch 71, [1916–17] All ER Rep 548 was an action for rescission of a contract of sale of a public house and four cottages, with a counterclaim for specific performance. The sellers, Hatt and Cox, were respectively a solicitor and his managing clerk. They were the trustees of a will trust, and were selling as such. In addition Hatt acted as solicitor for the purchaser Moody. The contract price was £8,400. Moody complained that Cox had failed to disclose to him a valuation showing the property to be worth less than the contract price, and that Cox had expressly asserted that the cottages were worth £225 each when he knew that they were worth less. There was also a 'clean hands' issue arising from the fact that Moody had paid two sums of £100 to Cox as a sweetener; that point is of no relevance to this appeal.

j [40] Since Hatt and Cox were selling as trustees, they had a duty to their beneficiaries to obtain the best price reasonably obtainable. It was argued that this modified the extent of Hatt's duty, as a solicitor, to Moody as his client. That argument was decisively rejected. The key passages in the judgments of Lord Cozens-Hardy MR, Warrington and Scrutton LJJ ([1917] 2 Ch 71 at 81, 85, 91, [1916–17] All ER Rep 548 at 551, 554–555, 558) are set out in Sir Andrew Morritt V-C's judgment (at [12], [13] and [14] respectively). It is sufficient to

repeat what Lord Cozens-Hardy MR said ([1917] 2 Ch 71 at 81, [1916–17] All ER Rep 548 at 551):

‘A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client “I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side.” The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say—which would be much better—“I cannot accept this business.” I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform.’

[41] The thrust of this passage, and of all three judgments in *Moody v Cox*, is that if a solicitor puts himself in a position of having two irreconcilable duties (in that case, to his beneficiaries and to his client, *Moody*) it is his own fault. If he has a personal financial interest which conflicts with his duty, he is even more obviously at fault. In this case BBE were in the position (through their own fault) of having two irreconcilable duties, to Mr Bromage and to Mr Hilton, and of also having a personal interest (because of the undisclosed £25,000 loan, which was likely to be recoverable only if Mr Bromage did well in his transaction with Mr Hilton). On the face of it their position was significantly worse than that of the solicitor in *Moody v Cox*.

[42] However, Mr Gibson submitted that Sir Andrew Morritt V-C had been right (at [15]) in distinguishing *Moody v Cox*:

‘In that case the duty arose from the fiduciary relationship between the purchaser, *Moody*, and his solicitor and vendor *Hatt* and the presumption of undue influence in consequence of the fact that *Hatt* was not only *Moody*’s solicitor but a vendor to him. No such relationship is relied on in this case.’

Similarly, he said (at [33]):

‘But that case concerned the breach of a fiduciary duty and presumption of undue influence arising on the sale of property by a solicitor to his client to which different considerations apply.’

With great respect to Sir Andrew Morritt V-C I cannot agree with that analysis. In *Moody v Cox* *Hatt* owed a (purely) fiduciary duty to his beneficiaries and a duty to his client which was (in the way that I have already explained) both contractual and fiduciary, the content of the contractual duty of full disclosure being rooted in the fiduciary relationship between solicitor and client. In the present case BBE owed that type of duty to both Mr Bromage and Mr Hilton, and they also had a personal financial interest. In *Moody v Cox* [1917] 2 Ch 71 at 80, [1916–17] All ER Rep 548 at 550 Lord Cozens-Hardy MR expressly stated that the solicitor’s duty of disclosure does not depend on undue influence.

- a [43] Mr Gibson also relied on the reference at the end of the judgment of Scrutton LJ ([1917] 2 Ch 71 at 92, [1916–17] All ER Rep 548 at 558), to ‘actual misrepresentations’. But in my opinion my noble and learned friend Lord Hoffmann was right in describing this (in the course of argument) as a throwaway remark. The overwhelming focus of all three judgments in *Moody v Cox* is on non-disclosure, and the principle as to the solicitor’s duty is stated in wide terms.
- b [44] Mr Gibson submitted that a solicitor who has conflicting duties to two clients may not prefer one to another. That is, I think, correct as a general rule, and it distinguishes the case of two irreconcilable duties from a conflict of duty and personal interest (where the solicitor is bound to prefer his duty to his own interest). Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability.
- c

d MORTGAGE CASES

- e [45] During the 1990s there were many reported cases concerned with claims (resulting from the crash in the property market) against solicitors who had acted for both sides in mortgage transactions. These cases are discussed at some length in the parties’ written submissions. But counsel rightly spent little time on them in oral argument because many of them turned (as I have already noted) on special features of the mortgage lender’s instructions to the solicitors. I do not think it is necessary or helpful to embark on a survey of the recent mortgage cases, but I note that in *Mortgage Express Ltd v Bowerman and Partners (a firm)* [1996] 2 All ER 836 at 844–845, Millett LJ stated the solicitor’s duty in wide and general terms:
- f

g ‘A solicitor who acts both for a purchaser and a mortgage lender faces a potential conflict of duty. A solicitor who acts for more than one party to a transaction owes a duty of confidentiality to each client, but the existence of this duty does not affect his duty to act in the best interests of the other client.’

Millett LJ then went on to explain why no conflict arose on the particular facts of that case.

- h [46] Sir Andrew Morritt V-C referred to the *Mortgage Express* case but treated it as inapplicable because of the implied term which he discerned as modifying the solicitor’s duty. Parker LJ (at [47]) also referred to the *Mortgage Express* case and derived from the judgment of Bingham MR (at 842) the proposition that any term in a solicitor’s contract of retainer relaxing a solicitor’s duty of confidentiality to his client (save with informed consent) would be contrary to public policy. I respectfully doubt whether Bingham MR intended to lay down any such rule, and I do not think there is any such rule. In any case the issue is not as to the extent of BBE’s duty to Mr Bromage, but as to their duty to Mr Hilton. It comes back to the same simple point that if a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified.
- j

## DISPOSAL

[47] For these reasons I would allow the appeal and direct that the quantum of damages (if not agreed) should be assessed by a judge. But it is now 15 years since Mr Hilton suffered a grievous wrong for which he has not been compensated. For the good name of the solicitors' profession his compensation should be agreed, on a generous scale, without further delay. a

**LORD BROWN OF EATON-UNDER-HEYWOOD.** b

[48] My Lords, for the reasons given in the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe I too would allow this appeal and make the order proposed.

*Appeal allowed.* c

Celia Fox Barrister.



**Kirin-Amgen Inc and others v Hoechst  
Marion Roussel Ltd and others**

**Hoechst Marion Roussel Ltd and others v  
Kirin-Amgen and others**

[2004] UKHL 46

HOUSE OF LORDS

LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD RODGER OF EARLSFERRY, LORD  
WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

5–8, 12–15 JULY, 21 OCTOBER 2004

*Patent – Infringement – Validity – Insufficiency – Product by process claim – Patents relating to production of erythropoietin – Recombinant DNA technology – Whether patents valid – Patents Act 1977, s 72(1)(c) – Convention on the Grant of European Patents 1973, arts 64(2), 69.*

The Amgen companies (Amgen) were the proprietors of a European Patent relating to the production of erythropoietin (EPO) by recombinant DNA technology. EPO was a protein that functioned in the blood to regulate the production of red blood cells, and was used in particular in the treatment of anaemia when associated with kidney failure. The Hoechst companies (Hoechst/TKT) had also developed a method of making EPO, using a process which it called ‘gene activation’ (GA-EPO). Amgen claimed that GA-EPO infringed the claims of the patent and Hoechst/TKT sought a declaration of non-infringement and revocation of the patent. The essential difference between the EPO made by Amgen and GA-EPO was that the former was made by an exogenous DNA sequence coding for EPO which had been introduced into a host cell and the latter was made by an endogenous DNA sequence coding in a human cell into which an exogenous upstream control sequence had been inserted. The claims of the patent were for, inter alia, a DNA sequence for use in securing the expression of EPO in a host cell (claim 1); EPO which was the product of the expression of an exogenous DNA sequence (claim 19); and EPO which was the product of the expression in a host cell of a DNA sequence according to claim 1 (claim 26). Only claims 19 and 26 were alleged to have been infringed as Hoechst/TKT did not make any GA-EPO in the United Kingdom. In the High Court the judge held claim 19 to be invalid for insufficiency but claim 26 to be valid and infringed. In reaching his conclusion he applied a series of analytic questions known as ‘the Protocol questions’ derived from a series of patent cases. The Court of Appeal held that both claims were valid but neither was infringed. Both parties appealed: Amgen against the decision that, as a matter of construction, Hoechst/TKTs’ process was not within the patent claims and Hoechst/TKT against the rejection of their attack on the claims for insufficiency and, in relation to claim 26, anticipation. The principal issue of construction for the court was whether, in accordance with art 69<sup>a</sup> of the

<sup>a</sup> Article 69, so far as material, is set out at [19], below

Convention on the Grant of European Patents 1973 (the European Patent Convention), given effect in the United Kingdom by the Patents Act 1977, a 'person skilled in the art' would understand 'host cell' to mean a cell which was host to the DNA sequence which coded for EPO, or whether, as submitted by Amgen, it could include a sequence which was endogenous to the cell, like the human EPO gene which expressed GA-EPO, as long as the cell was host to some exogenous DNA. Hoechst/TKT's appeal against the rejection of its challenge to claim 26 on the ground of anticipation also raised a point of principle: what counted as a 'new' product. The question was whether the EPO which was the expression in a host cell of a DNA sequence in accordance with claim 1 was new or the same as the EPO already part of the state of the art which others had purified from urine. Article 64(2)<sup>b</sup> of the European Patent Convention provided that if the subject matter of the European patent was a process 'the protection conferred by the patent shall extend to the products directly obtained by such process.' The question of sufficiency was governed by s 72(1)(c)<sup>c</sup> of the 1977 Act under which a patent could be revoked if the specification did not disclose the invention 'clearly enough and completely enough for it to be performed by a person skilled in the art'.

**Held** – Amgen's appeal would be dismissed and Hoechst/TKT's appeal would be allowed for the following reasons.

(1) The determination of the extent of protection conferred by a European patent was an examination in which there was only one compulsory question, namely that set by art 69 of the European Patent Convention and its Protocol: what would a person skilled in the art have understood the patentee to have used the language of the claim to mean? Everything else, including the Protocol questions, was only guidance to a judge trying to answer that question. There was no point in going through the motions of answering the Protocol questions when that could not sensibly be done until the claim had been construed. In such a case, as in the instant case, they simply provided a formal justification for a conclusion which had already been reached on other grounds. New technology was another situation in which the Protocol questions might be unhelpful, although if the claim could properly be construed in a way which was sufficiently general to include the new technology, the Protocol questions tended to answer themselves. In the present case, once the judge had construed the claims as he did, he had answered the question of infringement and it only caused confusion to try to answer the Protocol questions as well. In the circumstances, the person skilled in the art would not have understood the claim as sufficiently general to include gene activation. He would have understood it to be limited to the expression of an exogenous DNA sequence which coded for EPO. Accordingly, on a proper construction, Hoechst/TKT had not infringed any of the claims (see [52], [69], [80], [84], [85], [134], [136], [137], [140], below); *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 considered.

(2) Article 64(2) of the European Patent Convention allowed a patentee to rely directly on his process claim to allege infringement of a product made by that process. The point of art 64(2) was to extend the protection afforded by a process claim to a product directly made by that process and to make it unnecessary

b Article 64, so far as material, is set out at [89], below

c Section 72, so far as material, is set out at [102], below

- a* to claim the product defined by reference to the process. Accordingly, the only case in which the European Patent Office would accept a claim to a product defined in terms of its process of manufacture was when the product was new in the sense of being different from any existing product in the state of the art but the difference could not be described in chemical or physical terms. It was important that the United Kingdom applied the same law as the European Patent
- b* Office and other member states when deciding what counted as new for the purposes of the European Patent Convention. It followed that claim 26 was invalid on the ground of anticipation (see [89]–[91], [98], [100], [101], [134], [136], [137], [140], below); *International Flavors & Fragrances Inc* Decision T 150/82 [1984] OJ EPO 309 considered.
- c* (3) For the purposes of sufficiency pursuant to s 72(1)(c), whether the specification was sufficient or not was highly sensitive to the nature of the invention. The first step was to identify the invention and decide what it claimed to enable the skilled person to do. Then one could ask whether the specification enabled him to do it. In the instant case, the nature of the invention which the specification had to enable was a way of making EPO. The essence of
- d* the invention lay in the process. In the circumstances, the specification did enable the use of any cell for the expression of exogenous DNA and the use of another cell which enabled high-level expression was a way of making EPO disclosed by the invention. The judge had been entitled to reach the conclusions he did and right in law to conclude that the claim was not sufficiently enabled. Accordingly, claim 19 was invalid for insufficiency and the appeal would be allowed (see [103],
- e* [109], [118], [131], [132], [134], [136], [137], [140], below).

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### Conjoined Appeals

In three consolidated actions, Kirin-Amgen Inc, Ortho Biotech Inc, and Ortho Biotech Products LP (Amgen) claimed infringement of European patent EP0148605B2 relating to the production of erythropoietin by recombinant DNA technology, of which Amgen were the proprietors, and Hoechst Marion Roussel Ltd, Aventis Pharmaceuticals Inc (formerly known as Hoechst Marion Roussel Inc), and Transkaryotic Therapies Inc (TKT) claimed a declaration of non-infringement and revocation of the patent. Both Amgen and TKT appealed, with permission of the House of Lords' Appeal Committee given on 12 February 2003, from the decision of the Court of Appeal (Aldous, Hale and Latham LJ) on 31 July 2002 ([2002] EWCA Civ 1096, [2003] IP & T 694) (sub nom *Kirin-Amgen Inc and ors v Transkaryotic Therapies Inc and ors*), whereby it had held claims 19 and 26 of the patent to be valid and not infringed, in appeals by both Amgen and TKT from the decision of Neuberger J ([2001] IP & T 882, [2002] RPC 1) holding claim 19 to be invalid and claim 26 to be valid and infringed. The facts are set out in the opinion of Lord Hoffmann.

Antony Watson QC, Andrew Waugh QC and Colin Birss (instructed by Taylor Wessing) for Amgen.

David Kitchen QC, Richard Meade and Lindsay Lane (instructed by Bird & Bird) for TKT.

a Their Lordships took time for consideration.

21 October 2004. The following opinions were delivered.

**LORD HOFFMANN.**

b THE PROCEEDINGS

[1] My Lords, Kirin-Amgen Inc (Amgen), a Californian pharmaceutical company, is the proprietor of a European patent (EP 0148605B2) relating to the production of erythropoietin (EPO) by recombinant DNA technology. EPO is a hormone made in the kidney which stimulates the production of red blood cells by the bone marrow. The discovery by Amgen of a method of making EPO artificially for use as a drug was a significant advance in the treatment of anaemia, particularly when associated with kidney failure. Amgen market it under the name Epogen and the patent (which will expire on 11 December 2004) has been very profitable.

d [2] These appeals arise out of a dispute concerning both the validity and infringement of the patent between Amgen and two other pharmaceutical companies. Transkaryotic Therapies Inc (TKT) is a Massachusetts corporation. It has also developed a method of making EPO, which it markets under the name Dynepo. It uses a process which it calls 'gene activation' and the product [has] been referred to in this appeal as 'GA-EPO'. Hoechst Marion Roussel Ltd e (Hoechst) is the English subsidiary of a well-known multinational pharmaceutical company which has been proposing to import GA-EPO into the United Kingdom. In three consolidated actions, Amgen claims that GA-EPO infringes the claims of the patent in suit and TKT and Hoechst claim a declaration of non-infringement and revocation of the patent. I shall for convenience refer to both Hoechst and TKT as 'TKT' but it should be borne in mind that the only f allegations of infringement in the United Kingdom arise out of the importation of the drug by Hoechst.

[3] The science upon which recombinant DNA technology is based has been described in a number of judgments, not least in the admirable account given by Neuberger J in this case (see [2001] IP & T 882), much of which was reproduced g verbatim by the Court of Appeal ([2002] EWCA Civ 1096, [2003] IP & T 694). I do not propose to repeat these passages but gratefully adopt them and will largely take them as read.

THE RACE FOR EPO

h [4] The technology for manufacturing proteins ('polypeptides') by the expression of recombinant DNA developed rapidly after the mid-1970s. The speed of development is illustrated by the decision of your Lordships' House in *Biogen Inc v Medeva plc* [1997] RPC 1, in which a recombinant method of making the antigens of a hepatitis virus was patented with a priority date of 22 December 1978 but was conceded to have been obvious by 21 December 1979. j Pharmaceutical companies competed to be the first to plant the flag on some desirable protein.

[5] EPO was a particularly elusive goal in the early 1980s because it was difficult to get hold of enough of the natural product to do the necessary research. To design the probes to find the gene, whether in a genomic or cDNA library, you first had to know the amino acid sequence of at least a part of the natural

polypeptide. But the kidney makes such minuscule quantities that purified natural EPO was virtually unobtainable. In 1977 a team including Dr Takaji Miyake and Dr Eugene Goldwasser developed and published a protocol for purifying milligrams of EPO from large quantities of urine laboriously collected from patients suffering from aplastic anaemia: see *Miyake et al*, 252 J Biol Chem 252 No 15, pp 5558–5564 (1977). Dr Goldwasser made some of this urinary EPO ('uEPO') available to Dr Rodney Hewick of Cal Tech, who tried to sequence 26 residues at the N terminus. (The protein has 165 residues). This information was published by *Sue and Sytkowski* in 80 PNAS USA, pp 3651–3655 (1983) but two of the residues were incorrectly identified.

[6] The Amgen team trying to sequence the EPO gene was headed by (indeed, consisted largely of) Dr Fu-Kuen Lin. Dr Goldwasser was engaged as a consultant. He was able to make some uEPO available to Dr Lin, who designed a set of fully degenerate probes to hybridise with the DNA coding for two regions of the protein. As the kidney makes so little EPO, there was little prospect of obtaining mRNA for a cDNA library. So Dr Lin used his probes on the vast array of genes in a genomic library. Against the odds, he obtained three positives which enabled him to locate the EPO gene in the fall of 1983. He was then able by patient but conventional methods to identify the whole of its structural region, its introns, exons and splicing sites and a fair amount of the upstream and downstream sequences as well. He thus established the correct sequence of the amino acid residues which formed the protein and its leader sequence.

[7] This information, first discovered by Dr Lin, was essential to any process for making EPO, whether by Amgen's method or TKT's. As one of the principal issues in the case is whether TKT's GA-EPO (which is chemically exactly the same as Amgen's Epogen) falls outside the claims of the patent in suit because of the difference in the way it is made, I shall at once describe in bare outline the two methods. There are some details on which special arguments were founded and I shall come back to these later. For the moment, however, a sketch will do.

#### THE TWO METHODS OF MAKING EPO

[8] Once the sequence of the EPO gene had been discovered, it was possible to make it by methods of recombinant DNA technology which were well known in 1983. These are succinctly described in the specification of the patent in suit:

'Simply put, a gene that specifies the structure of a desired polypeptide product is either isolated from a "donor" organism or chemically synthesised and then stably introduced into another organism which is preferably a self-replicating unicellular organism such as bacteria, yeast or mammalian cells in culture. Once this is done, the existing machinery for gene expression in the "transformed" or "transfected" microbial host cells operates to construct the desired product, using the exogenous DNA as a template for transcription of mRNA which is then translated into a continuous sequence of amino acid residues.'

[9] That is the way the patent in suit teaches how to make EPO. Dr Lin isolated the gene which coded for human EPO from a human donor cell and then introduced it into a mammalian cell in culture which had been derived from the ovary of a Chinese hamster (a 'CHO cell'). As part of the hamster DNA, it expressed EPO. Of course it was not as simple as that. To get it into the DNA of the CHO cell, it had first to be incorporated into a bacterial plasmid vector. To



a improve the chances of expression, the gene's natural promoter was removed and a more powerful viral promoter substituted. To increase the rate of expression, cells in which the gene had been multiplied ('amplified') were selected by a technique which involved treating them with methotrexate. Indeed, the CHO cell had been chosen as host because it had a gene mutation which made it particularly suitable for amplification by methotrexate. But these  
b were all tricks of the trade well known among practitioners of the art. The essence of the technique was that described in the passage from the specification which I have quoted, namely, the introduction of an exogenous DNA sequence coding for EPO into a host cell in which it would be expressed.

[10] In TKT's gene activation method, the EPO is expressed in a human cell  
c by an endogenous gene naturally present or by cells derived by replication from such a cell. Ordinarily, such a gene would not express EPO. Almost all human cells contain the full complement of DNA coding for all the proteins needed by the body ('the human genome') but each cell will express only those proteins which its particular tissue requires. The rest remain inactive, disabled by the absence of a suitable regulator which is needed to promote expression. The TKT  
d technique involves introducing the necessary control sequence upstream of the EPO gene. The control sequence is accompanied by other bits of machinery (for example, to allow for amplification by methotrexate treatment) which it is for the moment unnecessary to describe. All this exogenous DNA has to be inserted into the human DNA at exactly the right point upstream of the EPO gene. This could  
e not have been done at the time of the patent but can now be done by using a phenomenon called 'homologous recombination'. It is fully described by Neuberger J and I need say no more than that it enables TKT to activate or 'switch on' the EPO gene in a human cell which would not ordinarily express that protein and then to select for commercial use those descendants of the manipulated cells in which the relevant genes have been amplified to produce a  
f high level of expression.

[11] The essential difference between Epogen and GA-EPO is that the former is made by an exogenous DNA sequence coding for EPO which has been introduced into an host cell and the latter is made by an endogenous DNA sequence coding for EPO in a human cell into which an exogenous upstream  
g control sequence has been inserted.

[12] With that introduction, we can now look at the patent. The specification explains the relevant science, the nature of EPO and the difficulties which stood in the way of identifying the gene. It then describes the methods which Dr Lin  
h used to find the gene in the DNA of monkeys and humans and sets out the full sequences for both species in Tables V and VI respectively. In a series of 12 examples it describes what Dr Lin was able to do with this information, including in example 7 the expression of human EPO in COS-1 cells (not very successful because of difficulties about amplification and transience of expression) and in example 10 its expression in CHO cells (successful because of amplification by  
j methotrexate). There are 31 claims but we need concern ourselves only with claims 1, 19 and 26. To summarise them very briefly and leaving out qualifications to which I shall later return, they are for (1) a DNA sequence for use in securing the expression of EPO in a host cell, (19) EPO which is the product of the expression of an exogenous DNA sequence and (26) EPO which is the product of the expression in a host cell of a DNA sequence according to claim 1. Only claims 19 and 26 are alleged to have been infringed because TKT

do not make any GA-EPO in this country. The alleged infringement is by importation. But claim 26 cannot be understood without first construing claim 1.

[13] I shall now set out the precise terms of the three relevant claims. Claim 1 is for—

'A DNA sequence for use in securing expression in a procaryotic or eucaryotic host cell of a polypeptide product having at least part of the primary structural [conformation] of that of erythropoietin to allow possession of the biological property of causing bone marrow cells to increase production of reticulocytes and red blood cells and to increase [haemoglobin] synthesis or iron uptake, said DNA sequence selected from the group consisting of: [(a)] the DNA sequences set out in Tables V and VI or their complementary strands; [(b)] DNA sequences which hybridize under stringent conditions to the protein coding regions of the DNA sequences defined in (a) or fragments thereof; and [(c)] DNA sequences which, but for the degeneracy of the genetic code, would hybridize to the DNA sequences defined in (a) and (b).'

[14] Claim 19 is for—

'A recombinant polypeptide having part or all of the primary structural conformation of human or monkey erythropoietin as set forth in Table VI or Table V or any allelic variant or derivative thereof possessing the biological property of causing bone marrow cells to increase production of reticulocytes and red blood cells to increase haemoglobin synthesis or iron uptake and characterised by being the product of eucaryotic expression of an exogenous DNA sequence and which has a higher molecular weight by SDS-PAGE from erythropoietin isolated from urinary sources.'

[15] Finally, claim 26 is for—

'A polypeptide product of the expression in a eucaryotic host cell of a DNA sequence according to any of claims 1, 2, 3, 5, 6 and 7.'

[16] Claims 2, 3, 5, 6 and 7 are all dependent on claim 1 in the sense that if the TKT method does not involve using a 'DNA sequence for use in securing expression [of EPO] in a . . . host cell' within the meaning of claim 1, it would not infringe any of the other claims either.

#### THE DECISIONS OF THE COURTS BELOW

[17] The trial judge held that claim 19 was invalid (for insufficiency) but that claim 26 was valid and infringed (see [2001] IP & T 882). The Court of Appeal (Aldous, Hale and Latham LJ) held that both claims were valid but that neither was infringed ([2002] EWCA Civ 1096, [2003] IP & T 694). Both sides appeal: Amgen against the decision that, as a matter of construction, the TKT process is not within the claims and TKT against the rejection of its attack on the claims for insufficiency and (in the case of claim 26) anticipation. I shall consider Amgen's appeal first.

#### EXTENT OF PROTECTION: THE STATUTORY PROVISIONS

[18] Until the Patents Act 1977, which gave effect to the Convention on the Grant of European Patents (Munich, 5 October 1973; TS 20 (1978); Cmnd 7090) (European Patent Convention) (EPC) there was nothing in any United Kingdom

- a statute about the extent of protection conferred by a patent. It was governed by the common law, the terms of the royal grant and general principles of construction. It was these principles which Lord Diplock expounded in the leading case of *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183, which concerned a patent granted before 1977. But the EPC and the Act deal expressly with the matter in some detail. Article 84 specifies the role of the claims in an application to the European Patent Office for a European patent:

'The claims shall define the matter for which protection is sought. They shall be clear and concise and be supported by the description.'

- [19] For present purposes, the most important provision is art 69 of the EPC, which applies to infringement proceedings in the domestic courts of all contracting states:

- (1) The extent of the protection conferred by a European patent or a European patent application shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims.'

- [20] In stating unequivocally that the extent of protection shall be 'determined' (in German, 'bestimmt') by the 'terms of the claims' (den Inhalt der Patentansprüche) the convention followed what had long been the law in the United Kingdom. During the course of the 18th and 19th centuries, practice and common law had come to distinguish between the part of the specification in which the patentee discharged his duty to disclose the best way of performing the invention and the section which delimited the scope of the monopoly which he claimed: see Fletcher-Moulton LJ in *British United Shoe Machinery Co Ltd v A Fussell & Sons Ltd* (1908) 25 RPC 631 at 650. The best-known statement of the status of the claims in UK law is by Lord Russell of Killowen in *Electric & Musical Industries v Lissen Ltd* [1938] 4 All ER 221 at 224, (1939) 56 RPC 23 at 39:

- 'The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit, and not to extend, the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document, and not as a separate document. Nevertheless, the forbidden field must be found in the language of the claims, and not elsewhere.'

- [21] The need to set clear limits upon the monopoly is not only, as Lord Russell emphasised, in the interests of others who need to know the area 'within which they will be trespassers' but also in the interests of the patentee, who needs to be able to make it clear that he lays no claim to prior art or insufficiently enabled products or processes which would invalidate the patent.

- [22] In Germany, however, the practice before 1977 in infringement proceedings (validity is determined by a different court) was commonly to treat the claims as a point of departure ('Ausgangspunkt') in determining the extent of protection, for which the criterion was the inventive achievement ('erfinderische Leistung') disclosed by the specification as a whole. Likewise in the Netherlands, Professor Jan Brinkhof, former Vice-President of the Hague Court of Appeals, has written that the role of the claims before 1977 was 'extremely modest': see *Is there*

*a European Doctrine of Equivalence?* (2002) 33 IIC 911, 915. What mattered was the 'essence of the invention' or what we would call the inventive concept.

#### THE PROTOCOL

[23] Although the EPC thus adopted the United Kingdom principle of using the claims to determine the extent of protection, the contracting states were unwilling to accept what were understood to be the principles of construction which United Kingdom courts applied in deciding what the claims meant. These principles, which I shall explain in greater detail in a moment, were perceived as having sometimes resulted in claims being given an unduly narrow and literal construction. The contracting parties wanted to make it clear that legal technicalities of this kind should be rejected. On the other hand, it was accepted that countries which had previously looked to the 'essence of the invention' rather than the actual terms of the claims should not carry on exactly as before under the guise of giving the claims a generous interpretation.

[24] This compromise was given effect by the 'Protocol on the Interpretation of art 69':

'Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.'

[25] It is often said, on the basis of the words 'a position between these extremes', that the Protocol represents a compromise between two different approaches to the interpretation of claims. But that is not quite accurate. It is a protocol on the interpretation of art 69, not a protocol on the interpretation of claims. The first sentence does deal with interpretation of the claims and, to understand it, one needs to know something about the rules which English courts used to apply, or impose on themselves, when construing not merely patents but documents in general. The second sentence does not deal with the interpretation of claims. Instead, it makes it clear that one cannot go beyond the claims to what, on the basis of the specification as a whole, it appears that 'the patentee has contemplated'. But the last sentence indicates that, in determining the extent of protection according to the content of the claims but avoiding literalism, the courts of the contracting states should combine 'a fair protection for the patentee with a reasonable degree of certainty for third parties'.

[26] Both art 69 and the Protocol are given effect in United Kingdom law, in relation to infringement, by ss 60 and 125 of the Act. Section 60 provides that a person infringes a patent if he does various things in the United Kingdom 'in relation to the invention' without the consent of the proprietor of the patent. Section 125 defines the extent of 'the invention':

'(1) For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall,



a unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly. . . .

b (3) The Protocol on the Interpretation of Article 69 of the European Patent Convention (which Article contains a provision corresponding to subsection (1) above) shall, as for the time being in force, apply for the purposes of subsection (1) above as it applies for the purposes of that Article.'

#### THE ENGLISH RULES OF CONSTRUCTION

c [27] As I indicated a moment ago, it is impossible to understand what the first sentence of the Protocol was intending to prohibit without knowing what used to be the principles applied (at any rate in theory) by an English court construing a legal document. These required the words and grammar of a sentence to be given their 'natural and ordinary meaning', that is to say, the meanings assigned to the words by a dictionary and to the syntax by a grammar. This meaning was d to be adopted regardless of the context or background against which the words were used, unless they were 'ambiguous', that is to say, capable of having more than one meaning. As Lord Porter said in *Electric & Musical Industries v Lissen Ltd* [1938] 4 All ER 221 at 245, (1939) 56 RPC 23 at 57:

e 'If the claims have a plain meaning *in themselves*, then advantage cannot be taken of the language used in the body of the specification to make them mean something different.' (My emphasis.)

f [28] On the other hand, if the language of the claim 'in itself' was ambiguous, capable of having more than one meaning, the court could have regard to the context provided by the specification and drawings. If that was insufficient to resolve the ambiguity, the court could have regard to the background, or what was called the 'extrinsic evidence' of facts which an intended reader would reasonably have expected to have been within the knowledge of the author when he wrote the document.

g [29] These rules, if remorselessly applied, meant that unless the court could find some ambiguity in the language, it might be obliged to construe the document in a sense which a reasonable reader, aware of its context and background, would not have thought the author intended. Such a rule, adopted in the interests of certainty at an early stage in the development of English law, was capable of causing considerable injustice and occasionally did so. The fact h that it did not do so more often was because judges were generally astute to find the necessary 'ambiguity' which enabled them to interpret the document in its proper context. Indeed, the attempt to treat the words of the claim as having meanings 'in themselves' and without regard to the context in which or the purpose for which they were used was always a highly artificial exercise.

i [30] It seems to me clear that the Protocol, with its reference to 'resolving an ambiguity', was intended to reject these artificial English rules for the construction of patent claims. As it happens, though, by the time the Protocol was signed, the English courts had already begun to abandon them, not only for patent claims, but for commercial documents generally. The speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Hansen-Tangen*, *Hansen-Tangen v Sanko Steamship Co*

[1976] 3 All ER 570, [1976] 1 WLR 989 are milestones along this road. It came to be recognised that the author of a document such as a contract or patent specification is using language to make a communication for a practical purpose and that a rule of construction which gives his language a meaning different from the way it would have been understood by the people to whom it was actually addressed is liable to defeat his intentions. It is against that background that one must read the well-known passage in the speech of Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 at 243 when he said that the new approach should also be applied to the construction of patent claims:

‘A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge.’

[31] This was all of a piece with Lord Diplock’s approach a few years later in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201 to the construction of a charterparty:

‘... I take this opportunity of restating that, if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.’

[32] Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, ‘the meaning of the words the author used’, but rather what the notional addressee would have understood the author to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience. I have discussed these questions at some length in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896.

[33] In the case of a patent specification, the notional addressee is the person skilled in the art. He (or, I say once and for all, she) comes to a reading of the specification with common general knowledge of the art. And he reads the specification on the assumption that its purpose is both to describe and to demarcate an invention—a practical idea which the patentee has had for a new product or process—and not to be a textbook in mathematics or chemistry or a shopping list of chemicals or hardware. It is this insight which lies at the heart of ‘purposive construction’. If Lord Diplock did not invent the expression, he certainly gave it wide currency in the law. But there is, I think, a tendency to regard it as a vague description of some kind of divination which mysteriously penetrates

a beneath the language of the specification. Lord Diplock was in my opinion being much more specific and his intention was to point out that a person may be taken to mean something different when he uses words for one purpose from what he would be taken to mean if he was using them for another. The example in the *Catnic* case was the difference between what a person would reasonably be taken to mean by using the word 'vertical' in a mathematical theorem and by using it in a claimed definition of a lintel for use in the building trade. The only point on which b I would question the otherwise admirable summary of the law on infringement in the judgment of Jacob LJ in *Rockwater Ltd v Technip France SA* [2004] EWCA Civ 381 at [41], [2004] RPC 919 at [41], is when he says in sub-para (e) that to be 'fair to the patentee' one must use 'the widest purpose consistent with his teaching'. This, as it seems to me, is to confuse the purpose of the utterance with what it would be c understood to mean. The purpose of a patent specification, as I have said, is no more nor less than to communicate the idea of an invention. An appreciation of that purpose is part of the material which one uses to ascertain the meaning. But purpose and meaning are different. If, when speaking of the widest purpose, Jacob LJ meant the widest meaning, I would respectfully disagree. There is no d presumption about the width of the claims. A patent may, for one reason or another, claim less than it teaches or enables.

[34] 'Purposive construction' does not mean that one is extending or going beyond the definition of the technical matter for which the patentee seeks protection in the claims. The question is always what the person skilled in the art e would have understood the patentee to be using the language of the claim to mean. And for this purpose, the language he has chosen is usually of critical importance. The conventions of word meaning and syntax enable us to express our meanings with great accuracy and subtlety and the skilled man will ordinarily assume that the patentee has chosen his language accordingly. As a number of f judges have pointed out, the specification is a unilateral document in words of the patentee's own choosing. Furthermore, the words will usually have been chosen upon skilled advice. The specification is not a document *inter rusticos* for which broad allowances must be made. On the other hand, it must be recognised that the patentee is trying to describe something which, at any rate in his opinion, is new; which has not existed before and of which there may be no generally g accepted definition. There will be occasions upon which it will be obvious to the skilled man that the patentee must in some respect have departed from conventional use of language or included in his description of the invention some element which he did not mean to be essential. But one would not expect that to happen very often.

h [35] One of the reasons why it will be unusual for the notional skilled man to conclude, after construing the claim purposively in the context of the specification and drawings, that the patentee must nevertheless have meant something different from what he appears to have meant, is that there are necessarily gaps in our knowledge of the background which led him to express himself in that particular way. The courts of the United Kingdom, the j Netherlands and Germany certainly discourage, if they do not actually prohibit, use of the patent office file in aid of construction. There are good reasons: the meaning of the patent should not change according to whether or not the person skilled in the art has access to the file and in any case life is too short for the limited assistance which it can provide. It is however frequently impossible to know without access, not merely to the file but to the private thoughts of the patentee

and his advisors as well, what the reason was for some apparently inexplicable limitation in the extent of the monopoly claimed. One possible explanation is that it does not represent what the patentee really meant to say. But another is that he did mean it, for reasons of his own; such as wanting to avoid arguments with the examiners over enablement or prior art and have his patent granted as soon as possible. This feature of the practical life of a patent agent reduces the scope for a conclusion that the patentee could not have meant what the words appear to be saying. It has been suggested that in the absence of any explanation for a restriction in the extent of protection claimed, it should be presumed that there was some good reason between the patentee and the patent office. I do not think that it is sensible to have presumptions about what people must be taken to have meant but a conclusion that they have departed from conventional usage obviously needs some rational basis.

#### THE DOCTRINE OF EQUIVALENTS

[36] At the time when the rules about natural and ordinary meanings were more or less rigidly applied, the United Kingdom and American courts showed understandable anxiety about applying a construction which allowed someone to avoid infringement by making an 'immaterial variation' in the invention as described in the claims. In England, this led to the development of a doctrine of infringement by use of the 'pith and marrow' of the invention (a phrase invented by Lord Cairns in *Clark v Adie* (1877) 2 App Cas 315 at 320) as opposed to a 'textual infringement'. The pith and marrow doctrine was always a bit vague ('necessary to prevent sharp practice' said Lord Reid in *C Van der Lely NV v Bamfords Ltd* [1963] RPC 61 at 77) and it was unclear whether the courts regarded it as a principle of construction or an extension of protection outside the claims.

[37] In the United States, where a similar principle is called the 'doctrine of equivalents', it is frankly acknowledged that it allows the patentee to extend his monopoly beyond the claims. In the leading case of *Graver Tank & Manufacturing Co Inc v Linde Air Products Co* (1950) 339 US 605 at 607, Jackson J said that the American courts had recognised—

'that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law.'

[38] In similar vein, Learned Hand J (a great patent lawyer) said that the purpose of the doctrine of equivalents was 'to temper unsparing logic and prevent an infringer from stealing the benefit of the invention': *Royal Typewriter Co v Remington Rand Inc* (1948) 168 F 2d 691 at 692. The effect of the doctrine is thus to extend protection to something outside the claims which performs substantially the same function in substantially the same way to obtain the same result.

[39] However, once the monopoly had been allowed to escape from the terms of the claims, it is not easy to know where its limits should be drawn. In *Warner-Jenkinson Co Inc v Hilton Davis Chemical Co* (1997) 520 US 17 at 28–29 the United States Supreme Court expressed some anxiety that the doctrine of equivalents had 'taken on a life of its own, unbounded by the patent claims'. It



a seems to me, however, that once the doctrine is allowed to go beyond the claims, a life of its own is exactly what it is bound to have. The American courts have restricted the scope of the doctrine by what is called prosecution history or file wrapper estoppel, by which equivalence cannot be claimed for integers restricting the monopoly which have been included by amendment during the prosecution of the application in the patent office. The patentee is estopped  
b against the world (who need not have known of or relied upon the amendment) from denying that he intended to surrender that part of the monopoly. File wrapper estoppel means that the true scope of patent protection often cannot be established without an expensive investigation of the patent office file. Furthermore, the difficulties involved in deciding exactly what part of the claim should be taken to have been withdrawn by an amendment drove the Federal  
c Court of Appeals in *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co Ltd* (2000) 234 F 3d 558, to declare that the law was arbitrary and unworkable. Lourie J said (at 596):

d 'The only settled expectation currently existing is the expectation that clever attorneys can argue infringement outside the scope of the claims all the way through this court of appeals.'

[40] In order to restore some certainty, the Court of Appeals laid down a rule that any amendment for reasons of patent validity was an absolute bar to any extension of the monopoly outside the literal meaning of the amended text. But the Supreme Court reversed this retreat to literalism on the ground that the cure  
e was worse than the disease: see *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co Ltd* (2002) 535 US 722.

[41] There is often discussion about whether we have a European doctrine of equivalents and, if not, whether we should. It seems to me that both the doctrine of equivalents in the United States and the pith and marrow doctrine in the  
f United Kingdom were born of despair. The courts felt unable to escape from interpretations which 'unsparing logic' appeared to require and which prevented them from according the patentee the full extent of the monopoly which the person skilled in the art would reasonably have thought he was claiming. The background was the tendency to literalism which then characterised the approach of the courts to the interpretation of documents generally and the fact  
g that patents are likely to attract the skills of lawyers seeking to exploit literalism to find loopholes in the monopoly they create. (Similar skills are devoted to revenue statutes.)

[42] If literalism stands in the way of construing patent claims so as to give fair protection to the patentee, there are two things that you can do. One is to adhere  
h to literalism in construing the claims and evolve a doctrine which supplements the claims by extending protection to equivalents. That is what the Americans have done. The other is to abandon literalism. That is what the House of Lords did in the *Catnic* case, where Lord Diplock said ([1982] RPC 183 at 235):

j '... both parties to this appeal have tended to treat "textual infringement" and infringement of the "pith and marrow" of an invention as if they were separate causes of action, the existence of the former to be determined as a matter of construction only and of the latter upon some broader principle of colourable evasion. There is, in my view, no such dichotomy; there is but a single cause of action and to treat it otherwise ... is liable to lead to confusion.'

[43] The solution, said Lord Diplock, was to adopt a principle of construction which actually gave effect to what the person skilled in the art would have understood the patentee to be claiming. a

[44] Since the *Catnic* case we have art 69 which, as it seems to me, firmly shuts the door on any doctrine which extends protection outside the claims. I cannot say that I am sorry because the *Festo* litigation suggests, with all respect to the courts of the United States, that American patent litigants pay dearly for results which are no more just or predictable than could be achieved by simply reading the claims. b

IS CATNIC CONSISTENT WITH THE PROTOCOL?

[45] In *Improver Corp v Remington Consumer Products Ltd* [1989] RPC 69 the Court of Appeal said that Lord Diplock's speech in the *Catnic* case advocated the same approach to construction as is required by the Protocol. (See also *Southco Inc v Dzus Fastener Europe Ltd* [1992] RPC 299.) But in *PLG Research Ltd v Ardon International Ltd* [1995] RPC 287 at 309 Millett LJ said: c

'Lord Diplock was expounding the common law approach to the construction of a patent. This has been replaced by the approach laid down by the Protocol. If the two approaches are the same, reference to Lord Diplock's formulation is unnecessary, while if they are different it is dangerous.' d

[46] This echoes, perhaps consciously, the famous justification said to have been given by the Caliph Omar for burning the library of Alexandria: 'If these writings of the Greeks agree with the Book of God, they are useless and need not be preserved: if they disagree, they are pernicious and ought to be destroyed'—a story which Gibbon dismissed as Christian propaganda. But I think that the Protocol can suffer no harm from a little explanation and I entirely agree with the masterly judgment of Aldous J in *Assidoman Multipack Ltd v Mead Corp* [1995] RPC 321, in which he explains why the *Catnic* approach accords with the Protocol. e

[47] The Protocol, as I have said, is a Protocol for the construction of art 69 and does not expressly lay down any principle for the construction of claims. It does say what principle should *not* be followed, namely the old English literalism, but otherwise it says only that one should not go outside the claims. It does however say that the object is to combine a fair protection for the patentee with a reasonable degree of certainty for third parties. How is this to be achieved? The claims must be construed in a way which attempts, so far as is possible in an imperfect world, not to disappoint the reasonable expectations of either side. What principle of interpretation would give fair protection to the patentee? Surely, a principle which would give him the full extent of the monopoly which the person skilled in the art would think he was intending to claim. And what principle would provide a reasonable degree of protection for third parties? Surely again, a principle which would not give the patentee more than the full extent of the monopoly which the person skilled in the art would think that he was intending to claim. Indeed, any other principle would also be unfair to the patentee, because it would unreasonably expose the patent to claims of invalidity on grounds of anticipation or insufficiency. f  
g  
h  
j

[48] The *Catnic* principle of construction is therefore in my opinion precisely in accordance with the Protocol. It is intended to give the patentee the full extent, but not more than the full extent, of the monopoly which a reasonable person

- a skilled in the art, reading the claims in context, would think he was intending to claim. Of course it is easy to say this and sometimes more difficult to apply it in practice, although the difficulty should not be exaggerated. The vast majority of patent specifications are perfectly clear about the extent of the monopoly they claim. Disputes over them never come to court. In borderline cases, however, it does happen that an interpretation which strikes one person as fair and
- b reasonable will strike another as unfair to the patentee or unreasonable for third parties. That degree of uncertainty is inherent in any rule which involves the construction of any document. It afflicts the whole of the law of contract, to say nothing of legislation. In principle it is without remedy, although I shall consider in a moment whether uncertainty can be alleviated by guidelines or a 'structured' approach to construction.
- c

#### EQUIVALENTS AS A GUIDE TO CONSTRUCTION

- [49] Although art 69 prevents equivalence from extending protection outside the claims, there is no reason why it cannot be an important part of the background of facts known to the skilled man which would affect what he
- d understood the claims to mean. That is no more than common sense. It is also expressly provided by the new art 2 added to the Protocol by the Munich Act revising the EPC, dated 29 November 2000 (but which has not yet come into force):

- e 'For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is equivalent to an element specified in the claims.'

[50] In the *Catnic* case [1982] RPC 183 at 243 Lord Diplock offered some observations on the relevance of equivalence to the question of construction:

- f 'The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall
- g outside the monopoly claimed, even though it could have no material effect upon the way the invention worked. The question, of course, does not arise where the variant would in fact have a material effect upon the way the invention worked. Nor does it arise unless at the date of publication of the specification it would be obvious to the informed reader that this was so.
- h Where it is not obvious, in the light of the then-existing knowledge, the reader is entitled to assume that the patentee thought at the time of the specification that he had good reason for limiting his monopoly so strictly and had intended to do so, even though subsequent work by him or others in the field of the invention might show the limitation to have been unnecessary. It is to be answered in the negative only when it would be
- j apparent to any reader skilled in the art that a particular descriptive word or phrase used in a claim cannot have been intended by a patentee, who was also skilled in the art, to exclude minor variants which, to the knowledge of both him and the readers to whom the patent was addressed, could have no material effect upon the way in which the invention worked.'

[51] In *Improver Corp v Remington Consumer Products Ltd* [1990] FSR 181 at 189 I tried to summarise this guidance: a

‘If the issue was whether a feature embodied in an alleged infringement which fell outside the primary, literal or acontextual meaning of a descriptive word or phrase in the claim (“a variant”) was nevertheless within its language as properly interpreted, the court should ask itself the following three questions: (1) Does the variant have a material effect upon the way the invention works? If yes, the variant is outside the claim. If no—(2) Would this (i.e. that the variant had no material effect) have been obvious at the date of publication of the patent to a reader skilled in the art. If no, the variant is outside the claim. If yes—(3) Would the reader skilled in the art nevertheless have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention. If yes, the variant is outside the claim. On the other hand, a negative answer to the last question would lead to the conclusion that the patentee was intending the word or phrase to have not a literal but a figurative meaning (the figure being a form of synecdoche or metonymy) denoting a class of things which included the variant and the literal meaning, the latter being perhaps the most perfect, best-known or striking example of the class.’ b  
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[52] These questions, which the Court of Appeal in *Wheatley v Drillsafe Ltd* [2000] IP & T 1076 at 1084, [2001] RPC 133 at 142 dubbed ‘the Protocol questions’ have been used by English courts for the past 15 years as a framework for deciding whether equivalents fall within the scope of the claims. On the whole, the judges appear to have been comfortable with the results, although some of the cases have exposed the limitations of the method. When speaking of the ‘*Catnic* principle’ it is important to distinguish between, on the one hand, the principle of purposive construction which I have said gives effect to the requirements of the Protocol, and on the other hand, the guidelines for applying that principle to equivalents, which are encapsulated in the Protocol questions. The former is the bedrock of patent construction, universally applicable. The latter are only guidelines, more useful in some cases than in others. I am bound to say that the cases show a tendency for counsel to treat the Protocol questions as legal rules rather than guides which will in appropriate cases help to decide what the skilled man would have understood the patentee to mean. The limits to the value of the guidelines are perhaps most clearly illustrated by the present case and therefore, instead of discussing the principles in the abstract as I have been doing so far, I shall make my comments by reference to the facts of the case. e  
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#### THE JUDGE’S CONSTRUCTION OF THE CLAIMS

[53] It will be recalled that claim 1 is to a DNA sequence, selected from the sequences set out in Table VI or related sequences, for securing the expression of EPO in a ‘host cell’. The chief question of construction is whether the person skilled in the art would understand ‘host cell’ to mean a cell which is host to the DNA sequence which coded for EPO. The alternative, put forward by Amgen, is that it can include a sequence which is endogenous to the cell, like the human EPO gene which expresses GA-EPO, as long as the cell is host to some exogenous DNA. In the TKT process, it is host to the control sequence and other machinery introduced by homologous recombination. j



a [54] On this question, the judge had the advantage of hearing the evidence of a number of witnesses who were highly skilled in the art. They all said that they would have understood claim 1 to be referring to a DNA sequence coding for EPO which had been isolated or synthesised and was suitable for expression in a host cell. In other words, the claim was to a sequence coding for EPO which was exogenous to the cell in which expression took place. The judge summed up his conclusions in [215]:

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'I am of the view that a cell is not a "host cell" unless it is host to exogenous DNA encoding for EPO or its analogue. Such a conclusion is based in part on the teaching of the [patent in suit]. The terms "host" and "host cell" are used consistently to describe cells which have been transfected with exogenous or foreign DNA (ie DNA from outside that particular cell) which encodes EPO, with a view to securing expression of EPO in those host cells. That was accepted by [Amgen's expert] Dr Brenner. The examples contained in [the patent in suit] are all concerned with EPO-encoding DNA which has been isolated outside the cell and inserted into the cell to which it is foreign. Indeed, at the relevant time, the routine method of production of a recombinant protein was by cloning the gene encoding the protein and the introduction of that clone into a self-replicating organism by transfection or transformation. There was no knowledge of the technique of "switching on" an endogenous encoding sequence by transfecting the cell with exogenous DNA sequences as including an artificial promoter.' (See [2001] IP & T 882 at [215].)

f [55] Besides these general considerations, the judge relied upon other indications in the language of the specification. The words 'for use in securing expression ... of a polypeptide' suggested the DNA which coded for that polypeptide rather than a control sequence which promoted expression of endogenous DNA. That was supported by para (b) of claim 1, which extended the claim to sequences which were not in Table VI but which hybridised under stringent conditions to 'the protein coding regions' of Table VI.

g [56] Furthermore, the specification appears anxious to point out that the invention covers the use of mammalian cells which already have an EPO gene of their own:

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'It will be understood that expression of, eg, monkey origin DNA in monkey host cells in culture and human host cells in culture, actually constitute instances of "exogenous" DNA expression inasmuch as the EPO DNA whose high level expression is sought would not have its origins in the genome of the host.'

j [57] That certainly suggests that the patentee regarded it as essential to his invention that the DNA of which high level expression was sought should not have its origin in the genome of the host cell. That would clearly exclude the DNA sequence which expresses GA-EPO, which forms part of the genome of the host cell.

[58] For these reasons, which I find entirely convincing, the judge came to the conclusion that the person skilled in the art would not regard the endogenous coding sequence which expressed GA-EPO as falling within claim 1. It followed that GA-EPO was not the expression of a DNA sequence within claim 1 and therefore did not infringe claim 26. And by the same process of reasoning, the

judge concluded that the person skilled in the art would not regard GA-EPO as 'the product of . . . expression of an exogenous DNA sequence' within claim 19. At this point in the judgment, TKT might have concluded that they had won. I shall return in a moment to consider why the judge nevertheless held claim 26 to have been infringed. But, first, I must deal with three criticisms of the judge's construction advanced by Mr Watson QC on behalf of Amgen. a

[59] First, Mr Watson says that in construing claim 1, the judge has read 'a DNA sequence' to mean 'an exogenous DNA sequence encoding for EPO' and thereby read into the claim words which are not there. Similarly in claim 26 he has read 'expression . . . of a DNA sequence' to mean 'expression of an exogenous DNA sequence coding for EPO'. But in my opinion no words have been 'read into' the claims. The meaning of the term 'host cell' is wholly dependent on context. The notion of a host entails the notion of a guest. If the guest is not expressly identified, it must be inferred from context. One answer might have been that the guest was intended to be any DNA whatever. In that case, TKT's human cells are host to the sequences inserted by homologous recombination. But the judge has held, in my opinion rightly, that 'host cell' in the context of the specification means 'cell which is host to an exogenous DNA sequence encoding for EPO'. This is not reading words into the claim any more than when one says that in a particular context 'the City' means 'the City of London'. b  
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[60] Secondly, Mr Watson submits that the judge assumed that GA-EPO was made by the human cells (HT-1080) in which the EPO gene was endogenous. In fact, it was made by the R-223 cells selected by methotrexate by reason of their amplification of the gene. Such amplification would not have occurred without the introduction of the exogenous DNA upstream of the EPO gene in the original cells. e

[61] This seems to me a lawyer's point if ever there was one. The claims are concerned with the expression of EPO by a gene which is exogenous to the cell. But the genes which express EPO in the R-223 cells are not exogenous. They come into existence when the cell is formed by division and simply replicate the genes in the HT-1080 cells. The fact that exogenous DNA is needed to promote amplification seems to me irrelevant. f

[62] Thirdly, Mr Watson submits that a part of the EPO encoding sequence was exogenous to the cell. For reasons into which it is unnecessary to inquire, the TKT process removed 13 nucleotides from the beginning of the leader sequence in the natural gene and substituted ten others. But the amino acid residues for which these nucleotides coded were removed during the process of expression and formed no part of the mature protein. The EPO to which the claims refer is in my opinion the mature protein which was entirely encoded by endogenous DNA. g  
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#### THE JUDGE'S APPLICATION OF THE PROTOCOL QUESTIONS

[63] Having thus construed the claims, the judge described his construction as 'literal' and moved on to the Protocol questions. In what sense could the construction have been literal? The first difficulty about the application of the Protocol questions is to decide what is meant by a 'primary, literal or acontextual meaning'. The judge's construction could not possibly be described as acontextual. It was entirely dependent on context and reflected the evidence of how the claim would have been understood by men skilled in the art. j

a [64] No one has ever made an acontextual statement. There is always some context to any utterance, however meagre. 'Acontextual meaning' can refer only to the conventional rules for the use of language, such as one finds in a dictionary or grammar. But then, to compare acontextual meaning in that sense with contextual meaning is to compare apples with pears. The one refers to a general rule about how words or syntax *should* be used and the other to the fact of what  
b on a specific occasion the language *was* used to mean. So, to make any sense of the terms 'primary, literal or acontextual meaning' in the Protocol questions, it must be taken to mean a construction which assumes that the author used words strictly in accordance with their conventional meanings.

c [65] The notion of strict compliance with the conventional meanings of words or phrases sits most comfortably with the use of figures, measurements, angles and the like, when the question is whether they allow for some degree of tolerance or approximation. That was the case in *Catnic* and it is significant that the 'quintet' of cases in which the German Bundesgerichtshof referred to *Catnic* and said that its approach accorded with that of the House of Lords were all concerned with figures and measurements. In such cases, the contrast with strict  
d compliance is approximation and not the rather pretentious figures of speech mentioned in the Protocol questions.

e [66] No doubt there are other cases, not involving figures or measurements, in which the question is whether a word or phrase was used in a strictly conventional or some looser sense. But the present case illustrates the difficulty of applying the Protocol questions when no such question arises. No one suggests that 'an exogenous DNA sequence coding for EPO' can have some looser meaning which includes 'an endogenous DNA sequence coding for EPO'. The question is rather whether the person skilled in the art would understand the invention as operating at a level of generality which makes it irrelevant whether  
f the DNA which codes for EPO is exogenous or not. That is a difficult question to put through the mangle of the Protocol questions because the answer depends entirely upon what you think the invention is. Once you have decided that question, the Protocol questions answer themselves.

g [67] The judge thought that the invention was the discovery of the sequence of the EPO gene and the associated information. It followed that any method of making EPO which used that information, whether by the expression of exogenous or endogenous DNA, would operate in the same way and that this would be obvious to the person skilled in the art. Furthermore, there was no reason why the patentee should have wished to insist upon any particular method of using the information to obtain the expression of EPO.

h [68] The Court of Appeal, on the other hand, thought that the invention was a way of making EPO. The information about the sequence of the gene was necessary to enable the invention to be performed but was not and could not be the invention itself. It followed that a different way of making EPO worked in a different way from that described in the invention and that this would have been  
j obvious to a person skilled in the art. The Court of Appeal added that if they had answered the first two Protocol questions in favour of Amgen they would also have answered the third in its favour. That is a somewhat unreal hypothesis and seems only to mean that if upon the true construction of the claims the invention was broad enough to include any method of making EPO, they would not have understood the patentee to be insisting on any particular method.

[69] I shall say in a moment why I agree with the Court of Appeal, but I want first to emphasise a point I have already made about the use of the Protocol questions. The determination of the extent of protection conferred by a European patent is an examination in which there is only one compulsory question, namely that set by art 69 and its Protocol: what would a person skilled in the art have understood the patentee to have used the language of the claim to mean? Everything else, including the Protocol questions, is only guidance to a judge trying to answer that question. But there is no point in going through the motions of answering the Protocol questions when you cannot sensibly do so until you have construed the claim. In such a case—and the present is in my opinion such a case—they simply provide a formal justification for a conclusion which has already been reached on other grounds. a  
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[70] I agree with the Court of Appeal that the invention should normally be taken as having been claimed at the same level of generality as that at which it is defined in the claims. It would be unusual for the person skilled in the art to understand a specification to be claiming an invention at a higher level of generality than that chosen by the patentee. That means that once the judge had construed the claims as he did, he had answered the question of infringement. It could only cause confusion to try to answer the Protocol questions as well. c  
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[71] No doubt there will be patent lawyers who are dismayed at the notion that the Protocol questions do not provide an answer in every case. They may feel cast adrift on a sea of interpretative uncertainty. But that is the fate of all who have to understand what people mean by using language. The Protocol questions are useful in many cases, but they are not a substitute for trying to understand what the person skilled in the art would have understood the patentee to mean by the language of the claims. e

[72] This is perhaps an appropriate point at which to mention what may appear to be a difference between the German, United Kingdom and Netherlands approach to these questions. It used to be thought that despite art 69 and the Protocol, there remained serious differences between the approaches to construction of the United Kingdom on the one hand and Germany and the Netherlands on the other. And it is true that in the early years of the EPC, there was a view in the German and Netherlands courts that the convention had made no difference and that the Protocol entitled the courts of contracting states to go on deciding the extent of protection exactly as before. The position in the Netherlands is described by Professor Brinkhof in the article *Is there a European Doctrine of Equivalence?* (2002) IIC 911 to which I have already referred. f  
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[73] But I do not think that this is any longer true. The highest courts in both Germany (see *Batteriekastenschnur* [1989] GRUR 903 at 904) and the Netherlands (see *Ciba-Geigy/Oté Optics* (1995) *Nederlandse Jurisprudentie* 39) have said that the effect of art 69 is to give the claims what the European Patent Office has called a 'central role': see *BAYER/Plant growth regulating agent* Decision G 0006/88 [1990] EPOR 257 at 261. The Bundesgerichtshof said in the *Batteriekastenschnur* case that the claims are no longer merely a point of departure but the decisive basis (*maßgebliche Grundlage*) for determining the extent of protection ([1989] GRUR 903 at 904). h  
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[74] In addressing the 10th Symposium of European Patent Judges in Luxembourg in 2000, the distinguished German patent lawyer Dr Rüdiger Rogge (then presiding judge of the 10th (intellectual property) Senate of the Bundesgerichtshof) said that he regarded the decisions of other countries on the



a extent of protection afforded by art 69 as important contributions to the jurisprudence of his own country. The same is true of the judges of the United Kingdom.

[75] The German courts have their own guidelines for dealing with equivalents, which have some resemblance to the Protocol questions. In the 'quinter' of cases before the Bundesgerichtshof (see, for example, *Kunststoffrohrteil* b [2002] GRUR 511 and *Schneidemesser 1* [2003] ENPR 12 309) which concerned questions of whether figures or measurements in a claim allow some degree of approximation (and, if so, what degree), the court expressly said that its approach was similar to that adopted in the *Catnic* case. But there are differences from the Protocol questions which are lucidly explained by Dr Peter Meier-Beck (currently a judge of the 10th Senate) in a paper to be published in the International Review c of Intellectual Property and Competition Law (IIC). For example, German judges do not ask whether a variant 'works in the same way' but whether it solves the problem underlying the invention by means which have the same technical effect. That may be a better way of putting the question because it avoids the ambiguity illustrated by *American Home Products Corp v Novartis Pharmaceuticals* d UK Ltd [2000] IP & T 1308, [2001] RPC 159 over whether 'works in the same way' involves an assumption that it works at all. On the other hand, as is illustrated by the present case, everything will depend upon what you regard as 'the problem underlying the invention'. It seems to me, however, that the German courts are also approaching the question of equivalents with a view to answering the same ultimate question as that which I have suggested is raised by art 69, namely what e a person skilled in the art would have thought the patentee was using the language of the claim to mean.

#### THE DECISION OF THE COURT OF APPEAL

[76] I agree with the Court of Appeal on construction for a number of reasons. f First, I think that the judge's construction pays no attention to the claims. It does not even use them as 'guidelines' but goes straight to Table VI and declares that to be the invention. Secondly, I think that the Court of Appeal was right in saying that Table VI could not have been the invention. Standing alone, it was a 'discovery . . . as such' within the meaning of s 1(2) of the Act: see *Genentech Inc's* g *Patent* [1989] RPC 147 at 204 per Purchas LJ and at 237 per Dillon LJ. On the other hand, as Whitford J said in the *Genentech* case ([1987] RPC 553 at 566):

'It is trite law that you cannot patent a discovery, but if on the basis of that discovery you can tell people how it can be usefully employed, then a patentable invention may result. This in my view would be the case, even h though once you have made the discovery, the way in which it can be usefully employed is obvious enough.'

[77] In such a case, while it may be true to say, as the Court of Appeal did ([2003] IP & T 694 at [52], [2003] RPC 31 at [52]) that Table VI lay 'at the heart of the invention', it was not the invention. An invention is a practical product or j process, not information about the natural world. That seems to me to accord with the social contract between the state and the inventor which underlies patent law. The state gives the inventor a monopoly in return for an immediate disclosure of all the information necessary to enable performance of the invention. That disclosure is not only to enable other people to perform the invention after the patent has expired. If that were all, the inventor might as well

be allowed to keep it secret during the life of the patent. It is also to enable anyone to make immediate use of the information for any purpose which does not infringe the claims. The specifications of valid and subsisting patents are an important source of information for further research, as is abundantly shown by a reading of the sources cited in the specification for the patent in suit. Of course a patentee may in some cases be able to frame his claim to a product or process so broadly that in practice it will be impossible to use the information he has disclosed, even to develop important improvements, in a way which does not infringe. But it cannot be right to give him a monopoly of the use of the information as such.

#### NEW TECHNOLOGY

[78] The effect of the construction for which Amgen contends is that claim 1 should be read as including any DNA sequence, whether exogenous or endogenous, which expresses EPO in consequence of the application to the cell of any form of DNA recombinant technology. It would have been easy to draft such a claim. Whether the specification would have been sufficient to support it, in the sense of enabling expression by any form of DNA recombinant technology, is another matter to which I shall return when I deal with validity. But the person skilled in the art (who must, in my opinion, be assumed to know the basic principles of patentability) might well have thought that the claims were restricted to existing technology because of doubts about sufficiency rather than lack of foresight about possible developments. Amgen would have been well aware in 1983 that recombinant technology was developing rapidly and that artificial homologous recombination had been achieved in bacterial and yeast cells and that its use in mammalian cells was regarded as a desirable goal.

[79] Amgen submit that although homologous recombination was a known phenomenon in 1983, its use to achieve 'gene activation' was unknown. The method of manufacture by DNA recombinant technology referred to in the claim was the only one known at the priority date. At the time, it was in practice equivalent to a general claim for manufacture by recombinant DNA technology. It should therefore be construed as such. Amgen say that if the claims cannot be construed in terms sufficiently general to include methods unknown at the priority date, the value of a patent would be destroyed as soon as some new technology for achieving the same result was invented.

[80] I do not dispute that a claim may, upon its proper construction, cover products or processes which involve the use of technology unknown at the time the claim was drafted. The question is whether the person skilled in the art would understand the description in a way which was sufficiently general to include the new technology. There is no difficulty in principle about construing general terms to include embodiments which were unknown at the time the document was written. One frequently does that in construing legislation, for example, by construing 'carriage' in a nineteenth century statute to include a motor car. In such cases it is particularly important not to be too literal. It may be clear from the language, context and background that the patentee intended to refer in general terms to, for example, every way of achieving a certain result, even though he has used language which is in some respects inappropriate in relation to a new way of achieving that result: compare *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687. In the present case, however, I agree with the Court of Appeal (and with the judge, before he came to

a apply the Protocol questions) that the man skilled in the art would not have understood the claim as sufficiently general to include gene activation. He would have understood it to be limited to the expression of an exogenous DNA sequence which coded for EPO.

b [81] The argument over whether the claim can include the new technology is linked to a dispute over the meaning of the second Protocol question. When one asks whether it would have been obvious to the person skilled in the art that the variant worked in the same way as the invention, does one assume that it works? Otherwise, in the case of a technology which was unknown at the priority date, the person skilled in the art would probably say that it was by no means obvious that it would work in the same way because it was not obvious that it would work at all.

c [82] Some might say, in answer to this question, that it depends on the nature of the invention. For example, in *American Home Products Corp v Novartis Pharmaceuticals UK Ltd* [2000] IP & T 1308, [2001] RPC 159 the alleged invention was a second medical use for the known drug rapamycin, which was found to have an immuno-suppressive effect. The question was whether a claim to rapamycin should be construed as including derivatives of rapamycin. The evidence was that d the person skilled in the art would be unable to say without experimentation that any particular derivative would have an immuno-suppressive effect. In applying the second Protocol question, it would have been absurd to ask whether, assuming that a derivative 'worked' in the sense of having an immuno-suppressive effect, it worked 'in the same way'. That would really be to beg the question. Neither the product nor the process was new: the whole point of the invention was the newly e discovered immuno-suppressive effect.

[83] On the other hand, in *Improver Corp v Remington Consumer Products Ltd* [1990] FSR 181 the invention was based upon the discovery that an arcuate rod with slits, when rotated at high speed, would take the hair off the skin by means of the opening and closing of the slits. The claim was to a rod in the form of an f 'helical spring' but the alleged infringer had found that an arcuate rod of vulcanised rubber with slits would do just as well. In answering the second Protocol question, I said that it did not matter that it would not have been obvious to the person skilled in the art to substitute a rubber rod. The question was whether such a rod would work in the same way as an helical spring. I went on, however, to say (in answer to the third question) that 'helical spring' could g not be generalised to mean any arcuate rod with slits. It meant an helical spring.

[84] So perhaps a better answer to the dispute over the second Protocol question is that new technology is another situation in which the Protocol questions may be unhelpful. On the other hand, if the claim can properly be construed in a way which is sufficiently general to include the new technology, h the Protocol questions tend to answer themselves.

[85] For these reasons I would hold that TKT did not infringe any of the claims and dismiss Amgen's appeal.

#### NOVELTY

j [86] TKT appeals against the rejection by both the judge and the Court of Appeal of its challenge to claim 26 on the ground of anticipation. This raises a point of principle about what counts as a new product.

[87] Section (1)(a) of the Act says that a patent may be granted only for an invention which is new and s 2(1) says that an invention shall be taken to be new if it does not form part of the state of the art. The Act assumes that any invention

will be either a product or a process (see the definition of infringement in s 60). Claim 26 is to a product, namely a polypeptide which is the expression in a host cell of a DNA sequence in accordance with claim 1. Such a product is EPO and the question is whether it is new or the same as the EPO which was already part of the state of the art, namely the uEPO which Miyake and others had purified from urine. a

[88] The practice in the United Kingdom under the Patents Act 1949 and earlier was to treat the fact that a product was made by a new process as sufficient to distinguish it from an identical product which was already part of the state of the art. This was not particularly logical, because the history of how a product was made is not an attribute which it carries around and makes it something new. It was still the same product, even if made in a different way. But the English practice had practical advantages when the extent of protection conferred by a patent was undefined (as it was until 1977) and it was assumed that a process claim could be infringed only by using that process in the United Kingdom. A product-by-process claim had the advantage of enabling the inventor of a new process to pursue not only the manufacturer who infringed his claim to the process but also, by virtue of the separate 'product-by-process' claim, anyone who dealt in a product which had been made by that process. That was particularly useful in the case of the importation of a product made by someone outside the jurisdiction by a process which would have infringed the process claim if it had been made in this country. b  
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[89] The EPC, however, contains a provision which allows a patentee to rely directly on his process claim to allege infringement of a product made (whether within the jurisdiction or abroad) by that process. This is art 64(2) (given effect in United Kingdom domestic law by s 60(1)(c) of the Act): e

'If the subject-matter of the European patent is a process, the protection conferred by the patent shall extend to the products directly obtained by such process.' f

[90] This provision largely removes the practical argument for allowing product-by-process claims. The European Patent Office has therefore been able to accept the logical argument that a new process is not enough to make the product new. It will not ordinarily accept a 'product-by-process' claim. A patentee who wishes to complain of dealings in a product made by his patented process must rely on his process claim and art 64(2). The principle is clearly stated by the Technical Board of Appeal in *International Flavors & Fragrances Inc* Decision T 150/82 [1984] OJ EPO 309, in which the United Kingdom was singled out as the only member state of the EPC which accepted product-by-process claims. g  
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[91] The only case in which the EPO will accept a claim to a product defined in terms of its process of manufacture is when the product is new in the sense of being different from any existing product in the state of the art but the difference cannot be described in chemical or physical terms. As the Board said in the *International Flavors* case (at para 8): j

'This may well be the only way to define certain natural products or macromolecular materials of unidentified or complex composition which have not yet been defined structurally.'



a [92] When the application for the patent in suit was made to the EPO, both claims 19 and 26 were product claims in which the product was described wholly or partly in terms of the way it was made. In the case of claim 19, it was a claim to EPO which was (a) in the form of Table VI ('or any allelic variant or derivative thereof') and (b) 'the product of . . . expression of an exogenous DNA sequence'. The Technical Board found on the evidence that EPO which complied with these descriptions would not necessarily be different from uEPO and therefore rejected the claim. Amgen were therefore put to finding some distinction between the patented EPO and uEPO. They amended the claim by adding the words 'and which has higher molecular weight by SDS-PAGE from erythropoietin isolated from urinary sources'. I shall come back to the sufficiency of such a claim but there is no doubt that the product would, by definition, be different from uEPO.

c [93] In the case of claim 26, the EPO was defined as the product of the expression, in a eucaryotic host of a DNA sequence according to claim 1. This is verbally different from the definition in claim 19, which applies to the expression of any exogenous DNA sequence, although whether this makes any practical difference is another matter. The Technical Board found on the evidence that expression in a eucaryotic host 'will ensure glycosylation of the product, thus distinguishing it from the prior art'.

d [94] The Board went on to say:

e 'The Board is on the evidence prepared to presume that the limitation to the polypeptide being a product makeable using the DNA of Claim 1 is a technical feature which ensures that it has a glycosylation pattern different from the known uEPO.'

f [95] I must confess to being a little puzzled by these findings. It is unclear to me whether the technical feature which ensured novelty was the use of a eucaryotic host cell (as the first quotation above suggests) or whether it was the use of DNA according to claim 1 (as the second quotation suggests). It is true that glycosylation occurs only in eucaryotic cells, but that is no distinction from the prior art because human cells are eucaryotic. Likewise, the DNA of claim 1 was alleged to be the human EPO gene as sequenced by Dr Lin. Nor can I quite understand why the Board arrived at a different conclusion in respect of the facts relevant to claim 19. But for present purposes none of this matters: the decision of the Board on claim 26 was based upon a finding of fact that it was necessarily different from uEPO.

g [96] Neuberger J, on the other hand, found as a fact that there was no difference between uEPO and EPO made according to claim 26. He drew no distinction between EPO made in accordance with claim 19 and EPO made in accordance with claim 26, calling them both recombinant EPO ('rEPO'). He found ([2001] IP & T 882 at [545]–[557]) that there was no necessary distinction between rEPO and uEPO. It seems clear that if the European Patent Office had made similar findings of fact, it would have rejected claim 26. So TKT say that Neuberger J ought to have held it had been anticipated.

j [97] Both the judge and the Court of Appeal rejected this argument as a matter of law, and for similar reasons. In the Court of Appeal, Aldous LJ said:

'The [Technical] Board [of the EPO] accepted that it is permissible to have a claim to a product defined in terms of a process of manufacture, but state that such claims should only be granted in cases when the product cannot be satisfactorily defined by reference to its composition, structure or other

testable parameter. That is a rule of practice which is not the concern of the national courts.' (See [2003] IP & T 694 at [30].) a

[98] That is, I must respectfully say, an incomplete statement of the position of the Board. The first requirement is that the product must be new and that a difference in the method of manufacturing an identical product does not make it new. It is only if the product is different but the difference cannot in practice be satisfactorily defined by reference to its composition etc that a definition by process of manufacture is allowed. The latter may be a rule of practice but the proposition that an identical product made by a new process does not count as new is in my opinion a proposition of law. It cannot be new in law but not new for the purposes of the practice of the Office. b

[99] Aldous LJ then went on to say (at [31]) 'it seems that the Office concluded that claim 26 fell within the type of case where the product could not be satisfactorily defined by its features'. That is true, but again incomplete. The important point is that the Office found that rEPO according to claim 26 was a new product because its glycosolation pattern would necessarily be different from that of uEPO. Once this finding of fact was removed, there was no basis for allowing claim 26. c

[100] Aldous LJ also relied upon art 64(2) as being consistent with a product-by-process claim. But in my opinion it leads to exactly the opposite conclusion and the Technical Board in the *International Flavors* case so held. The point of art 64(2) is to extend the protection afforded by a process claim to a product directly made by that process and to make it unnecessary to claim the product defined by reference to the process. d

[101] I think it is important that the United Kingdom should apply the same law as the EPO and the other member states when deciding what counts as new for the purposes of the EPC: compare *Merrell Dow Pharmaceuticals Inc v HN Norton & Co Ltd* (1995) 33 BMLR 201 at 205, [1996] RPC 76 at 82. It is true that this means a change in a practice which has existed for many years. But the difference is unlikely to be of great practical importance because a patentee can rely instead on the process claim and art 64(2). It would be most unfortunate if we were to uphold the validity of a patent which would on identical facts have been revoked in opposition proceedings in the EPO. I would therefore allow this part of the appeal and declare claim 26 invalid on the ground of anticipation. e

#### SUFFICIENCY

[102] TKT appeal against the Court of Appeal's rejection of their submissions that the specification is, on various grounds, insufficient to support claims 19 and 26. The law on this point is contained in s 72(1)(c) of the Act. A patent may be revoked if the specification does not disclose the invention 'clearly enough and completely enough for it to be performed by a person skilled in the art'. That means that the disclosure must enable the invention to be performed to the full extent of the monopoly claimed: see *Biogen Inc v Medeva plc* [1997] RPC 1 at 48. f

[103] Whether the specification is sufficient or not is highly sensitive to the nature of the invention. The first step is to identify the invention and decide what it claims to enable the skilled man to do. Then one can ask whether the specification enables him to do it. For example, in *American Home Products Corp v Novartis Pharmaceuticals UK Ltd* [2000] IP & T 1308, [2001] RPC 159 the patentee claimed that the known drug rapamycin and any of its derivatives could be put to a new use. But the claim for such use of all derivatives was not enabled because g

a only some derivatives could be so used and the specification did not enable the skilled man to identify which they were. The answer may well have been different if the claim was to a new process for making rapamycin and its derivatives or if rapamycin and its derivatives had been new products.

b [104] It seems to me that a good deal of the argument in this case about sufficiency, like the argument about infringement, really turns on a dispute over exactly what the invention is: whether it is the discovery of the DNA sequence which codes for EPO, or a way of making EPO, or a new artificial form of EPO. And the confusion is compounded by the fact that claims 19 and 26 are both in essence product-by-process claims, even though, in the case of claim 19, the product is distinguished from prior art by an artificial condition about molecular weight. All this creates ambiguity about the nature of the invention. But in order c to decide whether the invention has been fully enabled, you first have to decide what the invention is.

d [105] The complaints of insufficiency are four. First, if (contrary to the view I have expressed on infringement) the claims cover EPO made by any form of recombinant DNA technology, it is said that they are insufficient because the specification does not enable TKT's technology. I shall call this the 'breadth of claim objection'. It is a classic patent law squeeze.

e [106] Secondly, TKT submit that even if the claims are confined to EPO made by the expression of exogenous DNA in a host cell, they enable high-level expression only in CHO cells, which have the genetic mutation allowing Amgen's method of amplification. The specification is insufficient to enable high-level expression in any other cell variety. I shall call this the 'cell variety objection'.

f [107] Thirdly, the claims are not only to EPO but to all analogues which behave like EPO in promoting the manufacture of red blood cells. The specification is alleged to be insufficient because it does not enable one to predict which analogues will behave like EPO: (the 'analogues objection').

[108] Fourthly, the test for distinguishing EPO falling within claim 19 from uEPO (molecular weight) is in practice incapable of application. I shall call this the 'molecular weight objection'.

g [109] Before considering any of the four objections, it is, as I indicated earlier, necessary to decide the nature of the invention which the specification had to enable. In my opinion, it was a way of making EPO. For the reasons which I gave when discussing infringement, it was not and could not be the DNA sequence. It could only be a way (however broadly expressed) of making EPO by the use of that information. It could not be EPO itself because that was not new. Nor was it the discovery that a product had a useful quality. The useful qualities of EPO h were well known. Even in the case of claims 19 and 26, although they are nominally product claims, the essence of the invention lies in the process. If one keeps in mind that the invention is a way of making EPO, a good deal of the difficulty about sufficiency resolves itself.

j *Breadth of claims*

[110] If your Lordships agree with my view on the construction of the claims, they do not cover the TKT process and the specification need not enable it. So your Lordships need not decide whether the specification would have been sufficient if the patent had claimed every method of making EPO by recombinant DNA technology. The judge, for whom the breadth of claims question did arise,

said that the TKT process was enabled by the disclosure in Table VI because it could not have been operated without the DNA sequence information. Table VI was, he said, a principle capable of general application. He cited in support the decisions of the Netherlands Court of Appeal in *Kirin Amgen cs/Boehringer Mannheim cs* (27 January 2000) and the Federal Court of Australia in *Genetics Institute Inc v Kirin-Amgen Inc (No 3)* (1998) 156 ALR 30. The Court of Appeal, for whom the question did not arise, was inclined to agree with the judge. Aldous LJ said ([2003] IP & T 697 at [69], [2003] RPC 31 at [69]):

‘The law contemplates that patents will not lack sufficiency even though the claims cover inventive improvements. If the law was otherwise there would be no room for patents which disclosed a principle of general application unless the specification described how to carry out later inventions using the principle.’

[111] As the question does not arise for your Lordships either, I do not propose to express a concluded view. But the judge’s view was plainly influenced by his opinion that Table VI could itself be the invention. He regarded Table VI as disclosing a ‘principle capable of general application’ and applied a passage from my speech in the *Biogen* case ([1997] RPC 1 at 48–49):

‘If the invention discloses a principle capable of general application, the claims may be in correspondingly general terms . . . [I]f the patentee . . . has disclosed a beneficial property which is common to [a class of products] he will be entitled to a patent for all products of that class (assuming them to be new) even though he has not himself made more than one or two of them.’

[112] This gave rise to a good deal of argument about what amounted to a ‘principle of general application’. In my opinion there is nothing difficult or mysterious about it. It simply means an element of the claim which is stated in general terms. Such a claim is sufficiently enabled if one can reasonably expect the invention to work with anything which falls within the general term. For example, in *Genentech/Polypeptide expression* Decision T 0292/85 [1989] OJ EPO 275, the patentee claimed in general terms a plasmid suitable for transforming a bacterial host which included an expression control sequence to enable the expression of exogenous DNA as a recoverable polypeptide. The patentee had obviously not tried the invention on every plasmid, every bacterial host or every sequence of exogenous DNA. But the Technical Board of Appeal found that the invention was fully enabled because it could reasonably be expected to work with any of them.

[113] This is an example of an invention of striking breadth and originality. But the notion of a ‘principle of general application’ applies to any element of the claim, however humble, which is stated in general terms. A reference to a requirement of ‘connecting means’ is enabled if the invention can reasonably be expected to work with any means of connection. The patentee does not have to have experimented with all of them.

[114] In my opinion the facts did not support the application of this principle. Assuming the claims can be read, as the judge thought, to include any way of making EPO by recombinant DNA technology, the specification does not disclose a way of making it in sufficiently general terms to include the TKT process. It discloses only how to make EPO by introducing exogenous DNA coding for EPO into a host cell. The TKT method is not a version of this process



a which, although untried, could reasonably be expected to work just as well. It is different.

[115] The distinction is well illustrated by the Dutch and Australian cases upon which the judge relied. The issue in the Dutch appeal was whether the invention enabled the use of all forms of exogenous DNA, including cDNA and synthetic DNA. I agree that it did. But that is because cDNA and synthetic DNA  
b were both forms of exogenous DNA. The specification enabled the use of exogenous DNA in general terms and there was no reason for the skilled man to think that, if cDNA or synthetic DNA were obtainable, they would not work equally well. The Australian case was likewise concerned with whether the invention enabled the use of cDNA.

[116] The judge appears to have considered that an invention was enabled by a disclosure if it could not be worked without that disclosure. But that is obviously not enough. The disclosure in the specification must be not merely  
c necessary; it must be sufficient.

[117] As for the point made by the Court of Appeal, it is of course correct so far as it goes. The choice of a particular form of an integer falling within the terms of the claim may improve the way the invention works and be in itself an  
d inventive step. The specification is not insufficient merely because it does not enable the person skilled in the art to make such an invention. The use of the improvement is still a way of working the original invention. But TKT does not rely upon the fact that the use by TKT of an endogenous EPO gene was inventive. Their objection is that it is not a way of making EPO which is disclosed,  
e even in the most general terms, by the specification. As the point does not arise, I do not propose to express a concluded view. But, unlike the Court of Appeal, I think that the breadth of claim objection may well have been a good one.

#### *Cell varieties*

f [118] By contrast, I entirely agree with the Court of Appeal that the specification enabled the use of any cell for the expression of exogenous DNA. It is true that Amgen were only able to secure high-level expression in CHO cells. But the invention did not promise high-level expression and the discovery of another cell which enabled high-level expression would have been exactly the  
g kind of improvement which the Court of Appeal said did not have to be enabled by the specification. The use of such a cell is a way of making EPO disclosed by the invention.

#### *Analogues*

h [119] In considering analogues, it is important to bear in mind that the invention did not consist in the discovery that EPO and some of its analogues promoted the formation of red blood cells. That was well known. The case is therefore different from *American Home Products Corp v Novartis Pharmaceuticals UK Ltd* [2000] IP & T 1308, [2001] RPC 159 in which the invention lay in the discovery that a known  
i product (and possibly some of its analogues) had an immuno-suppressive effect. But the substance of this invention is a way of making EPO and its analogues. If the claim were to a process for making EPO and EPO-like analogues, it could be sufficiently enabled if the person skilled in the art could make analogues, at any rate if he could, without undue experimentation, decide whether any given analogue had the necessary EPO-like qualities or not. The difficulty is that whatever may be the substance of the invention, Amgen have chosen to claim the product made by

their invention and to define it by reference to its having EPO-like qualities. That difficulty would have been avoided if Amgen had relied upon a process claim and art 64(2). No doubt the reason why they did not do so was that, if they had relied upon the process claim (27), it would have been even clearer that TKT were not using the invention:

‘A process for production of [EPO], which process is characterised by culturing under suitable nutrient conditions a . . . host cell transformed or transfected with a DNA sequence according to . . . claim 1 in a manner allowing the host cell to express said [EPO].’

[120] In *Amgen Inc v Chugai Pharmaceutical Co Ltd* (1991) 18 USPQ 2nd 1016 the Federal Circuit Court of Appeals held that the claim to analogues was bad and I see the force of the reasoning which led them to that conclusion. As I consider that claims 19 and 26 are both invalid for other reasons, I prefer to express no concluded view on the analogues question.

### *Molecular weight*

[121] Claim 19 distinguishes the product falling within the claim on the ground that it has a ‘higher molecular weight by SDS-PAGE from erythropoietin isolated from urinary sources’. SDS-PAGE is a well-known method of ascertaining the apparent molecular weight of a protein which is fully described in the judgments below. There is no problem about applying the SDS-PAGE test to two proteins and deciding that one has a higher apparent molecular weight than the other. The difficulty lies in identifying the uEPO to test against the rEPO made according to the process specified in claim 19. The judge heard days of evidence of experiments to determine the molecular weights of various kinds of uEPO. There were variations which might have been attributable to the source of the urine and the method of purification or might have been purely random. The claim, which spoke of ‘erythropoietin isolated from urinary sources’ appeared to be indifferent to source or method of purification. The judge summed up his findings on the experiments at [479]:

‘First, some rEPOs have a higher apparent molecular weight by SDS-PAGE than some uEPOs; secondly, some rEPOs have the same apparent molecular weight as some uEPOs; thirdly, no rEPOs have a lower apparent molecular weight than any uEPOs.’

[122] In addition, it appeared from a scientific paper in evidence that rEPO expressed in insect cells (which *prima facie* came within claim 19) probably had a lower molecular weight than any uEPO.

[123] The judge concluded from this evidence that claim 19 was incapable of being infringed:

‘It appears to me that the variations in apparent molecular weight between different batches of urinary EPO, coupled with the fact that it is clear that many recombinant EPOs do not satisfy the test, would put the skilled addressee seeking to discover whether his product was within claim 19, and seeking to discover this in a reasonable way, in an unsatisfactory, indeed, an impossible, position.’ (See [2001] IP & T 882 at [480], [2002] RPC 1.)

[124] The claim appeared to assume that all uEPOs had effectively the same molecular weight, irrespective of source and method of isolation. This had been

a shown not to be the case. So which uEPO did the claim require to be used for the test? Simply to use the first uEPO which came to hand would turn the claim into a lottery. On the other hand, it would be burdensome to have to work one's way through several specimens of uEPO (which were, as I mentioned at the beginning of my speech, extremely hard to come by) and even then the result would be inconclusive because non constat that some untried specimen did not have a different molecular weight.

b [125] The judge decided that the lack of clarity made the specification insufficient. It did not merely throw up the possibility of doubtful cases but made it impossible to determine in any case whether the product fell within the claim. The invention was not disclosed 'clearly enough and completely enough for it to be performed by a person skilled in the art': s 72(1)(c).

c [126] The Court of Appeal disagreed. They said that it was sufficient that some uEPO could be tested against eEPO by SDS-PAGE. The fact that it did not specify which uEPO and that choosing one uEPO would bring the product within the claim and another would not was 'lack of clarity dressed up to look like insufficiency'. For my part, I do not think that can be right. If the claim says that d you must use an acid, and there is nothing in the specification or context to tell you which acid, and the invention will work with some acids but not with others but finding out which ones work will need extensive experiments, then that in my opinion is not merely lack of clarity; it is insufficiency. The lack of clarity does not merely create a fuzzy boundary between that which will work and that which will not. It makes it impossible to work the invention at all until one has found e out what ingredient is needed.

[127] The Court of Appeal went on to say that even if they were wrong on this point, the claim was sufficiently enabled. They gave the generality of the direction to use uEPO a specificity which they regarded as sufficient with the aid of the following propositions:

f '... the onus is upon TKT to establish that the test is insufficient; second that the question of insufficiency has to be judged as of 1984; third it has to be decided by the court through the eyes of the skilled person; fourth the skilled person is deemed to be seeking success rather than failure; fifth lawyers can often think up puzzles at the edge of a claim, but skilled persons g are concerned with practicalities not puzzles.' (See [2003] IP & T 694 at [96].)

[128] The Court of Appeal placed great emphasis upon the fact that the skilled person was taken to be 'seeking success', a phrase which is used by Aldous LJ 12 times over six pages. But I am unclear about what in the present context that means. Ordinarily, it is clear enough. The skilled person is taken to be trying to h make the invention work. If the skilled person would quickly realise that one method would work and another would fail, the specification is not insufficient because the claim is expressed in terms broad enough to include both methods. That was the point made by Lord Shaw of Dunfermline in the well-known passage cited by the Court of Appeal from his speech in *British Thomson-Houston Co Ltd v Corona Lamp Works Ltd* (1921) 39 RPC 49 at 89.

i [129] In the present case, however, the choice of uEPO has nothing to do with making the invention work. It is simply a criterion against which one tests whether the rEPO falls within the claims. The very concepts of 'success' or 'failure' seems irrelevant to the choice of uEPO. What counts as 'success'? Ex hypothesi the skilled person does not know in advance whether any given uEPO

will bring his rEPO within the claim or not. From the point of view of success or failure, one is as good as another. All the skilled man can do is try to guess which uEPO the patentee had in mind and if the specification does not tell him, then it is insufficient. a

[130] The Court of Appeal then proceeded to re-examine the judge's findings of fact about the conclusions to be drawn from the experiments and scientific papers on the molecular weight of different uEPOs. They excluded some of the samples which he had taken into account on the ground that they would not be considered by a skilled person who was 'seeking success'. But, for the reasons I have given, that does not appear to me a coherent reason. Others were excluded on the ground that the method of purification would not have been adopted by a skilled man in 1984. The judge was prepared to accept methods of purification which had been published in 1984 (like that of *Miyake et al*, to which I have already referred) and what he called 'obvious workshop modifications' of those methods. The Court of Appeal rejected the latter methods on the ground that there was no evidence that the skilled man would have adopted them. But the claims, as I have said, appear to be indifferent as to methods of purification. It is true that the patentee must be taken to have contemplated the kind of method a skilled man would have adopted in 1984 and the patent cannot become insufficient because some entirely different method, consistently producing uEPO with a different molecular weight, is invented afterwards. But the specification refers to a number of methods of purification which were in many respects different from each other. It seems to me unreal to suppose that a skilled person, trying to find out whether his rEPO was within the claims and reading a specification which obviously assumed that the method of purification did not matter, would adhere to the letter of one published method or another and not mix and match. b  
c  
d

[131] The question of whether the various purification methods were obvious modifications of published 1984 protocols was a matter for the judge who had heard the evidence. In my opinion he was entitled to reach the conclusions which he did and was right in law to conclude that the claim was not sufficiently enabled. I would therefore allow this part of the appeal and restore the judge's conclusion that claim 19 was invalid for insufficiency. e  
f

#### CONCLUSION g

[132] The result is that I would allow TKT's appeal and revoke the patent on the ground that claim 19 is insufficient (s 72(1)(c)) and claim 26 is anticipated (s 72(1)(a)). Standing back from the detail, it is clear that Amgen have got themselves into difficulties because, having invented a perfectly good and ground-breaking process for making EPO and its analogues, they were determined to try to patent the protein itself, notwithstanding that, even when isolated, it was not new. Hence the patenting of the two product-by-process claims which have failed, one because the last-minute amendment to distinguish the product from the natural EPO turned out to be based upon the false premise that all uEPO had the same molecular weight and the other because the factual basis on which the European Patent Office allowed it turned out to be wrong. h  
j

[133] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead and would warmly associate myself with his tribute to Professor Yudkin. His teaching was invaluable to the Committee and must have resulted in a considerable saving in costs for the parties.



**LORD HOPE OF CRAIGHEAD.**

- a [134] My Lords, I have had the great advantage of reading in draft the speech which has been delivered by my noble and learned friend Lord Hoffmann. I agree with it, and for all the reasons that Lord Hoffmann has given I too would dismiss Amgen's appeal, allow TKT's cross-appeal and make the orders which he has proposed. I wish to associate myself also with the additional points made by
- b my noble and learned friend Lord Walker of Gestingthorpe.

- c [135] Before leaving the case however I should like to pay a particularly warm tribute to the valuable assistance which, with the agreement of the parties and in common with others of your Lordships, I received from Professor Michael D Yudkin, Professor of Biochemistry at Oxford University, in a series of seminars which he gave in camera before the appeal was heard to introduce us to the relevant aspects of recombinant DNA technology. The work which Professor Yudkin did by means of these carefully prepared seminars enabled all those involved to concentrate on the issues of law in the appeal without having to spend a good deal of extra time in the course of the hearing on learning about the technology. This had the result of shortening the length of time that it was
- d necessary to devote to the hearing by several days. It was at Lord Hoffmann's suggestion in the course of a preliminary hearing that this was done, as there was no dispute about the technology. I suggest that it is a course which might usefully be adopted in the future in cases of this kind, where the technology is complex and undisputed and the parties are willing to consent to it.

- e **LORD RODGER OF EARLSFERRY.**

- f [136] My Lords, I have had the privilege of considering the speech of my noble and learned friend, Lord Hoffmann, in draft. I agree with it and, for the reasons he gives, I too would dismiss Amgen's appeal and allow TKT's appeal and make the order that he proposes. I also agree with the observations of my noble and learned friends, Lord Hope of Craighead and Lord Walker of Gestingthorpe. There is nothing that I can usefully add.

**LORD WALKER OF GESTINGTHORPE.**

- g [137] My Lords, I have had the privilege of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons given by Lord Hoffmann I would dismiss Amgen's appeal and allow TKT's cross-appeal.

- h [138] I would add only that I particularly welcome Lord Hoffmann's detailed explanation of the real significance of the *Improver* (or protocol) questions (see *Improver Corp v Remington Consumer Products Ltd* [1990] FSR 181 at 189; *Wheatley v Drillsafe Ltd* [2000] IP & T 1076 at 1084, [2001] RPC 133 at 142) and how they fit in with recent developments in continental patents jurisprudence. There is always a danger that any judicial summary of principle may, precisely because it is concise, practical and repeatedly cited, take on a life of its own, as if it were a statutory text with its own problems of construction to be resolved ('the way the invention works' in the first question is a striking example of this).

- j [139] The fact is that neither *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 nor the *Improver* case was concerned with anything approaching high-technology science. Lord Hoffmann has demonstrated that in a rapidly-developing, high-technology field the *Improver* questions may have no useful function, and may be a distraction from the one compulsory question set by art 69 and its protocol.

**LORD BROWN OF EATON-UNDER HEYWOOD.**

[140] My Lords, I have had the great advantage of reading in draft the speech which has been delivered by my noble and learned friend Lord Hoffmann. I agree with it, and for all the reasons that Lord Hoffmann has given I too would dismiss Amgen's appeal, allow TKT's cross-appeal and make the orders which he has proposed. a

*Amgen's appeal dismissed; Hoechst/TKT's cross-appeal allowed.* b

Celia Fox Barrister.

## R v Beckles

[2004] EWCA Crim 2766

COURT OF APPEAL, CRIMINAL DIVISION

LORD WOOLF CJ, McCOMBE AND DAVID CLARKE JJ

26 OCTOBER, 12 NOVEMBER 2004

*Criminal law – Trial – Summing up – Adverse comment – Silence of accused – Direction to jury – Adverse inference direction – Defendant relying on solicitor’s advice as reason for not mentioning in interview facts later relied on at trial – Question to be resolved by jury when considering whether to draw adverse inference in such circumstances – Criminal Justice and Public Order Act 1994, s 34.*

The appellant was tried on an indictment charging robbery, false imprisonment and attempted murder. The prosecution alleged that the victim of the offences had been lured to a fourth floor flat where he was detained, robbed and finally pushed out of a window by the appellant and a co-defendant. On his arrest, the appellant told the police that the victim had jumped out of the window. When he was formally interviewed, however, a solicitor informed the interviewing officer that she had advised the appellant not to answer any questions. During the interview, the appellant duly answered ‘no comment’ to the questions put to him, but in a second interview several months later he again stated that the victim had not been pushed out of the window. At trial, the appellant’s evidence did not differ significantly from the account that he had given to the police during his second interview. He added that he had intended to tell the police everything at the first interview, but that the solicitor had advised him to exercise his right to silence and that he had accepted her advice. When the judge summed up, he gave the jury a direction on the adverse inferences that might be drawn, pursuant to s 34<sup>a</sup> of the Criminal Justice and Public Order Act 1994, from the failure of the various defendants to mention in their first interviews facts upon which they had relied at trial. In particular, he instructed the jury that it was for them to decide what they made of the reasons given for not answering, and that they were not to hold it against the defendants if they thought that the reason given was a good one. The appellant was convicted on all counts, and his subsequent appeal was dismissed. However, the Criminal Cases Review Commission referred the matter back to the Court of Appeal following a decision by the European Court of Human Rights that the judge’s direction to the jury had violated the defendant’s convention right to a fair trial. On the appeal, the Court of Appeal considered the question the jury had to ask when reliance on legal advice was the reason given by a defendant for not answering questions.

**Held** – Where a solicitor’s advice was relied upon by the defendant, the ultimate question for the jury under s 34 of the 1994 Act remained whether the facts relied on at the trial were facts which the defendant could reasonably have been expected to mention at interview. If they were not, that was the end of the matter. If, however, the jury considered that the defendant genuinely relied on

<sup>a</sup> Section 34, so far as material, is set out at [5], below

the advice, that was not necessarily the end of the matter. It might still not have been reasonable for him to rely on the advice, or the advice might not have been the true explanation for his silence. If it were possible to say that the defendant genuinely acted upon the advice in a situation where that advice was no more than a convenient way of disguising his true motivation for not mentioning facts, the fact that he did so because it suited his purpose might mean that he was not acting reasonably in not mentioning the facts. His reasonableness in not mentioning the facts remained to be determined by the jury. If they concluded that he was acting unreasonably, they could draw an adverse inference from the failure to mention the facts. In the instant case, the judge had never directed the jury to consider the reasonableness, let alone the genuineness, of the appellant's reliance on his solicitor's advice as the reason why he did not answer questions in interview. The need for a proper direction had been all the more important since the primary adverse inference which the jury could draw was not that the appellant had made up his story later, but that he had not thought that it would stand up to examination. The unfairness caused by the misdirection rendered his convictions unsafe, and accordingly they would be quashed (see [46], [48], [49], [56], [57], below).

*R v Hoare* [2004] All ER (D) 49 (Apr) considered.

### Notes

For inferences from accused's silence, see Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1123A.

For the Criminal Justice and Public Order Act 1994, s 34, see 17 *Halsbury's Statutes* (4th edn) (2002 reissue) 528.

### Cases referred to in judgment

*Beckles v UK* (2002) 13 BHRC 522, ECt HR.

*R v Allan* [2004] EWCA Crim 2236, [2004] All ER (D) 114 (Aug), (2004) 148 Sol Jo LB 1032.

*R v B (Kenneth James)* [2003] EWCA Crim 3080.

*R v Betts* [2001] EWCA Crim 224, [2001] 2 Cr App R 257.

*R v Bowden* [1999] 4 All ER 43, [1999] 1 WLR 823, CA.

*R v Brizzalari* [2004] EWCA Crim 310, [2004] All ER (D) 325 (Feb), (2004) Times, 3 March.

*R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543.

*R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534.

*R v Hoare* [2004] EWCA Crim 784, [2004] All ER (D) 49 (Apr), (2004) 148 Sol Jo LB 473.

*R v Howell* [2003] EWCA Crim 01, [2003] All ER (D) 107 (Jan), [2003] Crim LR 405.

*R v Inman* [2002] EWCA Crim 1950.

*R v Knight* [2003] EWCA Crim 1977, [2004] 1 WLR 340.

*R v Pendleton* [2001] UKHL 66, [2002] 1 All ER 524, [2002] 1 WLR 72.

*R v Webber* [2004] UKHL 01, [2004] 1 All ER 770, [2004] 1 WLR 404.

### Appeal against conviction

Pursuant to a reference made by the Criminal Cases Review Commission on 27 October 2003 under s 9 of the Criminal Appeal Act 1995, the appellant, Keith Anderson Beckles, appealed against his conviction at the Central Criminal Court on 23 May 1997 of two counts of robbery, one count of false imprisonment and



- a one count of attempted murder following a trial before Judge Pownall QC and a jury. The facts are set out in the judgment of the court.

Anthony Jennings QC and Paul Mylvaganam (instructed by Hickman & Rose) for the appellant.

- b David Perry and Esther Schutzer-Weissmann (instructed by the Crown Prosecution Service) for the Crown.

*Cur adv vult*

12 November 2004. The following judgment of the court was delivered.

c **LORD WOOLF CJ.**

INTRODUCTION

- d [1] This reference by the Criminal Cases Review Commission (CCRC) under s 9 of the Criminal Appeal Act 1995 has a long history. In view of that history, we are especially grateful for the very helpful arguments which have been advanced by Mr Anthony Jennings QC, on behalf of the appellant, and Mr David Perry, on behalf of the Crown, both orally and in writing.

- e [2] The appellant, Keith Anderson Beckles, was convicted on 23 May 1997 at the Central Criminal Court before Judge Pownall QC of two counts of robbery, one count of false imprisonment and one count of attempted murder. He was sentenced to a total of 15 years' imprisonment. The sentence was made up of six years' imprisonment, concurrent, on each count of robbery, three years' imprisonment on the count of false imprisonment and nine years' imprisonment, consecutive, on the count of attempted murder.

- f [3] The appellant was tried jointly with Rudolph Leopold Montague and Michelle Fagler Whyte. Montague was convicted of only one count of robbery, but otherwise he was convicted on the same counts as the appellant. He was sentenced to a total of 18 years' imprisonment. Whyte was convicted of both counts of robbery and the false imprisonment count, but was not indicted on the attempted murder count. She was sentenced to a total of five years' imprisonment.

- g [4] On 7 May 1998, the full court of the Court of Appeal dismissed the appeals of both the appellant and Montague. On 8 October 2002, the European Court of Human Rights, on an application lodged by the appellant, ruled in *Beckles v UK* (2002) 13 BHRC 522, that there had been a violation of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950 Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) (the convention) as to the trial judge's directions to the jury. The misdirection concerned the instruction to the jury as to their right to draw adverse inferences from the appellant's silence during an interview with the police on 24 January 1996. On 13 November 2002, the appellant applied to the CCRC for his case to be referred to this court. On 13 May 2003, the CCRC gave a provisional decision not to refer. Following further representations made on behalf of the appellant on 20 June 2003, the CCRC made the present reference on 27 October 2003.

j [5] The judge based his direction about which complaint is made upon s 34 of the Criminal Justice and Public Order Act 1994 which, so far as is relevant, is in the following terms:

'(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies ... (c) the court, in determining whether there is a case to answer; and (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention ...

(5) This section does not—(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.'

[6] Section 34 was recently, justifiably, described by Dyson LJ in *R v B (Kenneth James)* [2003] EWCA Crim 3080 at [20], as 'a notorious minefield'. In *R v Brizzalari* [2004] EWCA Crim 310 at [57], [2004] All ER (D) 325 (Feb) at [57], (2004) Times, 3 March, the Court of Appeal felt it necessary to discourage prosecutors from too readily seeking to activate the provisions of s 34. As the court said: 'the mischief at which the provision was primarily directed was the positive defence following a "no comment" interview and/or the "ambush" defence'. In this case the police knew the essence of the appellant's defence before the police interviews.

[7] The House of Lords (Lord Bingham of Cornhill in the chair) has recently emphasised the importance of statutory safeguards in respect of s 34 being strictly observed and jury directions being carefully framed (see *R v Webber* [2004] UKHL 1 at [27], [2004] 1 All ER 770 at [27], [2004] 1 WLR 404). Lord Bingham made it clear (at [29]) that—

'the jury is very much concerned with the truth or otherwise of any explanation given by the defendant of his reasons for not mentioning the matter during earlier questioning, since if the defendant gives any exculpatory explanation of his failure to mention it which the jury accept as true or possibly so, it would be obviously unfair to draw any inference adverse to him from his failure to mention it.'

[8] The issues on this appeal are: (i) Did the trial judge misdirect the jury? (ii) If so, what is the effect of the misdirection? The answers to those questions are complicated by the decision of the Court of Human Rights and the fact that the trial took place before the Human Rights Act 1998 came into force, making the convention part of the domestic law of this country.

- a [9] Our decision on these questions is very much dependent upon the evidence given at the appellant's trial and the terms in which the judge directed the jury as to s 34 inferences. So it is to the effect of the relevant evidence followed by the relevant part of the summing up that we now turn.

#### SUMMARY OF THE RELEVANT EVIDENCE

- b [10] The evidence for the prosecution was that on 3 January 1996, the victim, Mr Mohamoud Abdi Mohammed (Mohamoud) spent the day selling khat (a stimulant leaf) in the Upton Park area of London. At about 9.30 pm he met Michelle Whyte, a prostitute. She proposed that they should go back to her flat for sex, which would cost £20. Mohamoud, who had takings of about £90 with him at the time, agreed. They took a cab to a flat owned by Montague but used c by Whyte for such purposes, in Hackney. Present in the flat, which was on the fourth floor, were three men, a woman and two teenagers. Soon after arriving at the flat Mohamoud was searched at knifepoint by one of the men whom he later identified as Rudolph Montague. Whyte and the appellant, it was alleged, held him while he was being searched. Montague found £30 or £40 and left the d premises to buy drugs. Mohamoud was prevented from leaving the premises by, it was alleged, the appellant. Montague returned to the flat with crack cocaine and this was smoked by those present with the exception of Mohamoud and the two teenagers. Mohamoud was later searched for a second time. He was held down by the appellant (who was in possession of a hammer at the time) while Whyte searched him, finding more money in a purse tucked between e Mohamoud's shirt and vest. Mohamoud was then kept in the flat until he was thrown out of a window by Montague, the appellant and one of the women. Mohamoud landed on the ground below. He could not move his lower body and attracted attention by throwing stones at a ground floor window. An ambulance was called to the scene and at 2.50 am on 4 January 1996, Mohamoud was taken f to the Royal London Hospital. He had seriously injured his spinal cord and remains completely paralysed from the waist down. He will be a complete paraplegic for the rest of his life.

#### THE POLICE INVESTIGATION

- g [11] Montague was arrested on 13 January 1996. He initially gave a false name. When interviewed he provided a prepared statement in which he admitted that a man had fallen out of a window at his flat but denied that he had anything to do with the incident. He stated that he had been visiting friends and was on his way back to his premises when he met two people who had come from his flat and warned him not to go back there because a man had jumped h through the window. He answered 'no comment' to most of the questions put to him. In particular, he refused to answer any questions concerning drugs or whether he had been at the flat at the time of Mohamoud's arrival. He refused to give the names of those who had been present in the flat.

- j [12] The appellant was arrested just after 9 am on 24 January 1996. In response to the caution he stated: 'I'm relieved, I've expected this every time I've been to the shops.' On his way to the police station he said, 'He wasn't pushed, he jumped. How is he?' On being told that Mohamoud was paralysed for life he stated: 'I can tell you everything, he jumped.' Following his arrival at the police station the appellant was seen by a solicitor. When the appellant was formally interviewed, the solicitor informed the interviewing officers:

'We have had the benefit of a lengthy private consultation, I have advised him in the circumstances he should not answer any questions at the present time. My reasons for this advice are that on the basis of what I've been told about the allegations, it's not reasonable for him to answer questions at the present time although he is willing to participate in an identification procedure.'

[13] The appellant answered 'no comment' to the questions put to him. Among the questions put to him were questions concerning whether he had been present in the flat at the time of the offences; whether he knew Montague; whether he had a gold tooth; whether Mohamoud had been thrown out of the window; and whether his fingerprints would be found on the window.

[14] Whyte was arrested on 26 January 1996. Upon being told that she was being arrested on suspicion of her involvement in the incidents of 3/4 January, she said: 'I don't believe it, didn't he mention someone helping me, helping him'. When interviewed she answered 'no comment'.

[15] On 31 May 1996, Mohamoud was shown video identification films and he positively identified Montague, Whyte and the appellant. He described Montague as the ringleader who had searched him and taken his wrists to throw him from the window. The appellant was identified as the man who had kept guard over him and who had taken his legs to throw him out of the window. Whyte was identified as the woman who had lured him to the premises and robbed him.

[16] Further video identification films were shown to Mohamoud on 20 June and 15 July 1996. This was in an effort to identify the other men present at the premises. On 20 June, Mohamoud failed to identify Everton Duncan, who was one of the men alleged to be at the flat, but he did identify one of the volunteers as the ringleader. On 15 July, Mohamoud identified John Alexander, another man at the flat, but stated that he had not been a party to any of the offences.

[17] Montague was re-arrested and interviewed on 30 August 1996. A prepared statement was read on his behalf by his solicitor. In it he admitted that he had been present in the flat when Whyte arrived with Mohamoud, but said that about four or five minutes later he left with another woman called Donna Smith to buy crack cocaine. He was later told by friends that the man in his flat had jumped out of the window. He made his way back to the flat and met the appellant, Whyte and two other women leaving the premises. They looked worried, especially the appellant. They all went to another flat and watched the ambulance arrive.

[18] The appellant was re-arrested on 16 September 1996. He was interviewed on 17 September 1996. At the beginning of the interview, in answer to the question of whether there was anything he wanted to say, he stated:

'Only that man was not pushed out of the window, he wasn't pushed out, and as far as I know I was not in the room, and Montague was not in the house ... He was alone in the room with [Michelle Whyte], and it was from Michelle that I learnt that he had gone out of the window, which I didn't believe. I went to have a look and I saw him lying on the grass and ... that's it. No one did ... I've heard a story that he's saying that one of us held him by the hands, and his legs, and put him through the window and that's grossly untrue.'



a [19] The appellant went on to say that he had been asleep. He woke up and saw Mohamoud and Michelle Whyte and others. Mohamoud paid Whyte and Montague then went out with Donna Smith (the appellant's girlfriend) to buy crack cocaine. Donna Smith returned with the drugs. Two other people arrived at the flat, Candy Groom and Everton Duncan. The appellant went into the bathroom with Donna Smith. Later he asked Michelle where her client was and she said that he had 'gone out the window'. The appellant went to the open window and saw Mohamoud on his back on the grass below. He then left the flat because he was scared and thought that Mohamoud might be dead. The appellant stated that Mohamoud's account of being thrown from the window was nonsense.

c [20] Michelle Whyte was re-arrested on 7 August 1996. When interviewed she declined to answer any questions stating: 'I am not willing to answer any questions as I was threatened and am in fear of danger so I'm not answering any questions.'

#### THE TRIAL PROCEEDINGS

d [21] The indictment was amended during the course of the trial by the addition of a second count of robbery. This was to reflect the fact that Mohamoud had been robbed on two distinct occasions during the time of his false imprisonment within the flat.

e [22] The original trial began on 24 April 1997, but an incident occurred part way through the trial, which meant that the trial had to restart. The first jury were discharged on 2 May 1997, a new jury sworn in and the second trial started on 12 May 1997. The prosecution case against the defendants depended substantially upon the evidence given by Mohamoud. The prosecution called evidence which established that a blood sample taken from Mohamoud following his arrival at the Royal London Hospital showed a low alcohol reading of 24 mg of alcohol per 100 ml of blood. There was also evidence that a fingerprint which matched the appellant was found on the window.

#### THE DEFENDANTS' EVIDENCE

g [23] Each of the defendants gave evidence at trial. Montague confirmed that Whyte had arrived at the flat with Mohamoud at about 1 am on 4 January. She paid for some crack. He then left with Donna Smith to buy more drugs and did not return to the premises. He added that on the way back to the flat he met two people who told him: 'Don't go back to your flat, Michelle's punter has jumped through the window.' He added that he later met Whyte and others and that one of them said, 'the man jumped through the window'.

h [24] The appellant's evidence did not differ significantly from the account which he had given to the police at the second interview on 17 September 1996. He admitted the conversations with the police. He added that when it came to being interviewed on 24 January 1996, he had intended to tell the police everything but the 'solicitor advised me to exercise my right of silence' and he accepted her advice. In his second interview, after Mohamoud had identified him, he told them 'as it was'.

j [25] During cross-examination, prosecution counsel asked the appellant why he had not answered police questions in the first interview and, following the appellant's reply, questions concerning the advice of his solicitor. Defence counsel indicated that legal professional privilege had not been waived.

Prosecution counsel then went on to ask the appellant why he had not admitted being in the flat until after he had been identified. The appellant said that he had been relying on his solicitor's advice. The judge then intervened:

*'Do not answer this until [defence counsel] has had an opportunity of saying anything to me. Would you be prepared to tell us what your solicitor said? Any objection?'*

Defence counsel said: 'It's a bit late, my Lord ... Your Lordship has asked the question in the presence of the jury. I am not going to seek to stop your Lordship.' The exchange then continued:

*'The judge. No, I am asking you whether you would have any objection to that question.'*

*Defence counsel. Not now, no.*

*Prosecution counsel. I am not intending to pursue that.*

*The appellant. Yes, I would be prepared, if that question was to me.'*

[26] Michelle Whyte in her evidence admitted that she worked as a prostitute and that she had taken Mohamoud to Montague's flat. She added that they did have sexual intercourse but were interrupted. She subsequently smoked crack and, feeling that she needed some fresh air, opened the window and saw Mohamoud lying on the ground. She denied that she had told the appellant that her 'punter' had gone 'out of the window'.

#### SUMMING UP

[27] The judge in the course of his summing up dealt with the appellant's arrest on 24 January. The critical parts of his summing up so far as this reference is concerned are as follows:

'Beckles was arrested 11 days later on 24 January. "I'm relieved," he said. "I've been expecting this every time I've been to the shops." On the way to the police station he said, "He wasn't pushed, he jumped. How is he?" He was told that Mohamoud was paralysed for life. "I can tell you everything," he said. "He jumped". He too was interviewed. He was asked whether he knew Montague and he was asked if he had been to [the flat] or into the front room there or into the bedroom there; whether he agreed he had a gold tooth and dreadlocks; whether he had taken crack cocaine on the day that we are all interested in and he agreed that he had been asked whether he had opened the window in the front room and whether his finger marks would be found in the front room and whether he had anything to say about the event on 3 or 4 January, and to all those questions he said, "no comment".'

The judge added:

'I am not going to go through the whole of any of these interviews because you have got your copies of them and can consider them carefully and at your leisure when you retire. You may think that each defendant in relation to their first interview said a number of things during the course of their evidence which they did not mention in those first interviews. The Crown suggest that in the circumstances, and I am dealing now with Beckles and Miss Whyte, they could reasonably have been expected to mention those things and the law is this, and it applies to both of them, Beckles and Miss Whyte, that you may draw such inferences as seem to you to be fair and

a proper from that failure of theirs to mention them. You could, for instance, infer that they have fabricated their evidence, made it up, after those first interviews. You could infer that they were indeed biding their time and seeing whether or not they would be identified. That failure to mention the sort of things or give answers to the sort of questions that I have listed, as Beckles failed, cannot of itself prove guilt. So, of course, if you were not sure of Mohamoud's identifications of any of these defendants, that would be an end of this case, even if you thought they were behaving in the way that I have just described over their first interviews. But although they cannot of themselves, those failures, prove guilt, you may hold that failure against them in deciding whether they are guilty. You do not have to: it is for you to decide. Beckles has told you that his reason for not answering some of the questions was that he had received advice from his solicitor that he should make no comment. Miss Whyte's reason was similar but with a difference. She said that she was still in shock and did not feel able to, could not tell her solicitor what had happened, so he advised her to say nothing. Of course we have—you have—no independent evidence as to what was said by either d solicitor, but if simply saying, "Oh my solicitor advised me not to answer questions" was by itself a good and final answer, any competent solicitor and a defendant would have the power to strangle at birth any interview and that would make, you may think, a mockery of the Act of Parliament which allows a jury, if they think it is right and proper, to make an adverse inference and that could not have been Parliament's intention. The fact is that it is e Beckles' choice, Miss Whyte's choice whether or not to accept their solicitor's advice or not and any solicitor worthy of his or her name should have included in the advice the various pros and cons of saying "no comment" and in particular should have included the possibility, even the probability, that his or her defence could be harmed if they failed to mention f facts that they could so easily do and that if they do not mention them, why then an adverse inference could be drawn. But as I say, you have no independent evidence as to what the solicitors said or did not say. But whether or not the solicitors said that, the officers certainly did. They did say to each of them that their defences could be harmed if they do not mention something, details which they are going to rely on later, and they mentioned g that more than once and, indeed, on each occasion that they were cautioned and no doubt, and it has never been suggested otherwise, Beckles was cautioned when he was first interviewed and you can see Miss Whyte's caution on page 2 of her interview. So it is for each defendant himself or herself to decide whether to answer or not. You decide what you make of h the reasons given for not answering. If you thought the reason given was a good one, then of course you would not hold it against them. If you thought that they were failing to answer certain awkward questions because, for example, they were keeping their powder dry, as it were, hoping against hope they would not be identified and the other reasons I mentioned a moment ago, or because they had not yet worked out what their defence was going to be, you could draw the inference that I have mentioned and, if j you did, that might point towards guilt, but it is you who decide whether it is fair and proper to draw those adverse inferences.'

Later the judge added after a complaint by the appellant's counsel:

'When dealing with Beckles' and Whyte's first interviews when they failed to answer questions, I did not specifically remind you, though you have heard it any number of times, that the defendants were cautioned that they do not have to say anything. That is of course the position, they do not have to say anything, but the inferences I suggested that you can draw nevertheless remain if you think they have not mentioned things that they could reasonably have been expected to mention and if you think it is fair to take the inferences of the sort that I have mentioned, but there is that right to silence.'

THE APPEAL TO THE COURT OF APPEAL (HENRY LJ, KEENE J AND JUDGE COLSTON QC)

[28] In giving the judgment of the court dismissing both Montague's and Beckles' appeals, Henry LJ indicated that he regretted the criticism of the summing up on the grounds that the jury had been misdirected as to s 34, and indicated that the direction was, if anything, unduly favourable to the appellant. He referred to the fact that the judge had left to the jury the issue of whether the solicitor's advice was capable of providing a reason for not disclosing the facts in question, in circumstances when the appellant's solicitor had not given evidence, privilege had not been waived and the appellant had given no evidence as to the reasons behind the advice given by the solicitor.

THE DECISION OF THE COURT OF HUMAN RIGHTS

[29] While the Court of Human Rights came to the conclusion that there had been a violation of art 6(1) of the convention, it also decided that that finding constituted in itself sufficient just satisfaction of any non-pecuniary damage suffered by the appellant. In the course of their judgment they made it clear that the right to silence under art 6(1) is not an absolute right and so the drawing of adverse inferences from an accused's silence, either at trial or at police interviews, could not of itself be considered incompatible with the requirements of a fair trial. The court went on to say that it would be incompatible with the right to silence to base a conviction solely or mainly on the accused's silence but that fact should nevertheless not prevent an accused's silence, 'in situations which clearly call for an explanation from him, [from being] taken into account in assessing the persuasiveness of the evidence adduced by the prosecution' (see (2002) 13 BHRC 522 at 535 (para 58)).

[30] The Court of Human Rights stated (para 59) that—

'whether the drawing of adverse inferences from an accused's silence infringes art 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. Of particular relevance are the terms of the trial judge's direction to the jury on the issue of adverse inferences.'

[31] The Court of Human Rights in the course of their judgment also drew attention to certain aspects of the summing up which were undoubtedly fair to the appellant. However, they added (at 536 (para 61)) that '[a]t his trial the [appellant] explained ... that he did not respond to police questioning since he had been advised not to do so'. He was prepared to elaborate on this reason and to



- a testify to the content of his solicitor's advice. Yet the trial judge emphasised to the jury on two occasions that there was 'no independent evidence' of what the solicitor had said at the police station without making any reference to the fact that the appellant had been prepared to provide details of his exchanges with his solicitor, and that he had manifested his willingness to co-operate with the police on the way to the police station. The Court of Human Rights added (para 62)
- b that it cannot 'be overlooked ... that the solicitor's advice appeared in the record of the police interview ... and was entirely consistent with the [appellant's] own explanation for his silence'. Further, they referred to the fact that the appellant did not seek to rely on any new facts or circumstances.

[32] These were matters that the Court of Human Rights considered went to the plausibility of the appellant's explanation which—

- c 'as a matter of fairness, should have been built into the [judge's] direction in order to allow the jury to consider fully whether the [appellant's] reason for his silence was a genuine one, or whether, on the contrary, his silence was ... consistent only with guilt and his reliance on legal advice to stay silent
- d merely a convenient self-serving excuse.'

- The Court of Human Rights also stated that, in circumstances where it was impossible to ascertain the weight (if any) given to the appellant's silence, it was crucial that the jury were properly directed on this matter. Their conclusion (at 537 (para 65)) was that the jury's consideration was 'not confined in a manner
- e which was compatible with the exercise by the [appellant] of his right to silence at the police station'. For these reasons there had been a breach of art 6(1).

#### SPECIMEN DIRECTIONS

- [33] The Court of Appeal and Mr Perry relied on the fact that the summing up of the judge was consistent with the relevant specimen direction prepared by the
- f Judicial Studies Board (JSB). This direction was issued in May 1996 and is limited to three short paragraphs. As the Court of Human Rights pointed out, however, the law has moved on since that specimen direction was issued. Those subsequent developments have made the law considerably more complex, and there have now been a series of decisions by both domestic courts and the Court
- g of Human Rights that have to be taken into account if a judge is not going to fall into error in his summing up. Fortunately, however, the JSB has kept pace with those developments and issued successive versions of the specimen direction to assist judges with their summing up in this difficult area.

- [34] The specimen direction has necessarily grown longer and, in addition, is accompanied by numerous notes. The latest specimen direction starts by
- h emphasising the desirability of any proposed direction being discussed with counsel before closing speeches on the nature of the direction and suggests that the discussions should start by a consideration whether any direction under s 34 of the 1994 Act should be given. This is an approach that we would strongly
- i indorse. Indeed for reasons that we will indicate later, we have real reservations whether the present case was a suitable case for a s 34 direction at all. But, as far as is known, (counsel appearing before us are different from those who appeared in the court below) there was no such discussion in this case.

[35] The current specimen direction is readily available and is reproduced in both *Archbold's Criminal Pleading, Evidence and Practice* and *Blackstone's Criminal Practice* so it is not necessary to set it out in this judgment. However, it is

important to note that the specimen direction now identifies at least three different conclusions that a jury may draw from the failure of an accused, when interviewed, to give facts which are subsequently relied upon by him as part of his defence. Those specifically mentioned are that the defendant either had no answer, or had no answer that he then believed would stand up to scrutiny, or has since invented or tailored his account to fit the prosecution's case. The specimen direction also makes it clear that the jury should be told only to draw such a conclusion if they think 'it is a fair and proper conclusion' and that they are therefore satisfied about three things:

[F]irst, that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; second, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; third, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer by him.'

[36] The specimen direction also deals specifically with the situation where, as here, legal advice to remain silent is relied upon. It states that the jury should be told that if they 'accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent [them] from drawing any conclusion from his silence'. The jury should—

[b]ear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence.'

The specimen direction then requires the judge to set out the relevant circumstances of the particular case and suggests that the jury should be asked—

'whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had or may have had an answer to give, but genuinely relied on the legal advice to remain silent, you should not draw any conclusion against him. But if, for example, you were sure that the defendant had no answer, and merely latched onto the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him ...'

[37] In general, although the latest specimen direction was of course not available to the trial judge, when his direction to the jury is compared with the specimen direction, the judge's summing up still emerges relatively unscathed. Most of the matters identified are covered. In particular he left it to the jury to decide 'whether it is fair and proper to draw those adverse inferences'. However, as against this there are the criticisms of the approach of the judge indicated in the Court of Human Rights decision. In particular, the jury were not told that if they came to the conclusion that he was advised by his solicitor as he contended, this would be a matter of significance in the appellant's favour.

#### THE LAW

##### *The 1998 Act*

[38] The 1998 Act was not in force at the time of the appellant's trial and the Act is not retrospective. However, the fact that the 1998 Act is not retrospective

- a does not mean that decisions of the Court of Human Rights should be ignored or regarded as irrelevant. The general effect of art 6 of the convention is to guarantee a fair trial. This has long been a requirement of our domestic law. There is a problem, however, in that s 2 of the Criminal Appeal Act 1968 (as amended), when setting out the test for determining whether an appeal should be allowed, does not expressly refer to the fairness of the trial. Instead the test is
- b whether the court 'think that the conviction is unsafe'. While there is this distinction in language, its importance should not be overemphasised.

- [39] The distinction in language was considered in a manner which both parties accept in *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534. In the judgment in that case, reference is made to the speech of Lord Bingham in *R v Pendleton* [2001] UKHL 66, [2002] 1 All ER 524, [2002] 1 WLR 72. The court then
- c said ([2002] 3 All ER 534 at [87]):

- 'The most important lesson to be learnt from this part of Lord Bingham's speech is that Parliament's overriding intention ... in the 1968 Act, is that it should be this court's central role to ensure that justice has been done and to rectify injustice.'
- d

Considering the effect of the passage of time, this court went on to say:

- [98] The non-technical approach is especially important in references by the Commission such as this since standards may have changed because of the passage of time. For understandable reasons, it is now accepted in
- e judging the question of fairness of a trial, and fairness is what rules of procedure are designed to achieve, we apply current standards irrespective of when the trial took place. But this does not mean that because contemporary rules have not been complied with a trial which took place in the past must be judged on the false assumption it was tried yesterday. Such
- f an approach could achieve injustice because the non-compliance with rules does not necessarily mean that a defendant has been treated unfairly. In order to achieve justice, non-compliance with rules which were not current at the time of the trial may need to be treated differently from rules which were in force at the time of trial. If certain of the current requirements of, for example, a summing up are not complied with at a trial which takes place
- g today this can almost automatically result in a conviction being set aside but this approach should not be adopted in relation to trials which took place before the rule was established. The fact that what has happened did not comply with a rule which was in force at the time of trial makes the non-compliance more serious than it would be if there was no rule in force.
- h Proper standards will not be maintained unless this court can be expected, when appropriate, to enforce the rules by taking a serious view of a breach of the rules at the time they are in force. It is not appropriate to apply this approach to a 40-year-old case ...

- [100] The question of whether a trial is sufficiently seriously flawed, so as to make a conviction unsafe because it does not comply with what would be regarded today as the minimum standards, must be approached in the round, taking into account all the relevant circumstances, and this is what we propose to do notwithstanding the fact that Mr Sweeney did not seek to rely on the different standards which existed at the time of the trial and the standards today.'
- j

[40] Mr Jennings for the appellant relied in particular on the decision of this court in *R v Allan* [2004] EWCA Crim 2236 at [112], [2004] All ER (D) 114 (Aug) at [112], (2004) 148 Sol Jo LB 1032, where Hooper LJ specifically rejected the argument that the decision of the Court of Human Rights was irrelevant. a

*The development of the law*

[41] It is not necessary for us to set out the various authorities which have resulted in the development of the law. The position is clearly set out by Lord Bingham in the recent case of *R v Webber* [2004] 1 All ER 770, [2004] 1 WLR 404. As Lord Bingham states (at [20]): 'Section 34 has, predictably, spawned a considerable body of Court of Appeal authority.' He then examines those authorities. A case to which Lord Bingham referred was *R v Bowden* [1999] 4 All ER 43, [1999] 1 WLR 823. In *R v Bowden* [1999] 4 All ER 43 at 47–48, [1999] 1 WLR 823 at 827 this court indicated in relation to ss 34–37, that '[t]here is nothing in any of these sections to suggest that Parliament intended in any way to modify the existing law on legal professional privilege'. As to this dictum Lord Bingham stated ([2004] 1 All ER 770 at [27]): b  
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'We would not wish to modify that statement in any way. It is indeed important, if the statutory provisions are not to be an instrument of unfairness or abuse, that the statutory safeguards are strictly observed, that jury directions are carefully framed and, in cases under s 34, that care is taken to identify the specific facts relied on at trial which were not mentioned during questioning.' d  
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[42] Having surveyed the earlier authorities, Lord Bingham advocated common sense rather than a narrow or pedantic approach as to what is a 'fact' for the purposes of s 34. He added that a defendant relies on a fact or matter in his defence not only when he gives or adduces evidence of it, but also when his counsel puts a positive case to the prosecution witnesses. Lord Bingham also stressed (at [38]) that 'the specific matters which the appellant had failed to mention at interview' needed to be identified. f

*Legal advice*

[43] Where the reason put forward by a defendant for not answering questions is that he is acting on legal advice, the position is singularly delicate. On the one hand the courts have not unreasonably wanted to avoid defendants driving a coach and horses through s 34 and by so doing defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal professional privilege. On the other hand, it is of the greatest importance that defendants should be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice. Again, there have been a number of authorities. Here Mr Jennings relied on a series of cases including *R v Inman* [2002] EWCA Crim 1950 and *R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543. *R v Chenia*, like this case, was a case where the defendant was purporting to rely on a solicitor's advice when the 1998 Act was not in force. g  
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[44] However, we consider that the case which we should next consider for its helpful judgment by Auld LJ is *R v Hoare* [2004] EWCA Crim 784, [2004] All ER (D) 49 (Apr), (2004) 148 Sol Jo LB 473. The court was there dealing with an argument, founded on *R v Betts* [2001] EWCA Crim 224, [2001] 2 Cr App R 257,



a that it was a misdirection to direct the jury to consider the reasonableness of the defendant's reliance on legal advice to remain silent; Kay LJ had said in that case (at [53]): 'it is not the quality of the decision but the genuineness of [it] that matters.' It was contended that this approach was inconsistent with the later decisions of the court in *R v Howell* [2003] EWCA Crim 1, [2003] All ER (D) 107 (Jan), [2003] Crim LR 405 and *R v Knight* [2003] EWCA Crim 1977, [2004] 1 WLR 340.

b [45] Auld LJ in *R v Hoare* disagreed that there was this inconsistency. In his judgment he said ([2004] All ER (D) 49 (Apr) at [51]:

c 'In our view, there is no inconsistency between the approach of Kay LJ in *R v Betts* and that of Laws LJ in *R v Howell* and *R v Knight*. As we have said, it is plain from Kay LJ's judgment that, even where a solicitor has in good faith advised silence and a defendant has genuinely relied on it in the sense that he accepted it and believed that he was entitled to follow it, a jury may still draw an adverse inference if it is sure that the true reason for his silence is that he had no or no satisfactory explanation consistent with innocence to give. That is of [a] piece with Laws LJ's reasoning in *R v Howell* and *R v Knight* that genuine reliance by a defendant on his solicitor's advice to remain silent is not in itself enough to preclude adverse comment.'

Auld LJ added:

e '[54] It is not the purpose of s 34 to exclude a jury from drawing an adverse inference against a defendant because he genuinely or reasonably believes that, regardless of his guilt or innocence, he is entitled to take advantage of that advice to impede the prosecution case against him. In such a case the advice is not *truly* the reason for not mentioning the facts. The s 34 inference is concerned with flushing out innocence at an early stage or supporting other evidence of guilt at a later stage, not simply with whether a guilty defendant is entitled, or genuinely or reasonably believes that he is entitled, to rely on legal rights of which his solicitor has advised him. Legal entitlement is one thing. An accused's reason for exercising it is another. His belief in his entitlement may be genuine, but it does not follow that his reason for exercising it is—a distinction with which Professor Di Birch in her commentary in the Criminal Law Review in *R v Howell* appears not to have grappled, in asserting that the question must surely be "has the suspect genuinely relied on his solicitor's advice".

f [55] The question in the end, which is for the jury, is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because [he] had no or no satisfactory explanation to give. For this purpose, but only for this purpose, s 34 in its provision for the drawing of an adverse inference, qualifies a defendant's right to silence. However, it is still for the prosecution to prove its case, s 38(3) of the 1994 Act ensures that a finding of a case to answer or a conviction shall not be based solely on such an inference.'

j [46] In our judgment, in a case where a solicitor's advice is relied upon by the defendant, the ultimate question for the jury remains under s 34 whether the facts relied on at the trial were facts which the defendant could reasonably have been expected to mention at interview. If they were not, that is the end of the matter. If the jury consider that the defendant genuinely relied on the advice, that is not

necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence. In *R v Betts* [2001] 2 Cr App R 257 at [54], Kay LJ was particularly concerned with 'whether or not the advice was truly the reason for not mentioning the facts'. In the same paragraph he also says:

'A person, who is anxious not to answer questions because he has no or no adequate explanation to offer, gains no protection from his lawyer's advice because that advice is no more than a convenient way of disguising his true motivation for not mentioning facts.'

If, in the last situation, it is possible to say that the defendant genuinely acted upon the advice, the fact that he did so because it suited his purpose may mean he was not acting reasonably in not mentioning the facts. His reasonableness in not mentioning the facts remains to be determined by the jury. If they conclude he was acting unreasonably they can draw an adverse inference from the failure to mention the facts.

[47] The current issue of the JSB's specimen directions was prepared in the light of the court's decision in *R v Betts*. In their explanatory note 18 (p 40.4), referring to *R v Howell*, the authors referred to the apparent conflict of authority and said that until it was resolved the specimen direction would follow *R v Betts* which is more favourable to the accused. Thus the specimen direction asks the jury to consider whether the defendant *genuinely* relied on the legal advice to remain silent. We understand that in the light of *R v Hoare* a revision to the specimen direction is now in draft and will be issued shortly. Under the revised direction the jury will be asked to consider whether the defendant *genuinely and reasonably* relied on the legal advice to remain silent.

#### OUR CONCLUSIONS

[48] The summing up in the present case did not match up to these standards, even though it accorded with the specimen direction in existence at the time. The judge never directed the jury to consider the reasonableness, let alone the genuineness, of the appellant's reliance on his solicitor's advice as the reason why he did not answer questions in interview.

[49] The crucial passage of his direction was:

'You decide what you make of the reasons given for not answering. If you thought that the reason given was a good one, then of course you would not hold it against them.'

The need for a proper direction on this was all the more important since this was not a case in which the primary adverse inference for the jury to draw was later fabrication, the appellant having made unsolicited remarks on his arrest which foreshadowed (though in much less detail) his defence at trial. Thus the primary adverse inference which the jury could draw in this case was not that he made up his story later, but that he did not think his story would stand up to examination.

[50] Mr Perry accepted that although this would not be apparent on the then state of the authorities, when the judge gave the directions as to s 34 inferences his summing up did involve a misdirection. We have already referred to the criticism of this passage by the Court of Human Rights, which we accept. Mr Perry sought to rely upon the appellant's failure to call any evidence from his solicitor, but this is to ignore both the fact that the solicitor made clear at the

a police interview that she had given such advice, and that the appellant had been prepared to give an account of his defence both before he was advised by his solicitor and in a subsequent interview.

b [51] More importantly, the appellant had already made it clear to the police before receiving legal advice that the core of his defence was that Mohamoud had jumped from the window. This last point, coupled with the fact that he had made it clear that he was prepared to give evidence as to the advice he had received (albeit that this was not pursued by the advocates), suggest that a s 34 direction may not have been appropriate in this case at all, because the evidence before the jury was consistent with the appellant having acted genuinely on the advice of his solicitor. His being silent could not result in the prosecution being ambushed or taken by surprise. The advice which the appellant was given might have been c justified because the appellant was unaware of the evidence on which the prosecution were relying. The judge might have concluded that to draw an adverse inference from the appellant's silence would, on the facts, be dangerous and in any event unnecessary (as is apparent from Mr Perry's principal argument for upholding the conviction).

d [52] As we have indicated earlier in this judgment, this issue needed to be resolved in discussion between the judge and counsel in the absence of the jury after the close of the evidence. If the judge had been persuaded that it was a proper case for a s 34 direction to the jury, it was necessary to identify with some precision the relevant adverse inference or inferences which the jury might legitimately draw.

e [53] Having come to the conclusion that there was a misdirection, there remains the issue as to the effect of that misdirection. Did it make the conviction unsafe? This is the most difficult issue in this case. Mr Perry vigorously submits that this is not the consequence. Whether he is correct depends upon the evidence we have already set out. Can we be satisfied that the unfairness which f was inherent in the jury being misdirected would not have affected the jury's verdict?

[54] Mr Perry's principal contention is based on the fact that the jury were told that if they did not accept Mohamoud's evidence, that was, in effect, the end of the case. Yet, they convicted not only the appellant but the other defendants too, so the jury must have accepted Mohamoud's evidence.

g [55] Mr Perry also refers to the fact that Michelle Whyte gave evidence of finding the window closed which, in the absence of any other evidence, he submits, means that Mohamoud could not have jumped through the window, as if he had, he could not have closed the window.

h [56] We recognise the force of Mr Perry's arguments, but in the end they do not satisfy us that we can safely put on one side the unfairness caused by the misdirection. Mohamoud's evidence was not without its inconsistencies and Michelle Whyte's evidence was flawed, as is indicated by the offences of which she was herself convicted. Mr Perry's argument implies that the jury must have been sure of the correctness of Mohamoud's evidence irrespective of any adverse i inference they might have drawn pursuant to s 34. But the fact is that the drawing of adverse inferences was left to them, and in an unsatisfactory manner. Such inferences can give added strength to the Crown's case against a defendant. It can tip the balance from being not sure of the Crown's case to being sure. It can give confirmation of the jury's preference for the Crown's case, of which (without that confirmation) they might not have been sure. It is impossible to say

whether the jury would have reached the same conclusion were it not for this element in their deliberations. And if the jury drew a further adverse inference from the failure of the appellant to call his solicitor to explain the advice which she had given, this could have had a significant effect on the verdicts at which they arrived.

[57] In our judgment it follows that the convictions are unsafe. We therefore quash the appellant's convictions.

*Appeal allowed.*

Stephen Leake    Barrister.



**a**    **AMEC Capital Projects Ltd v Whitefriars  
City Estates Ltd**  
[2004] EWCA Civ 1418

**b**    COURT OF APPEAL, CIVIL DIVISION  
KENNEDY, CHADWICK AND DYSON LJJ  
7, 28 OCTOBER 2004

**c**    *Building contract – Adjudication – Award – Jurisdiction to make award – Person named as adjudicator in JCT Standard Form of Building Contract with Contracts Design (1998 edition) unavailable by reason of death – Whether person appointed adjudicator under Scheme for Construction Contracts having jurisdiction – Housing Grants, Construction and Regeneration Act 1996 – Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.*

**d**    *Natural justice – Adjudicator – Bias – Adjudicator adjudicating on issue without jurisdiction – Adjudicator acquiring jurisdiction and adjudicating on same issue – Whether apparent bias.*

**e**    The claimant was engaged to carry out certain works for the defendant under a contract incorporating a JCT standard form. The contract provided for the reference of disputes to an adjudicator. Clause 39A.2 provided that the adjudicator was to be either the person with whom the parties had executed a JCT adjudication agreement (being the individual named as the adjudicator in App 1 to the contract or a person nominated by him) or, where no such agreement had been executed, the individual named in App 1 or, in the event of his unavailability a person nominated by him or, the individual with whom the parties had executed an adjudication agreement pursuant to cl 39A.3. The individual named in App 1 was A. The Housing Grants, Construction, and Regeneration Act 1996 introduced a statutory right of adjudication in construction contracts and the Scheme for Construction Contracts (England and Wales) Regulations 1998 were made under powers contained in the 1996 Act. A dispute arose between the claimant and the defendant as to outstanding payments and the claimant gave notice of adjudication. B was appointed pursuant to the machinery for the selection of adjudicators provided by the 1998 regulations. B made an award in the claimant's favour but when the defendant refused to pay the court refused to enforce the award. It ruled that the adjudicator should have been A or a person nominated by him and that B had had no jurisdiction. The claimant then sought again to refer the dispute to adjudication. Meanwhile A had died. The claimant considered that the effect of A's death was that the contract failed to provide a mechanism for the appointment of an adjudicator so that the 1998 regulations applied. It sought the appointment of B under the 1998 regulations to hear the second adjudication. B made a second award in the claimant's favour and the defendant again refused to pay. The claimant brought proceedings to enforce the adjudicator's award. The judge held that B's decision was void, as although the claimant had applied the correct machinery for the appointment of the

adjudicator, the defendant's right under the rules of natural justice to an unbiased tribunal had been breached. The claimant appealed. The defendant sought to uphold the judge's decision, *inter alia*, on the basis that B's decision was void on grounds of want of jurisdiction.

**Held** – (1) On the true construction of the contract, if a person was not appointed as adjudicator pursuant to cl 39A.2, the default machinery of the scheme applied, as cl 39A.3 could not apply before a person had been appointed, even if he had been nominated as adjudicator. It was common ground that no adjudication agreement had been executed with an adjudicator under cl 39A.2; that the person named in App 1 was not the adjudicator, being unavailable by reason of his death; and that the named person had not nominated an adjudicator. It followed that there had been no appointment of an adjudicator pursuant to cl 39A.2. Accordingly, the judge had reached the right conclusion on the issue of jurisdiction (see [10]–[13], below).

(2) The mere fact that the adjudicator had previously decided the issue was not of itself sufficient to justify a conclusion of apparent bias. There needed to be something of substance to lead the fair-minded and informed observer to conclude that there was a real possibility that he would not bring an open mind and objective judgment to bear. The purpose of the scheme of the 1996 Act to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement would be undermined if allegations of breach of natural justice were not examined critically when they were raised by parties who were seeking to avoid complying with adjudicators' decisions. It was, however, only where a defendant had advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground. Adjudicators were assumed to be trustworthy and to understand that they should approach every case with an open mind. That was not to say that, if the adjudicator were asked to re-determine an issue and the evidence and arguments were merely a repeat of what went before, he should be expected to ignore his earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. There should be such reconsideration of the matter as was reasonably necessary for him to be satisfied that his first decision was correct. In the instant case, there was no justification for the conclusion that there had been apparent bias, and the appeal would therefore be allowed (see [20]–[22], [47]–[49], below); *Locabail (UK) Ltd v Bayfield Properties Ltd*, *Locabail (UK) Ltd v Waldorf Investment Corp*, *Timmins v Gormley*, *Williams v HM Inspector of Taxes*, *R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan* [2000] 1 All ER 65 applying.

## Notes

For adjudication under construction contracts and for apparent bias and interests which may give rise to the appearance of bias, see, respectively 4(3) *Halsbury's Laws* (4th edn reissue) paras 206, 207, and 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) paras 99, 100.

For the Housing Grants, Construction and Regeneration Act 1996, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 284.

- a* For the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, see 4 *Halsbury's Statutory Instruments* (2003 issue) 24.

### Cases referred to in judgments

- Discaint Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402.
- b* *Ealing London BC v Jan* [2002] EWCA Civ 329.
- KFTCJC v Icori Estero SpA* (28 June 1991, International Arbitration Report. Vol 6 #8 8/91), Cour d'Appel de Paris.
- Locabail (UK) Ltd v Bayfield Properties Ltd, Locabail (UK) Ltd v Waldorf Investment Corp, Timmins v Gormley, Williams v HM Inspector of Taxes, R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan* [2000] 1 All ER 65, [2000] QB 451, [2000] 2 WLR 870, CA.
- c* *Medicaments and Related Classes of Goods (No 2), Re* [2001] ICR 564, [2001] 1 WLR 700, CA.
- Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.
- d* *R v Gough* [1993] 2 All ER 724, [1993] AC 646, [1993] 2 WLR 883, HL.
- Vakauta v Kelly* (1989) 167 CLR 568, Aus HC.

### Cases referred to in skeleton arguments

- Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* (2001) 80 Con LR 14.
- e* *Pring & St Hill Ltd v CJ Hafner (t/a Southern Erectors)* [2002] EWHC 1775 (TCC).
- RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC).

### Appeal

- f* The claimant, AMEC Capital Projects Ltd, appealed with permission of Potter LJ granted on 30 March 2004, from the decision of Judge Toulmin QC on 27 February 2004 ([2004] EWHC 393 (TCC), [2004] All ER (D) 461 (Feb)) dismissing its claim for the enforcement of an award of £717,885.22 against the defendant, Whitefriars City Estates Ltd, made by Michael Biscoe as adjudicator in relation to a construction contract made between the claimant and the defendant incorporating the JCT Standard Form of Building Contract with Contractors Design (1998 edition with amendments). The facts are set out in the judgment of Dyson LJ.
- g*

*Stephen Furst QC* (instructed by *Masons*) for AMEC.

- h* *David Thomas QC* (instructed by *Kingsley Napley*) for Whitefriars.

*Cur adv vult*

28 October 2004. The following judgments were delivered.

- j* **DYSON LJ** (giving the first judgment at the invitation of Kennedy LJ).

### INTRODUCTION

[1] This appeal raises questions of alleged bias and procedural unfairness by an adjudicator appointed to determine a dispute in relation to a construction

contract referred to him under the Housing Grants, Construction and Regeneration Act 1996.

#### THE FACTS

[2] Pursuant to a contract partly contained in what was described as a 'letter of intent' dated 18 October 2000, AMEC Capital Projects Ltd (AMEC) was engaged by Whitefriars City Estates Ltd (Whitefriars) to carry out certain pre-construction works and the procurement of a second-stage tender in connection with a building development in Tudor Street, London EC4. The contract incorporated the JCT Standard Form of Building Contract with Contractors Design (1998 edn) with amendments. It provided for reference of disputes to an adjudicator. The relevant contractual provisions were as follows:

'39A.2 The Adjudicator to decide the dispute or difference shall be, on the application of either Party, either the individual with whom the Parties have executed the "JCT Adjudication Agreement for an Adjudicator Named in a Contract" (being the individual named as the Adjudicator in Appendix 1 or a person nominated by him), or where no such agreement has been executed, the individual named as the Adjudicator in Appendix 1, or in the event of his unavailability a person nominated by him, or the individual with whom the Parties have executed an Adjudication Agreement pursuant to clause 39A.3. Provided that

.2.1 where either Party has given notice of his intention to refer a dispute to adjudication then any application to the person named as the Adjudicator in Appendix 1 or any agreement or nomination under clause 39A.3 must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer.

.2.2 upon receipt by the Parties, from the individual named as the Adjudicator in Appendix 1, of confirmation of his availability or of the name of the person nominated by him the Parties shall thereupon execute with that individual or that person as the case may be the "JCT Agreement for an Adjudicator Named in a Contract."

39A.3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him then

.1. either Party may apply to the individual named as the Adjudicator in Appendix 1 to replace the Adjudicator to adjudicate that dispute or difference save that

.2. if the individual named as the Adjudicator in Appendix 1 is unavailable then either Party may apply to the partner or director who is managing (for the time being) the practice of such named individual and the Parties shall execute the JCT Adjudication Agreement with the replacement Adjudicator. Provided that if the Adjudicator has executed with the Parties the "JCT Agreement for an Adjudicator Named in a Contract" and he is unable by reason of illness or other cause to adjudicate on a dispute or difference referred to him any appointment under clause 39A3 shall not terminate the Adjudication Agreement of that individual with the Parties.'



a [3] Appendix 1 provided that 'the Adjudicator will be George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him'.

b [4] AMEC carried out the pre-construction services and on 1 May 2001 was given possession of the site. It submitted its second-stage tender in June. The tender figure was the subject of negotiations, but the parties were unable to agree on a price. In the result, on 31 July 2001 Whitefriars terminated the contract and appointed a replacement contractor. AMEC had by this time submitted invoices dated 26 March for £204,000 (which had been paid), 17 April for £97,000 and 18 June for £414,629.41. The last two invoices have never been paid. On 10 October, it submitted a draft final account in the net sum of £508,401.52 (exclusive of VAT and interest).

c [5] On 23 April 2003, AMEC's solicitors gave notice of adjudication pursuant to cl 39A of the contract in respect of its claim for £508,401.52 plus VAT and interest. Mr Michael Biscoe of Biscoe Associates was appointed as adjudicator by the Royal Institute of British Architects (RIBA) pursuant to the machinery for the selection of adjudicators provided by para 2(1)(c) of the Scheme for Construction Contracts (the Scheme) which is set out in Sch 1 to the Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649. On 5 June, he issued his reasoned decision that Whitefriars should pay the principal sum claimed plus VAT of £88,970.26 and interest in the sum of £120,513.44, making a total of £717,885.22. AMEC commenced enforcement proceedings. Whitefriars resisted the claim on a number of grounds which included: (i) that Mr Biscoe had no jurisdiction because he had not been appointed in accordance with the terms of the contract and (ii) that he had acted in breach of the rules of natural justice.

f [6] On 19 September 2003, Judge Humphrey Lloyd QC decided that para 2(1)(c) of the Scheme was not applicable, and that, in accordance with App 1, the adjudicator should have been 'George Ashworth of Davis Langdon & Everest, or in the event of his unavailability a person nominated by him'. Accordingly, Mr Biscoe had no jurisdiction and his decision was a nullity. The judge did not need to, nor did he, decide the other issues that had been raised by Whitefriars.

g [7] On 31 October, AMEC's solicitors served a second notice of adjudication on Whitefriars in respect of the claim for £508,401.52 plus VAT and interest. They wrote:

h 'As previously advised to your solicitors, Kingsley Napley, there is no George Ashworth at Davis Langdon & Everest and so, the terms incorporated into the contract fail to provide a mechanism that will allow our client to appoint and instruct an adjudicator in accordance with section 108(2)(b) of the Act. The only Mr Ashworth who could be identified at Davis Langdon & Everest was a Geoffrey Ashworth who sadly died a few weeks ago. In the circumstances, as a result of section 108(5) the Act, the adjudication conditions of the contract are void and therefore, the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1999 [sic] ("the Scheme") apply. Pursuant to paragraph 2[(1)](c) of the Scheme and in compliance with section 108(2) of the Act, we hereby inform you that we will be applying

forthwith to the President of the Royal Institute of British Architects (“RIBA”) to nominate an adjudicator.’ a

[8] On the same day, they wrote a letter to the RIBA in which they summarised the history of the first adjudication and the decision of Judge Lloyd QC and applied for the appointment of an adjudicator. The letter stated:

‘Given that our present application is in relation to the same dispute and bearing in mind that RIBA nominated Mr Biscoe as adjudicator and he made a decision thereon, we suggest that in the interests of saving time and costs, it makes sense that Mr Biscoe be nominated again ...’ b

[9] Mr Biscoe was duly nominated. He accepted the nomination and following the service of a referral of adjudication, a response, set-off and counterclaim and a reply, he issued his second decision on 17 December 2003. He decided that Whitefriars was obliged to pay the net sum claimed plus VAT and interest. Whitefriars failed to honour this decision. AMEC issued enforcement proceedings for a second time. Whitefriars defended the claim on the grounds that: (a) upon the true construction of the contract, the adjudicator should have been nominated by the partner managing Mr Ashworth’s practice and not pursuant to the Scheme; and (b) Mr Biscoe’s decision was void since he had committed several breaches of natural justice. On 27 February 2004, Judge Toulmin QC dismissed the claim ([2004] EWHC 393 (TCC), [2004] All ER (D) 461 (Feb)). He held that AMEC had applied the correct contractual machinery for the appointment of the adjudicator so that Mr Biscoe had the requisite jurisdiction, but he decided that there had been breaches of the rules of natural justice sufficient to invalidate the decision. AMEC appeals with the permission of Potter LJ. Whitefriars has served a respondent’s notice seeking to uphold the judge’s decision on the grounds that AMEC had followed the wrong contractual machinery, and that Mr Biscoe’s decision was therefore void on the grounds of want of jurisdiction. c  
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#### THE JURISDICTION POINT

[10] It is common ground that ‘George Ashworth’ was a misnomer for ‘Geoffrey Ashworth’, and that the reference to ‘George’ should be understood as being a reference to ‘Geoffrey’. Geoffrey Ashworth had been a partner of Davis Langdon & Everest but he had died on 13 October 2003. Mr Thomas QC submits that the death of Mr Ashworth did not result in a breakdown of the cl 39A machinery for the appointment of an adjudicator. He says that on the death of Mr Ashworth, cl 39A.3.2 applied. Upon his death he became ‘unavailable’ and AMEC should have applied for the appointment of an adjudicator to the partner or director who for the time being was managing Mr Ashworth’s practice. The word ‘referred’ where it appears in the third line of cl 39A.3 does not connote that a dispute must already have been referred before the adjudicator becomes unavailable. It can cover the situation where an adjudicator becomes unavailable when a reference is to be made. g  
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[11] In my judgment, the judge reached the correct conclusion on this issue. The starting point is that the word ‘Adjudicator’ is defined in cl 1.3 of the conditions of the standard form of contract as ‘any individual appointed pursuant to clause 39A as the Adjudicator’ (my emphasis). It is clear that cl 39A.2 is dealing with the appointment of the adjudicator. It provides a number of different

a methods by which the adjudicator may be appointed. That is made plain by the proviso which, it is common ground, governs an appointment made by any of the methods described in cl 39A.2. Thus, on the face of it, if a person is not appointed as adjudicator pursuant to cl 39A.2, the default machinery of the Scheme must apply. It is common ground that: (i) no adjudication agreement was executed with an adjudicator under cl 39A.2, (ii) Mr Ashworth (the person named in App 1) was not the adjudicator because, by reason of his death, he was unavailable, and (iii) he did not nominate an adjudicator. It follows that there was no appointment of an adjudicator pursuant to cl 39A.2.

[12] Clause 39A.3 is dealing with the situation that arises if the adjudicator (ie the person appointed as adjudicator pursuant to cl 39A) 'dies or becomes ill or is unavailable for some other cause'. It cannot apply before a person has been appointed, even if he has been nominated as adjudicator. On Mr Thomas's argument, it is necessary to read the word 'Adjudicator' in the first line of cl 39A.3 as meaning, or at least as including, the person named as the adjudicator in App 1. But if that had been the intention of the parties, they would have said so. The scheme of cl 39A is clear. Clause 39A.2 is dealing with the original appointment of an adjudicator. If, after an adjudicator has been appointed, he becomes unavailable and is therefore unable to adjudicate on a dispute 'referred to him', then a replacement may be appointed in one of the two ways described in cl 39A.3.1 and 39A.3.2. This interpretation accords with the clear and plain language of the contract. It fits more naturally with the use of the words 'a dispute or difference referred to him'. The natural interpretation of these words is that the dispute or difference has (already) been referred to the adjudicator. Mr Thomas's interpretation of these words is strained.

[13] So why should the words not be given their plain and ordinary meaning? Mr Thomas suggests that this interpretation can give rise to anomalies which the parties cannot sensibly have intended. In particular, he points out that it would mean that, if the person named in the appendix as adjudicator was unavailable to be appointed to determine a dispute, the contractual machinery would break down, but could spring back to life if the named adjudicator were to become available to decide a subsequent dispute. He submits that it is unlikely that this is what the parties would have intended. Rather, they are likely to have intended to provide their own mechanism for appointment for the duration of the contract, and not a mechanism that sometimes applied, and sometimes did not. I have little doubt that the parties would have hoped that the same mechanism could apply throughout the contract, and perhaps also that the same adjudicator could be appointed to decide all disputes as they arose. But it was obviously prudent to provide for an alternative arrangement if the mechanism of first choice were to break down. It is by no means self-evident that the parties would not have wished the mechanism of first choice to be revived (if that were possible) once a different mechanism had been adopted. I have no doubt that the judge reached the right conclusion on the issue of jurisdiction.

#### BREACH OF NATURAL JUSTICE

#### *The legal principles*

[14] The common law rules of natural justice or procedural fairness are twofold. First, the person affected has the right to prior notice and an effective

opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable. a  
b

[15] In the present case, although allegations of breach of the first of these rules have been made by Whitefriars from time to time, Mr Thomas has made it clear that he now only relies on the alleged bias of Mr Biscoe.

[16] It is rightly not in dispute that the rule against bias applies to adjudicators appointed to determine disputes under the 1996 Act. It is not said on behalf of Whitefriars that Mr Biscoe was in fact biased in reaching his second decision. It is, however, submitted that his decision should be declared to be invalid on the grounds of apparent bias. The test for apparent bias is not in doubt. It is whether a fair-minded and informed observer, having considered all the circumstances which have a bearing on the suggestion that the decision-maker was biased, would conclude that there was a real possibility that he was biased: see *Porter v Magill* [2001] UKHL 67 at [103], [2002] 1 All ER 465 at [103], [2002] 2 AC 357. c  
d

[17] Bias can come in many forms. As the Court of Appeal said in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564 at 576, [2001] 1 WLR 700 at 711 (para 37): e

‘Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.’ f  
g

[18] The circumstances giving rise to a real possibility of bias are many. In *Locabail (UK) Ltd v Bayfield Properties Ltd*, *Locabail (UK) Ltd v Waldorf Investment Corp*, *Timmins v Gormley*, *Williams v HM Inspector of Taxes*, *R v Bristol Betting and Gaming Licensing Committee, ex p O’Callaghan* [2000] 1 All ER 65 at 77–78, [2000] QB 451 at 480 (para 25), the Court of Appeal made some observations about the factors which may or may not give rise to a real danger of bias, emphasising that everything would depend on the facts. It is true that the court was considering bias in the context of the test of ‘real danger of bias’ which had been propounded by the House of Lords in *R v Gough* [1993] 2 All ER 724, [1993] AC 646, rather than the later fair-minded and informed observer test approved in *Porter’s* case. But the later test was described by Lord Hope of Craighead in *Porter’s* case as no more than a ‘modest adjustment’ of the test in *R v Gough*. h  
j



a Moreover, in the *Locabail* case [2000] 1 All ER 65 at 74, [2000] QB 451 at 476–477  
(para 17) the court said that in the overwhelming majority of cases the  
application of the real danger or possibility test and the reasonable suspicion or  
apprehension test (effectively that approved in *Porter's* case) would yield the  
same result. It seems to me, therefore, that the value of the guidance given in  
b *Locabail* remains undimmed. It is important to emphasise, however, that it  
should be treated as no more than guidance: it should not be treated as if it were  
a statute. The court said:

c 25. It would be dangerous and futile to attempt to define or list the  
factors which may or may not give rise to a real danger of bias. Everything  
will depend on the facts, which may include the nature of the issue to be  
decided. We cannot, however, conceive of circumstances in which an  
objection could be soundly based on the religion, ethnic or national origin,  
gender, age, class, means or sexual orientation of the judge. Nor, at any  
rate ordinarily, could an objection be soundly based on the judge's social  
d or educational or service or employment background or history, nor that  
of any member of the judge's family; or previous political associations; or  
membership of social or sporting or charitable bodies; or Masonic  
associations; or previous judicial decisions; or extra-curricular utterances  
(whether in textbooks, lectures, speeches, articles, interviews, reports or  
responses to consultation papers); or previous receipt of instructions to act  
e for or against any party, solicitor or advocate engaged in a case before him;  
or membership of the same Inn, circuit, local Law Society or chambers  
(*KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991,  
International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real  
danger of bias might well be thought to arise if there were personal  
f friendship or animosity between the judge and any member of the public  
involved in the case; or if the judge were closely acquainted with any  
member of the public involved in the case, particularly if the credibility of  
that individual could be significant in the decision of the case; or if, in a case  
where the credibility of an individual were an issue to be decided by the  
judge, he had in a previous case rejected the evidence of that person in such  
g outspoken terms as to throw doubt on his ability to approach such person's  
evidence with an open mind on any later occasion; or if on any question at  
issue in the proceedings before him the judge had expressed views,  
particularly in the course of the hearing, in such extreme and unbalanced  
terms as to throw doubt on his ability to try the issue with an objective  
judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other  
h reason, there were real ground for doubting the ability of the judge to  
ignore extraneous considerations, prejudices and predilections and bring  
an objective judgment to bear on the issues before him. The mere fact that  
a judge, earlier in the same case or in a previous case, had commented  
adversely on a party or witness, or found the evidence of a party or witness  
j to be unreliable, would not without more found a sustainable objection. In  
most cases, we think, the answer, one way or the other, will be obvious.  
But if in any case there is real ground for doubt, that doubt should be  
resolved in favour of recusal. We repeat: every application must be  
decided on the facts and circumstances of the individual case. The greater  
the passage of time between the event relied on as showing a danger of bias

and the case in which the objection is raised, the weaker (other things being equal) the objection will be.' a

[19] The risk of apparent bias may need to be considered where the decision of a tribunal is allowed on appeal, a rehearing is ordered and the question arises whether the rehearing should be conducted by the same or a different tribunal. It arose in the rather unusual circumstances of the present case when the RIBA had to consider whether to nominate Mr Biscoe to decide the same issue as he had purported to decide in the first adjudication, namely whether AMEC was entitled to recover the sum that it was claiming for work done prior to the termination of its contract. The question that falls to be decided in all such cases is whether the fair-minded and informed observer would consider that the tribunal could be relied on to approach the issue on the second occasion with an open mind, or whether he or she would conclude that there was a real (as opposed to fanciful) possibility that the tribunal would approach its task with a closed mind, predisposed to reaching the same decision as before, regardless of the evidence and arguments that might be adduced. Usually, the reason for sending a case back for a rehearing will be that there is fresh evidence or a new point, or the appeal court has held that the tribunal made some mistake which, it is to be expected, will not be repeated on the rehearing. The present case is unusual in that the court did not find that Mr Biscoe had made any mistake in arriving at his first decision, and, so far as the RIBA were aware, there was no fresh material. b c d

[20] In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact re-run of the first. e f g h

[21] The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear. As was said in the *Locabail* case, the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had j

a made an extremely hostile remark about a party, the position might well be different. Thus, in *Ealing London BC v Jan* [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him 'further than he could throw him'. So too in *Timmins v Gormley*, which was heard with *Locabail*, it was held that there was a sufficient danger where a  
b personal injuries case in which insurers were the real defendants was heard by a recorder who had published articles in which he had expressed 'pronounced pro-claimant anti-insurer views' (see [2000] 1 All ER 65 at 92, [2000] QB 451 at 496-497 (para 89)).

[22] It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the Scheme of the 1996 Act is now well known.  
c It is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not  
d examined critically when they are raised by parties who are seeking to avoid complying with adjudicators' decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground.

e  
*Apparent bias in this case*

[23] With that introduction, I turn to consider the various arguments advanced by Mr Thomas in support of his submission that there was apparent bias in the present case.

f [24] Mr Thomas accepts that the mere fact of Mr Biscoe's reappointment is not sufficient to found a case of apparent bias. The additional factors on which he relies are: (a) that Mr Biscoe's first decision was made without jurisdiction and (b) that the legal advice that Mr Biscoe obtained during the first adjudication in relation to the defence being advanced by Whitefriars (which was not disclosed to the parties) was 'carried forward' into the second adjudication. I shall take  
g these in turn.

[25] I confess that I fail to understand how the fact that the original decision was made without jurisdiction has any relevance to the issue of apparent bias. The fact that the first decision was a nullity did not make Mr Biscoe any more  
h or less likely to approach the second adjudication with a closed mind than if the first decision had been one which he had jurisdiction to make. In my view, the first point is misconceived.

[26] In order to explain the second point, it is necessary to set out a little of the history. AMEC's claim in the first adjudication (repeated in the second) was that it was entitled to be paid the sum claimed as 'reasonable and proper costs'  
j incurred in accordance with the letter of 18 October 2000 following the giving by Whitefriars of notice to cease work. In its response to the claim, Whitefriars contended that it was not precluded by cl 30.3.4 of the standard conditions of contract from advancing a set-off and counterclaim. That clause provides so far as material:

**30.3.4** Not later than 5 days before the final date for payment of an amount due pursuant to clause 30.3.3 the Employer may give a written notice to the Contractor which shall specify any amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground. a

**30.3.5** Where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4 the Employer shall pay the Contractor the amount stated in the Application for Interim Payment. b

[27] Whitefriars contended that cl 30.3.4 did not oblige the employer to give written notice of any amount to be withheld or deducted: oral notice was sufficient. As he was entitled to do, Mr Biscoe obtained legal advice on this point. In his first award, he held (para 6.7) that the contract required a written notice to be given, and that an oral notice would not suffice. The failure to give notice in writing was fatal to Whitefriars' defence. c

[28] In the second adjudication, Whitefriars took a different point. It argued that, since there had been a termination of the contract, the provisions of cl 30 did not apply. It contended that payment was governed by cl 27.6, which provided that, in the event of the determination of AMEC's employment, AMEC was not entitled to any further payment until all the works had been completed by the replacement contractor. It followed that the failure to give notice in writing in accordance with cl 30.3.4 was irrelevant. AMEC's response was that cl 27 had no application. The termination had not been made pursuant to cl 27, but rather pursuant to the provisions of the letter of 18 October 2000. d

[29] The essential reasoning of Mr Biscoe is to be found in para 7.2 of his decision. e

'My task is to apply the terms of the contract to the facts of this dispute. It is clear that whatever Whitefriars' complaints against AMEC may have been, when presented with a valid application for payment, it failed to follow the terms of the letter of intent and the draft amended JCT contract that it had drawn up with such care. It did not at any time serve a withholding notice which it had to do if it was to avoid the obligation to meet each application in full. This oversight, which I assume it to have been, occurred twice and inevitably means that it must meet the invoices in full.' f

[30] Implicitly, he rejected Whitefriars' cl 27 defence. Whitefriars did not advance any alternative argument in the event that its cl 27 defence was rejected. It did not even explicitly repeat its earlier unsuccessful oral notice point. In these circumstances, I consider that Mr Biscoe was not obliged to reconsider the oral notice point, since it had not been raised, and Mr Thomas does not suggest otherwise. There being no notices in writing, it was inevitable that Mr Biscoe would arrive at the same conclusion as before. g

[31] This is the background against which the significance of the legal advice is to be considered. But it is apparent that the legal advice did not deal with the cl 27 point because this issue had not been raised in the first adjudication. It is true that the absence of written notice was relevant in the second adjudication in the sense that, subject to the cl 27 point, the absence of written notice was h



a fatal to Whitefriars' defence. But no issue was raised in the second adjudication as to the relevance of the lack of written notice if the cl 27 defence failed. In these circumstances, the legal advice was of no relevance to the issues raised in the second adjudication. The argument based on the legal advice must, therefore, be rejected.

b [32] I should add that, even if Whitefriars had resurrected the oral notice point as an alternative to the cl 27 point, I would have rejected a bias argument based on that legal advice. The mere fact that legal advice had been obtained in the first adjudication would not have led the fair-minded informed observer to conclude that there was a real possibility that Mr Biscoe would have approached the oral notice point with a closed mind.

c [33] During the course of argument, Mr Thomas advanced a different complaint. He submitted that Mr Biscoe had failed to deal with the cl 27 point. On the face of it, there is force in this submission, although if Whitefriars had been genuinely concerned about Mr Biscoe's failure to deal explicitly with it, I would have expected it to ask him to supplement his decision by giving his reasons for rejecting the cl 27 defence. Be that as it may, Whitefriars has not raised this complaint before, and in my view it is too late to raise it now. Even if the point is a good one, it has nothing whatsoever to do with apparent bias.

### *Three further arguments*

e [34] Mr Thomas relies on three further arguments in support of his case on apparent bias. These are (a) the telephone conversation of 7 November between Mr Cassidy and Mr Biscoe; (b) the advice obtained by Mr Biscoe in relation to his jurisdiction; and (c) the possibility of a claim made by Whitefriars against Mr Biscoe.

### *The telephone conversation*

f [35] Following the nomination of Mr Biscoe, Mr Cassidy (the partner at Masons who was acting as solicitor on behalf of AMEC) telephoned the office of Biscoe Associates on 7 November. He wanted to know to which office he should send the papers. He spoke to Mr Biscoe, who wanted to know why the dispute was being referred to him for a second time. The full note made by g Mr Biscoe of the conversation was sent to both parties and is in these terms:

h 'I had a telephone conversation with Mr Peter Cassidy of Masons on Friday 7 Nov 2003. I confirmed that I had already heard from the RIBA regarding an adjudication I had decided a few months ago concerning AMEC and Whitefriars. I understood that I would be receiving papers shortly. Mr Cassidy wished to know to which office he should send them. I informed him he should send them to Collier House. I enquired why the matter had been referred to me again and Mr Cassidy explained that his client had taken enforcement proceedings following the issue of my decision and the judge had not enforced the decision. This was to do with j a named adjudicator being in the appendix to the contract attached to the letter of intent. He reminded me that the question of whether the contents of the appendix were agreed or not agreed had been an issue between the parties. The judge had found that the named adjudicator should have heard the adjudication. Since the named adjudicator, Mr George Ashworth (but actually Mr Geoffrey Ashworth) of DLE, has since sadly

died the matter was now open again and that his clients were referring the matter back to me as I would see from the documents when I received them. The reason for coming straight to me was that my familiarity with the facts would save time and cost. I mentioned that I had already heard from the RIBA and would respond appropriately when I received the papers. I further mentioned that I had a very full diary for the week beginning 10 Nov and that I would not be able to deal with the matter until the following week.'

[36] It has not been suggested that this note is inaccurate, but Whitefriars do not accept that it is necessarily complete. In my judgment, there are no grounds for believing that the note does not fully and accurately reflect what was said during the telephone conversation. In his letter of 17 November, Mr Biscoe said that the conversation—

'was of an administrative nature and the issues discussed were to allow me to understand why I was being involved again and were confined to matters of fact and did not in [the] least prejudice the position of the Respondent nor benefit the Referring Party. It merely assisted me in understanding what was being asked of me.'

[37] The passage in the conversation which led the judge to hold that a fair-minded and informed observer might well have concluded that there was a real possibility of bias was the statement by Mr Cassidy that the reason why the dispute was being referred to Mr Biscoe was that his familiarity with the facts would save time and costs. But if Mr Biscoe had not been told that this was the reason why the matter was coming back to him (as it plainly was), he would have been likely to infer that it was, at any rate once he had seen the judgment of Judge Lloyd. As I have said, Mr Thomas accepts that the fact that the dispute was referred back to Mr Biscoe does not of itself justify a conclusion of apparent bias in this case. I do not see how the position is affected by Mr Cassidy's comment that the reason why the dispute was being referred to Mr Biscoe was that he was familiar with the facts. In particular, I do not accept that this remark amounted to an invitation to Mr Biscoe to reach the same decision as on the previous occasion, still less that it is to be inferred that there was a real possibility that Mr Biscoe would reach the same decision by reason of that remark. I would accept that conversations between one party and the tribunal in the absence of the other party should be avoided. Communications should ordinarily be in writing with copies to all parties. But I see nothing in the circumstances of this conversation, which arose out of an innocuous telephone call to Mr Biscoe's office, which would lead the fair-minded and informed observer to conclude that what was said would give rise to a real possibility of bias.

The advice in relation to jurisdiction

[38] In their letter to Mr Biscoe dated 12 November, Whitefriars' solicitors, inter alia, challenged his jurisdiction on the grounds that the Scheme did not apply. This is the argument that was repeated to this court and which I have rejected at [10]–[13], above. Although, as is common ground, Mr Biscoe had no power to determine his jurisdiction, he had to decide what to do in the light of

a the challenge that had been made. Unsurprisingly, he sought legal advice. Mr Thomas does not suggest that he was not entitled to take this sensible step. He was advised by Clyde & Co that his nomination by the RIBA was valid and that he did have jurisdiction to determine the dispute. On 24 November, Mr Biscoe notified the parties that he had been so advised by Clyde & Co and set out the gist of the advice that he had received. Whitefriars' solicitors were able to, and did, make representations to Mr Biscoe on the jurisdiction issue, but they were unable to persuade him not to proceed with the adjudication.

b [39] Mr Thomas does not submit that there was a breach of the rules of natural justice in the sense that Whitefriars were not given a reasonable and effective opportunity to make representations on the question of jurisdiction. There is no doubt that Whitefriars' solicitors were able to, and did, deploy their arguments in their letter of 12 November. The substance of the legal advice was conveyed in Mr Biscoe's letter of 24 November. It did not contain anything that could not have been foreseen by Whitefriars' solicitors. The issue of jurisdiction raised a short point of construction. Nevertheless, Mr Thomas contends that the failure of Mr Biscoe to disclose the gist of the advice before he decided that he had jurisdiction is a factor that should be taken into account and lead to the conclusion that there was apparent bias in this case. I confess that I have great difficulty in understanding this submission. It seems to me that, if there is anything in this complaint, it can only be that there was a failure to allow Whitefriars an opportunity to make representations. In my view, Whitefriars' complaint has nothing to do with bias. The judge decided that the failure to disclose the gist of the advice before he decided that he had jurisdiction was contrary to natural justice. He said ([2004] All ER (D) 461 (Feb)):

f '[126] The other contention has more substance. Where an adjudicator is seeking advice from a third party, it is essential that he informs the parties in advance (as Mr Biscoe did in the second adjudication), that he notifies the parties of how he has formulated the question on which the advice has been sought, so that the parties can evaluate the advice in context and, finally, he discloses the substance of the advice which he has been given and gives the parties an opportunity to comment on it before he reaches his decision. This did not happen in this case. Mr Biscoe declared that he had jurisdiction to act before he disclosed the advice from Clyde & Co on which his decision was based. This was contrary to natural justice.

g [127] I am very conscious that the time limits may dictate the manner in which the steps are carried out, but it seems to me that justice demands that the parties should be informed of the questions asked of the third party expert, of the answers given by the expert and that an opportunity should be given to comment on the advice given by the expert in advance of the adjudicator's decision. I can see no distinction between expert advice given on the question of jurisdiction and advice which goes to the merits. See, for example, *Discairn Project Services Ltd v Opecprime Development Ltd* [2000] BLR 402 at 405 per Judge Bowsher QC.'

j [40] In my judgment, Mr Thomas is right not to seek to uphold this conclusion of the judge. There was no breach of the rules of natural justice

here. As I have said, Whitefriars' solicitors had already made representations on the point of construction. They do not suggest that there was a line of argument that they had not foreseen which they would have wished to advance in order to meet the advice given by Clyde & Co. Natural justice requires no more than that a party should have an effective opportunity to make representations before a decision is made. In my view, Whitefriars had such an opportunity in the present case and took advantage of it. a

[41] A more fundamental question was raised as to whether adjudicators are in any event obliged to give parties the opportunity to make representations in relation to questions of jurisdiction. I respectfully disagree with the judge's view that the requirements of natural justice apply without distinction, whether the issue being considered by the adjudicator is his own jurisdiction or the merits of the dispute that has been referred to him for decision. The reason for the common law right to prior notice and an effective opportunity to make representations is to protect parties from the risk of decisions being reached unfairly. But it is only directed at decisions which can affect parties' rights. Procedural fairness does not require that parties should have the right to make representations in relation to decisions which do not affect their rights, still less in relation to 'decisions' which are nullities and which cannot affect their rights. Since the 'decision' of an adjudicator as to his jurisdiction is of no legal effect and cannot affect the rights of the parties, it is difficult to see the logical justification for a rule of law that an adjudicator can only make such a 'decision' after giving the parties an opportunity to make representations. The matter can be tested in this way. Let us suppose that the court were to hold that an adjudicator was right to 'decide' that he had jurisdiction, but that he had reached this 'decision' without giving the parties an opportunity to make representations on the point. The court would not declare the 'decision' to be void. It would not do so because the adjudicator's 'decision' was of no legal effect. No useful purpose would be served by such a declaration, not least because the court had held that the adjudicator did in fact have jurisdiction. The court would not grant any relief for the supposed breach of natural justice in such a case. It seems to me that this demonstrates that the rules of natural justice have no part to play in relation to issues that the decision-maker has no power to decide. b

[42] Nevertheless, I consider that, where time permits, adjudicators would be well-advised to give the parties the opportunity to make representations on an issue of jurisdiction: they may receive valuable assistance which will help them to decide whether they should proceed with the adjudication. And that is what happened in the present case. But I do not consider that an adjudicator who decides to proceed with an adjudication is acting in breach of natural justice if he does not allow the parties that opportunity. c

[43] For the reasons that I have given, the complaint made in relation to the advice on jurisdiction is irrelevant to any question of bias. d

#### Possibility of a claim e

[44] By their letter dated 12 November 2003, Whitefriars' solicitors asked Mr Biscoe to recuse himself on the grounds that his ability 'to act impartially and unbiased in this matter has been compromised' inter alia 'because you may be liable for some of our clients' costs'. They explained that Whitefriars had incurred approximately £100,000 in legal costs in contesting the first f



a adjudication, and a further £28,000 in defending the proceedings issued by AMEC to enforce the first adjudication. It was Whitefriars' intention to claim these costs from AMEC. But in so far as it was unable to do so, it intended to recover the costs from Mr Biscoe 'as damages for proceeding with an adjudication wrongly'. On the face of it, it seems to me that such a claim would have had no prospects of success, since para 26 of the Scheme provides:

b 'The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith ...'

c [45] Bad faith has never been alleged. But even if there were any substance in the claim, the fair-minded and informed observer would not conclude on that account that there was a real possibility that Mr Biscoe was biased. His response in a letter dated 17 November contained the following passage:

d 'Both parties may be assured that I shall act in this case if I consider the correct course is for me to do so. I shall act impartially and in accordance with the correct procedure. I shall not be deterred from discharging my duties as an adjudicator and find it improper that solicitors representing the Respondent should attempt to deter me from acting by threats of action for damages and accusations of bias which are without substance.'

e [46] In my judgment, there is nothing in the circumstances of this case which would have led the fair-minded and informed observer to doubt that Mr Biscoe would act precisely as he said he would act in this letter. I consider that such an observer would interpret this letter as showing no more than that Mr Biscoe was showing a resolute refusal to succumb to some rather crude  
f bullying. If the threat of proceedings against a tribunal were, without more, to lead to a conclusion of apparent bias, it would be open to a party to undermine the integrity of the Scheme simply by making such a threat. Mr Thomas recognises the danger of such abuse that is inherent in this argument, and relies on it as a subsidiary point which, he says, should be taken into account with his  
g other submissions. I find it difficult to conceive of circumstances where the threat of proceedings against a tribunal would of itself lead the fair-minded and informed observer to conclude that there was a possibility of bias. But I am in no doubt that the threat that was made against Mr Biscoe would not lead the fair-minded informed observer to conclude that there was a real possibility of  
h bias in the present case.

#### CONCLUSION

j [47] The judge held that there was a real possibility of bias in the present case by reason of the combined effect of the fact that: (a) on AMEC's case, the issues were the same in the two adjudications; (b) on the basis of Mr Biscoe's findings, the issues that he had to decide were the same in both adjudications; (c) the legal advice obtained in the first adjudication may have been 'carried forward' into the second adjudication and influenced the second decision; (d) Mr Biscoe did not give the parties an opportunity to comment on the legal advice obtained on the jurisdiction issue in the second adjudication; and (e) Mr Cassidy had a private conversation with Mr Biscoe. For the reasons that

I have given, I do not consider that these factors, whether taken individually or in combination, justify the conclusion that there was apparent bias in this case. I would allow this appeal. a

**CHADWICK LJ.**

[48] I agree.

**KENNEDY LJ.**

[49] I also agree. b

*Appeal allowed.*

Dilys Tausz Barrister. c

**Akram v Adam**

[2004] EWCA Civ 1601

COURT OF APPEAL, CIVIL DIVISION

BROOKE, JONATHAN PARKER, AND KEENE LJJ

3, 30 NOVEMBER 2004

*Practice – Service – Service by post – Service by first class post at individual's last known residence – Defendant having no notice of proceedings – Whether order made at trial to be set aside – Whether breach of right to access to court – Human Rights Act 1998, Sch 1, Pt I, art 6 – CPR 6.5(6).*

The defendant was the tenant of a room in the house where the claimant landlord also lived. The claimant wished to obtain possession in order to carry out conversion works to create a self-contained flat for the defendant. CPR 6.5(6)<sup>a</sup> provided that where no solicitor was acting for the party to be served, and the party had not given an address for service, the document had to be sent or transmitted to, or left at, in the case of an individual, his usual or last known residence. In July 2003, the claimant's solicitors posted a claim form by first class post to the defendant at the shared address. The defendant, however, did not learn about the proceedings until October, by which time a hearing had taken place and a possession order been granted. He applied for the possession order to be set aside on the basis that he had not received the claim form and had no notice of the hearing. The district judge heard conflicting evidence about the reasons for the defendant's post going astray. She found that the letter posted by the claimant's solicitors to the defendant at his address had not been delivered to the defendant's room or retained for him at the collection office pursuant to any arrangements he had made with the postman. She concluded that there had not been good service and set aside the order for possession. The claimant appealed. The judge allowed his appeal (i) relying on the provisions of CPR 6.5(6) for the conclusion that service by first class post to the defendant at his address constituted good service; and (ii) holding that in any event the district judge should not have set the possession order aside because the defendant had no defence to the proceedings. The defendant appealed to the Court of Appeal where the issue arose as to whether the procedural code of the CPR which allowed service to be effected according to the rules even though the person served had no notification of the claim breached the right of access to a court guaranteed by art 6<sup>b</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

**Held** – The procedural code of the CPR did not contravene the right to a fair trial contained in art 6 of the convention by permitting service by post to an individual at his usual or last known residence, and allowing such service to stand as good

<sup>a</sup> CPR 6, so far as material, is set out at [5], below

<sup>b</sup> Article 6, so far as material, provides: 'In the determination of his civil rights and obligations ... everyone is entitled to ... a hearing ...'

service unless it was known before a default judgment was entered that that method of service was ineffective. The procedural code gave a defendant access to a court if for some reason the prescribed method of service did not draw the proceedings to his attention before the judgment was entered. If the claimant had complied with the CPR the judgment would be a regular one, but if the defendant could show that he had a real prospect of successfully defending the claim or that there was some other good reason why the court should intervene, the court could set aside the judgment, so long as application was made promptly after the defendant had become aware of the proceedings. If a court was satisfied that, if the default judgment were set aside, a defendant would not have an arguable defence, art 6 did not entitle him to a trial or oblige the claimant on some other occasion to show that the defendant had no arguable defence. In the instant case, on the findings of the district judge the default judgment had been regularly entered, because the claim form was posted to the defendant at his usual residence and there was no finding that it had been returned undelivered. It followed on the ordinary interpretation of the CPR that that judgment could only have been set aside under the discretion of the court to do so if the defendant had had a real prospect of success, and the judge had been correct to find that the defendant's suggested defence had had no merit at all. Accordingly, the appeal would be dismissed (see [34], [41]–[46], below).

*White v Weston* [1968] 2 All ER 842, *Cranfield v Bridgegrove Ltd and other appeals* [2003] 3 All ER 129, *Hackney London BC v Driscoll* [2003] 4 All ER 1205 and *James v UK* (1986) 8 EHRR 123 considered.

## Notes

For the overriding objective of the CPR, and for address for service, see 37 *Halsbury's Laws* (4th edn reissue) paras 60, 320, and for the right of access to a court, see 8(2) *Halsbury's Laws* (4th edn reissue) para 141.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

## Cases referred to in judgment

*A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 All ER 538, [1972] 2 QB 314, [1972] 2 WLR 1242, CA.

*Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.

*Godwin v Swindon BC* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997.

*Hackney London BC v Driscoll* [2003] EWCA Civ 1037, [2003] 4 All ER 1205, [2003] 1 WLR 2602.

*Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206.

*James v UK* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECt HR.

*R v Appeal Committee of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670, [1956] 1 QB 682, [1956] 2 WLR 800, CA.

*Thomas Bishop Ltd v Helmville Ltd* [1972] 1 All ER 365, [1972] 1 QB 464, [1972] 2 WLR 149, CA.

*White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647, [1968] 2 WLR 1459, CA.



**Appeal**

The defendant, Richard Benjamin Adam, appealed from the order of Judge Yelton in the Southend County Court made on 2 April 2004 allowing the appeal of the claimant, Mohammed Akram, from the order of District Judge Silverwood-Cope in the same court on 11 December 2003, setting aside an order for possession of certain premises at 5 Moulsham Drive, Chelmsford occupied by Mr Adam under a protected tenancy, made by Deputy District Judge Cooksley on 16 September 2003. The facts are set out in the judgment of Brooke LJ.

Mr Adam appeared in person.

David Carter (instructed through the *Bar Pro Bono Unit*) for Mr Akram.

*Cur adv vult*

30 November 2004. The following judgment was delivered.

**BROOKE LJ.**

[1] This is an appeal by the defendant Richard Benjamin Adam against an order made by Judge Yelton in the Southend County Court on 2 April 2004 whereby he allowed the claimant Mohammed Akram's appeal against an order made by District Judge Silverwood-Cope in the same court on 11 December 2003. The district judge had directed that an order for possession made on 16 September 2003 by Deputy District Judge Cooksley in the absence of the defendant be set aside. This second appeal raises an important point of practice which was identified but expressly not decided by this court in *Hackney London BC v Driscoll* [2003] EWCA Civ 1037, [2003] 4 All ER 1205, [2003] 1 WLR 2602. I said in my judgment in that case at [25]:

'For my part I would prefer to express no views about the correct legal analysis when a "defendant" avers that he had no notice of proceedings against him at all, so that he might be regarded as a "stranger" to them (see the quotation from Russell LJ's judgment in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647) in [14], above). The resolution of that issue will have to await another day.'

[2] Mr Adam was since 1983 the Rent Act protected tenant of a large rear ground floor room (with shared kitchen and bathroom) at 5 Moulsham Drive, Chelmsford. In 1996 Mr Akram bought this house subject to Mr Adam's tenancy, and he has lived in other parts of the property since then. In May 1997 he embarked on possession proceedings which in due course elicited a defence and counterclaim from Mr Adam. In May 2001 the particulars of claim were amended to include as a ground for possession the proposition that Mr Akram was willing to provide suitable alternative accommodation in the form of a self-contained flat incorporating its own kitchen and bathroom.

[3] On 19 October 2001 Judge Brandt held that in general terms these proposals were reasonable. In fact he expressed the view that they were entirely sensible because the two men could not get on. He went on to give ancillary directions in the hope that the parties would agree the detail of the proposed works and how they might be carried out. The parties, however, were unable to

reach agreement, and on 16 January 2002 Judge Brandt made a further order approving the claimant's plans and directing the defendant to provide him with appropriate access so as to enable the plans to be implemented. The defendant appealed against the second part of this order, and on 6 November 2002 this court set it aside on the grounds that the judge had no jurisdiction to make it ([2002] EWCA Civ 1679).

[4] It is noteworthy that in the informal discussion which followed the delivery of his judgment in October 2001 Judge Brandt made it clear that service on the defendant at his sister's address in Surrey would constitute good service on him for the purposes of those proceedings. This observation was never, however, formalised in a court order.

[5] On 17 July 2003 the claimant instituted fresh proceedings. They were founded on the same proposition, but on this occasion the defendant was offered a weekly tenancy of a rear small room on the ground floor of the premises (with permission to store his belongings in the rear large room while the works were being carried out), on the basis that he would be offered a protected tenancy of the new self-contained flat once the conversion works had been completed. On 18 July 2003 the claimant's solicitors posted the claim form and the particulars of claim by first class post to the defendant at 5 Moulsham Drive. In due course Judge Yelton held that this constituted good service pursuant to CPR 6.5(6) which provides that—

'Where—(a) no solicitor is acting for the party to be served; and (b) the party has not given an address for service, the document must be sent or transmitted to, or left at, the place shown in the following table.'

The table includes the following entries:

'Nature of party to be served'	Place of Service
Individual	Usual or last known residence'

[6] CPR 6.2(1)(b) permits service by first class post. Nothing in this case turns on the date when the claim form was deemed to be served pursuant to CPR 6.7(1), although there was no dispute that this would have been 20 July 2003, the second day after it was posted.

[7] The claim form contained a notification that the claim would be heard on 16 September 2003, and on that day Deputy District Judge Cooksley decided in the absence of Mr Adam that it was reasonable to make a possession order. He directed possession on or before 23 September 2003.

[8] On 20 October Mr Adam came to learn about these proceedings and the possession order when he returned to the premises to find that a warrant for possession had been executed and that he was unable to gain access to his bed-sitting room which was filled with large quantities of his personal belongings. On 21 October he applied for an order that the possession order be set aside because he did not receive the claim form or particulars of claim and was not aware of the hearing that had taken place. In a supporting witness statement he said that letters addressed to him at 5 Moulsham Drive were taken by his landlord and that he did not receive them. Letters from the county court and the Court of Appeal had been sent to him at his sister's address in Surrey. His landlord's

a solicitors knew this address, but they did not use it on this occasion. If he had known about the proceedings he would have filed a defence and counterclaim. He therefore asked that the possession order be set aside immediately to enable him to do so.

b [9] This application came before District Judge Silverwood-Cope on 11 December 2003. By this time the conversion works had been completed and the new flat was ready for Mr Adam's use, but he remained adamant that he wanted the possession order set aside even though in theory this would render him liable to pay rent from the time that possession had been obtained. In addition to written evidence the district judge heard oral evidence from both Mr Akram and Mr Adam, and we have been provided with a transcript of the proceedings before her.

c [10] In her judgment the district judge said that there had been clear and well-known difficulties with postal service to Mr Adam at 5 Moulsham Drive, with allegations and counter-allegations about what happened to his post when it was delivered there. These complaints had been manifested since 1997.

d [11] On the one hand Mr Akram denied that he was responsible for the post going astray, and said that he endeavoured to ensure that Mr Adam's post was received by him. On the other hand Mr Adam denied that this was the case. In the past he had made a special arrangement with the regular postman that he would keep Mr Adam's post for him at the depot, but sometimes these arrangements did not work because a reserve postman was on duty. The district judge described the direction Judge Brandt had made in October 2001 to mitigate these difficulties (see [4], above). She said that although these were new proceedings, they had a continuum and connection with the previous proceedings, and that one could really not be divided from the other:

f 'The claimant therefore should be alert to these difficulties regarding service and regarding postal service because they were germane in the previous proceedings and Judge Brandt tried to eliminate those problems.'

g [12] She said that notwithstanding those known difficulties Mr Akram asserted that there had been proper service on the defendant at 5 Moulsham Drive. She recorded his evidence to the effect that Mr Adam's room was in such a mess that post pushed under the door could have easily been overlooked. She also noted a suggestion in the evidence that the bailiff had noticed a pile of post in the doorway to Mr Adam's room. On the other hand, she said that in May 2003 Mr Adam had seen a notice to quit on his door, so that he was on notice then that something was happening. In the past he had been alive to proceedings and had attended court when necessary.

h [13] The district judge then found as a fact that Mr Adam had been at his sister's address where he was helping her to look after their elderly, ill mother, and that Mr Akram had known that Mr Adam had not been at the premises for some time. She recorded Mr Adam's evidence that he came back to 5 Moulsham Drive off and on to check that everything was all right, and that it had been on one of these visits that he saw the notice to quit.

j [14] She then expressed her conclusions in these terms:

'I have to say that bearing in mind the history of this case and the previous proceedings that have been before the county court and subsequently before the Court of Appeal when the address for service was given, it is not in all the

circumstances of this case sufficient to regard that service was effected by a delivery either by postman or by Mr Akram himself, bearing in mind the allegations and counter-allegations that have been made, being responsible for pushing documents under the door to the defendant's room at 5 Moulsham Drive, so I consider that there has not been good service and so in these circumstances the defendant has been deprived of being able to attend the court on the hearing if he so wished, filing a defence within the time that is allocated for that.'

She therefore made an order setting aside the judgment and directing that the claim be re-served on the defendant at his sister's address for service.

[15] It is now necessary to say a little more about the allegations and the counter-allegations that were made. Mr Adam said that his arrangements with a postman that his letters should be kept for him at the delivery office came to an end in 1999–2000 when the regular postman had moved somewhere else. Because he had never used the address at 5 Moulsham Drive when he wanted letters sent to him, it did not matter very much that he never received letters at that address. In December 2002, however, he was working as a temporary Christmas sorter for the Royal Mail and he learned that other people were receiving payslips through the post and he was not. The following week he succeeded in intercepting the letter containing his payslip before the postman put it through the door, and he arranged that the following week he would collect the equivalent letter from the delivery office. In September 2003, at about the same time as the possession order was said to have been posted to him, the Job Centre told him that they had sent a letter to him which he did not in fact receive. It was not at the delivery office, and it had not been pushed under his door. He said that Mr Akram claimed that he slipped letters under the door but he did not.

[16] In a witness statement Mr Akram maintained that he understood from the postman that Mr Adam's post was held at the collection office for him to collect personally for him, and he exhibited a signed statement from the present postman to this effect. He said that on occasion Mr Adam's post was given to him in error. If he could catch the postman he would give it back to him to take back to the collection office. Otherwise he would push it under the door of Mr Adam's room. He explained to the district judge that he did this to prevent his nephews and nieces from tearing Mr Adam's letters up when they came to the house.

[17] Mr Adam did not accept what the present postman said. He had never paid a fee for a collection service and he said that Mr Akram had himself been a postal worker for some time, so that he might have been able to persuade the present postman to attest to arrangements that had not in fact been made. He said he had been to the collection office every few weeks to see if anything had turned up, but there had been nothing for him there for the last nine months. In a witness statement he said that after the regular postman left, the new postmen would only keep letters for him after he had specifically told them he was expecting a letter and asked them to.

[18] It is unfortunate that the district judge did not make clear findings of fact in the face of this evidence. But it appears that she found that although the claimant's solicitors had posted the letter to Mr Adam at 5 Moulsham Drive it was not delivered to Mr Adam's room nor retained for him at the collection office pursuant to any arrangements he had ever made with the postman.



- a [19] Although this court had decided the five appeals under the title *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441 on 14 May 2003, and the case was reported on 2 July 2003 and 31 October 2003, the district judge does not appear to have appreciated the possible relevance of this authority, and it does not appear to have been drawn to her attention at the hearing.
- b [20] Judge Yelton allowed Mr Akram's appeal on two grounds. He held that service by first class post to Mr Adam at 5 Moulsham Drive constituted good service, and that in any event the district judge ought not to have set the possession order aside (even if she thought that there had not been good service) because Mr Adam had no defence to the proceedings:
- c 'The whole thing in fact is a nonsense ... because Mr Adam is saying the order should be set aside because he did not consent to the work being done. However, now the work has been done he has alternative accommodation available to him which Judge Brandt has already said is suitable alternative accommodation.'
- d [21] The point which Mr Adam would have wished to make, if he had received notice of the proceedings, was that the small rear room he was being offered while the conversion works were being carried out did not constitute suitable alternative accommodation within the meaning of the Rent Act 1977, even though he was being allowed the use of his original larger room for the purposes of storing his overflow property during this period. Judge Yelton did not refer to this point, but since Mr Adam was living with his sister at the material time it was not a very good one when set against the background of these protracted proceedings.
- e [22] Judge Yelton's decision was based on the proposition that CPR 6.5(6) prescribes that where no solicitor is acting for an individual party who has not given an address for service, a document to be served on him must be sent or transmitted to or left at his usual or last known residence (see [5], above), and that there was no doubt that 5 Moulsham Drive was Mr Adam's usual residence. The judge discounted the effect of the informal direction which Judge Brandt had made about using Mr Adam's sister's address as his address for service on the grounds that that direction had been given in the previous proceedings.
- f [23] It is reasonably clear that the decision which influenced Judge Yelton was the judgment of this court on the appeal in *Smith v Hughes* which was reported under the title *Cranfield v Bridgegrove Ltd* (see [19], above) at paras [90]–[104]. In that case Mr Hughes, an uninsured driver, had been involved in a road traffic accident in December 1997 in which the claimant was injured. When the Motor Insurers' Bureau (MIB) became involved with the claim, they instructed inquiry agents who reported to them in April 1999 that Mr Hughes's address in the electoral register was an address in Birchwood, near Warrington, but that he had left this address, and his current whereabouts were unknown. On 25 May 1999
- g the MIB passed this information onto the solicitors acting for the claimant's mother, who had instructed the same firm in connection with her own claim. On 10 April 2001, when proceedings were instituted, the claim form and particulars of claim were sent by first class post to Mr Hughes at the Birchwood address. These documents were not returned to them by the Post Office. On 15 August 2001 the MIB was joined as second defendant, and they took the preliminary
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point that the claim form had not been served on Mr Hughes within the four months permitted for service. a

[24] A district judge decided that the claim form had not been served on Mr Hughes on 12 April 2001 and dismissed the claim. This court allowed the claimant's appeal. Dyson LJ, who gave the judgment of the court, said:

[101] It seems that there is some doubt as to the meaning and effect of r 6.5(6) where service is effected on an individual at his last known residence. The notes to the White Book (*Civil Procedure* (Autumn 2002 edn)) vol I, p 133 include the following: "The CPR do not make it clear whether service by post to a defendant's last known address at which he no longer resides, and the defendant does not in fact receive the claim, is good service." b

[102] In our judgment, the position is clear. There are two conditions precedent for the operation of the provisions of r 6.5(6), namely that (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service. If those conditions are satisfied, then the rule states that the document to be sent *must* be sent or transmitted to, or left at, the place shown in the table. In the case of an individual, that means at his or her usual or last known residence. The rule is plain and unqualified. We see no basis for holding that, if the two conditions are satisfied, and the document is sent to that address, that does not amount to good service. The rule does not say that it is not good service if the defendant does not in fact receive the document. If that had been intended to be the position, the rule would have said so in terms. Nor can we see any basis for holding that, if the claimant knows or believes that the defendant is no longer living at his or her last known residence, service may not be effected by sending the claim form, or leaving it at, that address. That would be to fly in the face of the clear words of the rule. The rule is intended to provide a clear and straightforward mechanism for effecting service where the two conditions precedent to which we have referred are satisfied. c  
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[103] As we have said, there is no suggestion in this case that 45 Whitworth Close was not Mr Hughes' last known residence. If the MIB had disputed the claimant's claim that this was Mr Hughes' last known residence, then difficult questions might have arisen. In particular, is the rule concerned with the claimant's actual knowledge, or is it directed at the knowledge which, exercising reasonable diligence, he or she could acquire? We incline to the latter view, but, as we have said, the point does not arise on this appeal.' g

[25] In the appeals decided under the title of *Cranfield v Bridgegrove Ltd* this court was following in the footsteps of another division of the court in *Godwin v Swindon BC* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997 who were determined to create a workable regime for service pursuant to the new procedural code in CPR Pt 6. Those cases were devoted to the question whether a claim was or was not served on a defendant within time for the purpose of defeating a contention that the claim was statute-barred. They were usually concerned with questions relating to the time of deemed service, although *Smith v Hughes* was concerned with whether there had been deemed service at all within the meaning of the rules. h  
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[26] They were not, however, principally concerned with examining the position of a defendant who becomes aware that judgment has been entered

a against him in proceedings, or at a hearing, of which he had no knowledge and wishes to have the judgment against him set aside as of right, without any question of a judge being entitled at that stage to do as Judge Yelton did, and consider the merits of the suggested defence pursuant to CPR 13.3(1)(a) before being willing to set the judgment aside.

[27] One aspect of this question was considered by this court in *Hackney London BC v Driscoll* [2003] 4 All ER 1205, [2003] 1 WLR 2602. The local authority mortgagors had been told by Mr Driscoll that he was no longer living at the mortgaged property, and were given his new address, but when they sought possession, the court served the claim form on him at the address of the mortgaged property. In due course he became aware that possession proceedings were afoot and attended two procedural hearings, but because the court also sent the notice of the trial date to him at his old address he did not attend court that day, and an order for immediate possession was made against him in his absence.

[28] Unhappily he became affected by a severe mental illness, and he did not become aware of the possession order until about five months after it had been made, by which time the claimants had executed the warrant for possession. He was eventually discharged from hospital care two years later, and he applied for an order setting aside the possession order 17 months after that. Both the district judge and the circuit judge refused his application; being unwilling to exercise discretion in his favour under CPR 39.3(5), but this court granted him permission to appeal on the basis that he wished to argue that he was entitled to have the possession order set aside as of right, since he had had no notice of the hearing date. Heavy reliance was placed in this regard on the decision of this court in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647.

[29] In paras [13]–[16] of my judgment in *Hackney London BC v Driscoll* I summarised the facts in *White v Weston* and the relevant extracts from the judgments of Russell and Sachs LJ. For the purposes of this judgment I will not repeat what I said then, but will content myself with restating the well-known dictum of Denning LJ (which Sachs LJ cited) in *R v Appeal Committee of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670 at 674, [1956] 1 QB 682 at 691:

‘... it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.’

Russell LJ vividly described the defendant as a ‘stranger’ (see [1968] 2 All ER 842 at 846, [1968] 2 QB 647 at 659) to proceedings of which he had had no notice until after a judgment had been entered against him.

[30] That was a case which turned on the proper interpretation of s 26 of the Interpretation Act 1889 and Ord 8, r 8(3) of the County Court Rules 1936, SI 1936/626. Sachs LJ said ([1968] 2 All ER 842 at 847, [1968] 2 QB 647 at 660) that only an explicit and clear provision in a statute, or in rules having statutory force, could operate to deprive a citizen of his right to notice of the commencement of process against him, and that to permit service other than personal service at an address which was not in fact his abode nor his residence nor his business address would be a provision clearly calculated to deprive him of that right. (The problem which arose in *White v Weston* was that although the defendant had given the plaintiff the details of a home address in Ilford at the time their cars collided, he had moved to Romford five months before court proceedings started, so that

service by post at the Ilford address—in the absence of anything resembling the table attached to CPR 6.5—did not constitute service at all.)

[31] Within five years of the decision in *White v Weston* a trilogy of cases in the Court of Appeal ultimately set out clear guidelines for the service by post of High Court proceedings on a company at its registered office. In the last of these cases, *A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 All ER 538, [1972] 2 QB 314, this court interpreted the combination of s 437(1) of the Companies Act 1948 and s 26 of the Interpretation Act 1889 as having the following effect. If a plaintiff could prove that a copy of the writ was sent by prepaid post to the defendant company's registered office and he received no intimation that the letter had not been delivered, he was entitled to proceed to sign judgment if no appearance was entered in due time, and the ensuing judgment would be a regular judgment (see Lord Denning MR [1972] 2 All ER 538 at 542, [1972] 2 QB 314 at 322). The position is most clearly stated in a passage in the dissenting judgment of Orr LJ in *Thomas Bishop Ltd v Helmville Ltd* [1972] 1 All ER 365 at 376–377, [1972] 1 QB 464 at 479 which was cited and expressly approved in the *Cathrineholm* case (where this court had to choose between earlier conflicting authorities):

‘... the point of time to be looked at in deciding whether the judgment was regularly obtained is the time when the judgment was given or signed, and that if at that time there is nothing known to the court (or to the plaintiff whose duty it would be to communicate it to the court) which indicates that the relevant process has not been delivered in the ordinary course of post, it is to be deemed to have been so delivered for the purposes of that judgment, although it will be open to the defendant to apply to have the judgment set aside in the court's discretion on the ground, *inter alia*, that he was not served or was not served in time.’

[32] Under pre-CPR practice there was a difference between an irregular judgment (which could be set aside as of right—*ex debito iustitiae*) and a regular judgment (where the defendant had to show that he had a defence on the merits before the court would be prepared to have the judgment set aside): see the *Cathrineholm* case per Lord Denning MR ([1972] 2 All ER 538 at 541–542, [1972] 2 QB 314 at 322), Roskill LJ ([1972] 2 All ER 538 at 544, [1972] 2 QB 314 at 324) and Sir Gordon Willmer ([1972] 2 All ER 538 at 544, [1972] 2 QB 314 at 325).

[33] It appears to me that the CPR rule-makers had the pitfalls of earlier practice well in mind when they made their new procedural code. Thus the new code—(i) expressly identified the place of service at which a document might be properly served (see the table annexed to CPR 6.5), being the ‘usual or last known residence’ in the case of an individual; (ii) expressly provided that a document which was served in accordance with the CPR or any relevant practice direction should be deemed to be served on the day shown in the table annexed to CPR 6.7; (iii) expressly provided in CPR 6.10 that a certificate of service must not only give prescribed details as to the method and date of service but must also state that the document has not been returned undelivered; (iv) expressly provided in CPR 6.11 that in cases where a document was to be served by the court and the court was unable to serve it (language which would include those cases where a document sent by post was returned undelivered), the court must send a notice of non-service stating the method attempted to the party who requested service; (v) made it clear in CPR 6.14(2)(b) that a claimant may not obtain judgment in



a default unless he has filed the certificate of service (which must of necessity state that the claim form was not returned undelivered (see (iii) above)); (vi) made it clear that the difference between a default judgment wrongly entered (which must be set aside—see CPR 13.2) and any other default judgment (which may only be set aside if one of the conditions set out in CPR 13.3(1) are satisfied and the application was made promptly) depends on whether the procedural steps  
b required by CPR 12.3 were or were not followed (so far as relevant in the particular circumstances) or whether the whole of the claim had been satisfied before the judgment was entered; (vii) made a special provision in CPR 13.5(2) requiring a claimant to file a request for his own judgment to be set aside, or to apply to the court for directions, if after entering judgment he subsequently has good reason to believe that the particulars of claim did not reach the defendant  
c before he entered judgment.

[34] In the present case on the findings of the district judge the judgment was regularly entered, because it was posted to the defendant at his usual residence and the district judge made no finding that the claim form was returned undelivered. The situation might have been different if she had found that the  
d claimant deliberately suppressed the claim form when it arrived by post in his house. It follows that on the ordinary interpretation of the relevant provisions of the CPR, supported by the judgment of this court in *Smith v Hughes* (see [23]–[24], above), this judgment could only be set aside as a matter of discretion pursuant to CPR 13.3, and it would not be possible to fault the way in which Judge Yelton exercised his discretion. The suggested defence had no merit at all. For  
e completeness I would add that Mr Adam appears to have paid no rent at all since 1997, and the idea that Rent Act protection in these circumstances protects a tenant who was in fact habitually living with his sister on the other side of London is not a particularly appealing one.

[35] In reaching this conclusion I have not overlooked what May LJ said in  
f *Godwin v Swindon BC* [2001] 4 All ER 641 at [49], [2002] 1 WLR 997:

‘In my judgment, Pt 13 contains appropriate provisions to deal justly with circumstances where a defendant, against whom judgment in default of acknowledgment of service or defence has been entered, at worst did not in fact receive the claim form and particulars of claim before judgment was entered. Rule 13.5 is odd, in that it refers only to a claimant who has good reason to believe that particulars of claim did not reach the defendant before the claimant entered judgment. But it makes quite clear that the rules do not intend that such a defendant should be stuck with the judgment without due  
g consideration by the court. If the judgment was wrongly entered because the conditions in r 12.3(1) or (2) and (3) were not satisfied, the court must set it aside under r 13.2. In any other case, the court has a discretion under r 13.3(1) to set the judgment aside or vary it. The discretion may be exercised under sub-r (a) if the defendant has a real prospect of successfully defending the claim. That is the obverse of the relevant part of r 24.2 and may apply  
h whenever the defendant received the claim form and particulars of claim. Rule 13.3(1)(b) has a disjunctive alternative, so that the court may set aside or vary judgment entered in default if it appears to the court that there is some other good reason why the judgment should be set aside or varied or the defendant should be allowed to defend the claim. In my view, this is  
j plainly capable of extending to circumstances where the defendant has not

received the claim form and particulars of claim before judgment was entered against him. It is not an absolute right, but does not have to depend on the defendant having a real prospect of successfully defending the claim. The court therefore has sufficient power to do justice in these cases and will, no doubt, normally exercise this discretion in favour of a defendant who establishes that he had no knowledge of the claim before judgment in default was entered unless it is pointless to do so. The defendant, for instance, may have no defence to the claim, but may justifiably want to have the judgment set aside on the basis that, had he known about the claim, he would have satisfied it immediately without having an embarrassing judgment recorded against him. There may also be questions of costs.'

In the present case it would have been pointless to set aside the judgment, for the reasons given by Judge Yelton.

[36] The reason why we have had to consider Mr Adam's arguments at some length is that in the CPR case law to date the courts have been mainly concerned with the position of a claimant who delays serving a claim until the very end of the time permitted to him under the rules or the Limitation Act 1936. They have not been principally concerned with deep-seated issues of justice when seen from the standpoint of a defendant who says (as in the passage of May LJ's judgment in *Godwin's* case which I have just cited) that he had no notice of the proceedings at all until after he heard about the default judgment, so that he was a stranger to them (to use Russell LJ's phrase) and the court therefore, he contends, had no jurisdiction over him. In July 2003 I expressly left the consideration of this issue open in the *Driscoll* case [2003] 4 All ER 1205, [2003] 1 WLR 2602 until a case in which it directly arose. Since that time the relevant arguments have been fully deployed by Adrian Zuckerman in *Civil Procedure* (2003).

[37] Mr Zuckerman develops the argument at pp 139–140 (paras 4.1–4.4), pp 148–149 (4.29–4.32), pp 169–170 (4.94–4.96), pp 243 (8.13–8.14) and pp 673–674 (21.105–21.106) of his book. Put shortly, he challenges the historical assumption that service and notification are one and the same thing. He suggests (p 148 (para 4.29)) that this is largely a heritage from the time when the standard method of originating process was by means of personal service. Now that modern methods of communication are permissible, the act of transmission (which may be referred to as service) and the fact of notification are no longer coexistent. In other words, a claimant may be able to show that he has effected service in accordance with the rules, but a defendant should still be entitled to say: 'I knew nothing about these proceedings and I am entitled to have this judgment set aside as of right.' In a bold passage in ch 4 of his book Mr Zuckerman suggests that Denning LJ got things wrong in *R v Appeal Committee of London Quarter Sessions, ex p Rossi* [1956] 1 All ER 670 art 674, [1956] 1 QB 682 at 691 (see [29], above). He writes (p 170 (para 4.96)):

'If the right to notification is a fundamental principle of our law, it cannot cease to be so merely because the claim form was not returned, perhaps because it was lost on the way to its destination or on its return journey. The fundamental right to fair trial must be respected in any event. No other position would be compatible with [art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950].'

a [38] We have not heard proper argument on this point because Mr Adam appeared in person and Mr Carter, who appeared pro bono on behalf of Mr Akram, did not have prior notice of Mr Adam's reliance on Mr Zuckerman's book and was restricted to argument on the point which had necessarily not been prepared in advance.

b [39] It appears to me, however, that the point is without substance. By s 1(1) of the Civil Procedure Act 1997 Parliament made provision for there to be rules of court governing the practice and procedure to be followed in the county courts, and the Civil Procedure Rules 1998, SI 1998/3132 were made pursuant to that power. Section 1(3) of the Act expressly provides:

c 'Any power to make or alter Civil Procedure Rules is to be exercised with a view to securing that—(a) the system of civil justice is accessible, fair and efficient ...'

d [40] This governing purpose is restated in the overriding objective in CPR 1.1 and runs through the new rules and the case law (particularly the case law in this court) by which the rules and their underlying philosophy have been explained to judges and practitioners. In his judgment in *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206 Dyson LJ contrasted in one particular context the "intricate and numerous" authorities' under one of the former Rules of the Supreme Court on the one hand and the 'new procedural code' (which should generally be interpreted without reference to earlier case law) on the other (see [10], [12]).

e [41] I do not see anything in the new code which contravenes art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in the way which Mr Zuckerman suggests. A code which permits service by post to an individual at his usual or last known residence, and which allows such service to stand as good service unless it is known before a default judgment is entered that that method of service was ineffective provides for an accessible, fair and efficient way of administering justice, and these are all attributes much prized by Strasbourg jurisprudence.

f [42] The code gives a defendant access to a court if for some reason the prescribed method of service does not draw the proceedings to his attention before the judgment is entered. So long as the claimant has complied with the rules, the judgment is a regular one, but if the defendant can show that he has a real (and not a merely fanciful) prospect of successfully defending the claim or that there is some other good reason why the court should intervene, the court is empowered to set aside the judgment, so long as the application is made promptly, after the defendant has become aware of the proceedings.

g [43] I cannot believe that Strasbourg jurisprudence requires the procedural rules of a national court to oblige the claimant in such a case to initiate further ancillary proceedings to strike out a defence or to enter summary judgment under CPR Pt 24, with all the concomitant expense and delay which this would involve. The fair trial guarantees in art 6 of the convention must entitle a defendant to be heard, but if he cannot show the court that his defence would have a real prospect of success, or that there is some other compelling reason why a trial should be conducted, it does not require the parties and the court to indulge in an expensive and time-consuming charade. In *James v UK* (1986) 8 EHRR 123 at 157–158 (para 81) the European Court of Human Rights said that

art 6(1) extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law. If a court, like Judge Yelton, is satisfied that the defendant would not have an arguable defence if the default judgment were set aside, art 6 does not in my judgment entitle the defendant to a trial (or oblige the claimant on some other occasion to show that the defendant has no arguable defence).

[44] For these reasons I would dismiss this appeal. Since Mr Carter appeared pro bono, there will be no order as to costs. I would like to pay tribute not only to the clarity of his oral argument but also to the quality of the written materials Mr Adam placed before us in support of his interesting contentions.

**JONATHAN PARKER LJ.**

[45] I agree

**KEENE LJ.**

[46] I also agree.

*Appeal dismissed.*

Dilys Tausz Barrister.



a **R (on the application of Smith) v Parole Board**

**R (on the application of West) v Parole Board**

[2005] UKHL 1

b

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD SLYNN OF HADLEY, LORD HOPE OF CRAIGHEAD,  
LORD WALKER OF GESTINGTHORPE AND LORD CARSWELL

c 22, 24, 25 NOVEMBER 2004, 27 JANUARY 2005

*Prison – Prisoner – Release on licence – Parole Board recommending revocation of licence of prisoner released on licence – Parole Board deciding not to order re-release of prisoner – Whether decision procedurally fair – Whether prisoner entitled to oral hearing – Whether decision breaching right to liberty and security – Whether decision breaching right to fair trial – Criminal Justice Act 1991, s 39 – Human Rights Act 1998, Sch 1, Pt I, arts 5(1), (4), 6(1).*

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In two conjoined appeals the claimant determinate sentence prisoners had been released on licence. Each breached the conditions of his licence. On the recommendation of the Parole Board the licences were revoked and the claimants were recalled to prison under s 39<sup>a</sup> of the Criminal Justice Act 1991. The Parole Board then considered whether to recommend release. The claimants were informed of their right to make written representations to the Parole Board under s 39 of the 1991 Act. Each offered an explanation of his conduct in his written representations, in one case offering to substantiate those explanations. One asked for an oral hearing and the other did not. The Parole Board decided to direct the release of neither. The claimants applied for judicial review. The issue before the House of Lords was the procedure to be followed by the Parole Board when a determinate sentence prisoner, released on licence, sought to resist subsequent revocation of his licence. The claimants contended that such a prisoner should be offered an oral hearing. They relied on common law and on the rights to liberty and security, and to a fair trial contained in arts 5<sup>b</sup> and 6<sup>c</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (as set out in Sch 1 to the Human Rights Act 1998. By art 5(1) no one was to be deprived of his liberty save in circumstances including, inter alia, the lawful detention of a person after conviction by a competent court and under art 5(4) everyone who was deprived of his liberty by arrest or detention was entitled to take proceedings by which the lawfulness of his detention was to be decided speedily by a court and his release ordered if the detention was not lawful. Article 6 guaranteed rights to everyone in the determination of ‘any criminal charge’ against them, and less extensive rights in the determination of ‘civil rights and obligations’.

a Section 39, so far as material, is set out at [21], below

b Article 5, so far as material, is set out at [36], [37], below

c Article 6, so far as material, is set out at [38], [42], below

**Held** – (1) While the common law duty of procedural fairness did not require the Parole Board to hold an oral hearing in every case where a determinate sentence prisoner resisted recall, if he did not decline the offer of such a hearing, the duty was not constricted to holding oral hearings only where there was a dispute on the primary facts. The prisoner should have the benefit of a procedure which fairly reflected, on the facts of his particular case, the importance of what was at stake for him, as for society. Facts not in dispute might be open to explanation or mitigation, or might lose some of their significance in the light of other new facts. The Parole Board could well be assisted in discharging its task of assessing risk by exposure to the prisoner or the questioning of those who had dealt with him. It could often be very difficult to address effective representations without knowing the points which were troubling the decision-maker (see [31], [35], [49], [62], [68], [90], [91], below).

(2) (Lord Slynn dissenting) Since in cases such as the instant appeals conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the trial court, the sentence of the trial court satisfied art 5(1) of the convention not only in relation to the initial term served by the prisoner, but also in relation to revocation and recall (see [36], [72], [90], [91], below).

(3) The Parole Board, being empowered (a) to examine whether circumstances had arisen sufficient in law to justify further detention of a determinate sentence prisoner released on licence and, if so (b) to decide whether the protection of the public called for the further detention of the individual detainee, would in its review satisfy the requirements of art 5(4) of the convention provided it was conducted in a manner that met the requirement of procedural fairness (see [37], [55], [72], [90], [91], below).

(4) The Parole Board's revocation proceedings did not involve the determination of a criminal charge within art 6(1) of the convention. The distinguishing feature of a criminal charge was that might lead to punishment. A challenge to revocation of a licence might lead to detention imposed to protect the public, but it could not lead to punishment. In the instant appeals (per Lord Bingham, Lord Walker and Lord Carswell) it was not necessary to resolve whether the challenges to revocation involved a determination of the claimants' civil rights and obligations within the meaning of art 6(1) since determinate sentence prisoners wishing to challenge the revocation of their licences had the protection of the Parole Board's common law duty of procedural fairness (see [40], [44], [90], [91], below). (Per Lord Slynn and Lord Hope) The decisions as to recall in the instant appeals were not concerned with civil rights within the meaning of art 6(1) (see [60], [81], below).

(5) In each of the instant appeals the Parole Board had breached its duty of procedural fairness owed to the claimant by failing to offer an oral hearing of his representations against revocation of his licence and was accordingly in breach of art 5(4) of the convention. The appeals would accordingly be allowed (see [45]–[47], [60]–[62], [75], [90], [91], below).

## Notes

For procedural fairness and written representations, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) paras 90, 94, and for the right to liberty and security of the person, and the right to a fair trial, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127, 129, 134.

- a** Section 39 of the Criminal Justice Act 1991 is repealed by the Criminal Justice Act 2003, ss 303(a), 332, Sch 37, Pt 7, as from a day to be appointed under s 336(3) of the 2003 Act.

For the Criminal Justice Act 1991, s 39, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue) 816.

- b** For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue), 705, 706.

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- c** *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381, [1943] AC 147, HL.  
*Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338, NSW CA.  
*Benham v UK* (1996) 22 EHRR 293, [1996] ECHR 19380/92, ECt HR.  
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- d** *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373, [1971] ECHR 2832/66, ECt HR.  
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- f** *Howarth v National Parole Board* (1974) 50 DLR (3d) 349, Can SC.  
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- g** *Lauko v Slovakia* (2001) 33 EHRR 994, [1998] ECHR 26138/95, ECt HR.  
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*Morrissey v Brewer* (1972) 408 US 471, US SC.  
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*Pabla Ky v Finland* [2004] ECHR 47221/99, ECt HR.
- h** *Practice Note (custodial sentences: explanation)* [1998] 1 All ER 733, [1998] 1 WLR 278, CA.  
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*R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141.
- j** *R v Parole Board, ex p Watson* [1996] 2 All ER 641, [1996] 1 WLR 906, CA.  
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## Appeals

### *R (on the application of Smith) v Parole Board*

The claimant Trevor Smith appealed with permission of the House of Lords Appeal Committee given on 23 February 2004 from the decision of the Court of Appeal (Kennedy, Brooke LJ, and Holman J) on 31 July 2003 ([2003] EWCA Civ 1269, [2004] 1 WLR 421) dismissing his application for judicial review of the decision of the Parole Board on 3 April 2002 not to direct his release on licence, he at the time being a long-term prisoner within s 33(5) of the Criminal Justice Act 1991. The Court of Appeal heard the application pursuant to CPR 52.15(4). The facts are set out in the opinion of Lord Bingham of Cornhill.

### *R (on the application of West) v Parole Board*

The claimant Justin West appealed with permission of the House of Lords Appeal Committee given on 23 February from the decision of the Court of Appeal (Simon Brown and Sedley LJ, Hale LJ dissenting) on 14 November 2002 ([2002] EWCA Civ 1641, [2003] 1 WLR 705) dismissing his appeal from the decision of Turner J on 26 April 2002 ([2002] EWHC (Admin) 769) dismissing his application for judicial review of the decision of the Parole Board on 2 October 2002 not to direct his release on licence, he being at the time a short-term prisoner within s 33(5) of the Criminal Justice Act 1991. The facts are set out in the opinion of Lord Bingham of Cornhill.

*Edward Fitzgerald QC and Phillippa Kaufmann* (instructed by *Bhatt Murphy*) for Smith.

*David Pannick QC and Parishil Patel* (instructed by the Treasury Solicitor) for the Board in Smith's case.

*Richard Clayton QC and Kris Gledhill* (instructed by *Kaim Todner*) for West.

*David Pannick QC and Kristina Stern* (instructed by the Treasury Solicitor) for the Board in West's case.

Their Lordships took time for consideration.

27 January 2005. The following opinions were delivered.

### LORD BINGHAM OF CORNHILL.

[1] My Lords, these appeals concern the procedure to be followed by the Parole Board when a determinate sentence prisoner, released on licence, seeks to resist subsequent revocation of his licence. The appellants contend that such a prisoner should be offered an oral hearing at which the prisoner can appear and, either on his own behalf or through a legal representative, present his case, unless the prisoner chooses to forgo such a hearing. They base their argument on the common law and on arts 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), relying on both the criminal and civil limbs of art 6. The respondent Parole Board accepts that in resolving challenges to revocation of their licences by determinate sentence prisoners it is under a public law duty to act in a procedurally fair manner. It accepts that in some cases, as where there is a disputed issue of fact material to the outcome, procedural fairness may require it to hold an oral hearing at which the issue may be contested. It accepts, through leading counsel, that it may in the past have been too slow to grant oral

hearings. But it strongly resists the submission that there should be any rule or presumption in favour of an oral hearing in such cases, contending that neither the common law nor the convention requires such a rule or such a presumption.

JUSTIN WEST: THE FACTS

[2] The appellant West was sentenced to three years' imprisonment for affray on 27 October 2000. He was thus a short-term prisoner within the meaning of s 33(5) of the Criminal Justice Act 1991, and by virtue of s 33(1) of the Act the Secretary of State was obliged to release him on licence once he had served one-half of his sentence. In the ordinary way, his licence would have remained in force until the date on which he would (but for his release) have served three-quarters of his sentence: s 37(1).

[3] The appellant, having spent some time in custody before sentence, was duly released on licence on 6 August 2001. His licence was due to expire on 7 May 2002. His licence included terms that he should place himself under the supervision of any nominated probation officer; should keep in touch with the officer as instructed; should live at an address approved by the officer and notify the officer in advance of any change of address; and should be of good behaviour and not commit any offence or take any action which would jeopardise the objectives of his supervision. He was informed in writing that he must comply with the conditions of the licence and that the objectives of the supervision were to protect the public, to prevent re-offending and to achieve his successful re-integration into the community. He was warned in writing that if he failed to comply with the requirements of his probation supervision or otherwise posed a risk to the public he would be liable to have his licence revoked and be recalled to custody until the date on which his licence would otherwise have expired.

[4] On 22 August 2001 the appellant's licence was revoked and he was recalled to prison by the Secretary of State for the Home Department acting on the recommendation of the Parole Board under s 39(1) of the 1991 Act. The Board was prompted to make its recommendation by the appellant's probation officer, who was supported by her superior. The reasons given were that the appellant had breached the conditions of his licence by failing to keep in touch with his probation officer in failing to keep an appointment on 20 August without giving a reasonable explanation; by failing to live regularly at his approved address; and by visiting the hostel address of his former partner, allegedly assaulting her, and being suspected of kicking in a door at her hostel.

[5] The appellant's solicitors made brief written representations against his recall to prison under s 39(3)(a) of the 1991 Act. They gave an explanation of the appellant's failure to keep the appointment, stated that he had only spent one night away from his approved address, denied that he had assaulted his ex-partner and explained that he had broken open the door to prevent his ex-partner harming herself, as she had threatened. It was denied that the incident at the hostel had involved the commission of any crime. The solicitors offered to substantiate the appellant's account and suggested that an oral hearing would be appropriate, since there were issues of fact and witnesses would be needed if the Parole Board proposed to resolve them.

[6] The Parole Board considered the appellant's representations on 2 October 2002 but rejected them. It noted his admissions concerning the appointment and the ex-partner but said that it did not accept his explanations and noted that he had, on his own admission, spent a night away from his approved address. It also noted that the appellant had been seen drinking at the hostel, a matter not put to

a him. The Parole Board took the view that his behaviour, taken as a whole, indicated a poor sense of judgment and a propensity for acting in a way which was incompatible with a continuing licence: the appellant served eight-and-a-half months in prison during the period of recall.

[7] His broadly-based application for judicial review of the Parole Board's decision was dismissed by Turner J on 26 April 2002: [2002] EWHC 769 (Admin),  
b [2002] All ER (D) 256 (Apr). On appeal, his case was advanced on much narrower grounds, but the Court of Appeal by a majority (Simon Brown and Sedley LJ, Hale LJ dissenting) dismissed his appeal: [2002] EWCA Civ 1641, [2003] 1 WLR 705.

#### TREVOR SMITH: THE FACTS

c [8] On 8 May 1998 the appellant Smith was convicted of rape and of making threats to kill. He was sentenced to eight years' imprisonment, reduced on appeal to six-and-a-half years'. He was thus a long-term prisoner within the meaning of s 33(5) of the 1991 Act. By virtue of s 35(1) of that Act, he became eligible for release on licence by the Secretary of State after serving one-half of his sentence, if the Parole Board so recommended. By virtue of s 33(2) of the Act, the  
d Secretary of State was obliged to release him on licence after he had served two-thirds of his sentence. This was his 'non-parole date', the date on which he was entitled to be released. In the ordinary way, his licence would have remained in force until the date on which he would (but for his release) have served three-quarters of his sentence: s 37(1). But in this case, because the appellant had  
e been sentenced for a sexual offence, the trial judge made an order under s 44 of the Act, the effect of which was to extend the licence period to the end of the appellant's sentence.

[9] On 23 October 2000 the Parole Board refused the appellant's first application for parole. It gave written reasons for its decision, referring to the serious nature of  
f the appellant's offences, his past record of violence, his refusal to undertake courses in prison to address his offending behaviour, his use of class A drugs in prison, his failing of a recent mandatory drugs test and his complete lack of insight.

[10] The appellant was released on licence on 7 November 2001, which (taking account of time spent in custody before sentence) was his non-parole date. His licence contained the same conditions as that of the appellant West,  
g save that it named a probation hostel at which he was to live and named a psychiatrist upon whom he was to attend.

[11] The appellant lived at the named hostel. Two weeks after his release he was tested for drugs and tested positive for cocaine, benzodiazepine and methadone. He admitted the use of cocaine but denied using the other drugs. He  
h was sent a warning letter on 23 November 2001.

[12] On 10 December 2001 the appellant moved at his own request, and with the consent of his probation officer, to a different hostel. On 15 January 2002 he tested positive for cocaine and, three days later, for cocaine and opiates.

[13] On 25 January 2002 the appellant's supervising probation officer, with the  
j support of his superior, recommended the revocation of the appellant's licence. He based this recommendation on the appellant's drug use and the risk he thereby presented to the community. It was acknowledged that in every other respect the appellant had complied with his licence conditions, and had kept appointments with the psychiatrist, but the psychiatrist was concerned about the effect of drug abuse, and withdrawal from drugs, on the appellant's personality. The probation officer was worried about the effect of powerful drugs on a man

whom he considered to be 'volatile, impressionable and potentially dangerous'. He was also concerned about his criminal associations in the drug world. a

[14] The Secretary of State referred the recommendation to the Parole Board to decide whether it should recommend revocation of the appellant's licence under s 39(1) of the 1991 Act. On 4 February 2002 the Parole Board recommended revocation. The Secretary of State accepted this recommendation and recalled the appellant to prison on 6 February 2002. The written reason for revocation given to him was his breach of his licence conditions in testing positive for drugs on two occasions. b

[15] Solicitors for the appellant submitted lengthy written representations to the Parole Board, asking the Board to recommend the release of the appellant under s 39(5)(b) of the 1991 Act, and the Secretary of State duly referred the appellant's case to the Board under s 39(4)(a). In these submissions the appellant admitted the use of crack cocaine. But he said that, although he had first become addicted to drugs while in prison, he had successfully worked to be drug-free at the time of his release. He denied using other drugs, blamed the drug culture prevalent in both hostels for his reversion to the use of cocaine and drew attention to his own attempts to escape from a cycle of drug addiction. He had himself sought a change of hostel, only to find the second hostel as drug-ridden as the first. He had himself taken steps to obtain advice and counselling. The appellant's solicitors did not ask for an oral hearing by the Parole Board. c  
d

[16] The Parole Board considered the appellant's representations on 3 April 2002 and decided not to direct the appellant's release. The appellant was not present or represented when this decision was made, and there was no oral hearing. In its written reasons for rejecting the appellant's representations, the Parole Board concluded that the appellant's inability or unwillingness to desist from drugs represented too great a risk to public safety. The appellant remained in prison until the expiry of his sentence on 3 December 2003, having served 22 months during the period of recall. e

[17] The appellant issued this application for judicial review on 30 December 2002. After a successful interlocutory appeal, the Court of Appeal allowed the appellant to advance all the issues he wished at the substantive hearing, which it reserved to itself. On 31 July 2003, the Court of Appeal (Kennedy, Brooke LJ and Holman J) dismissed the application: [2003] EWCA Civ 1269, [2004] 1 WLR 421. f  
g

#### THE PROVISIONS FOR EARLY RELEASE, LICENSING AND REVOCATION

[18] The statutory provisions and subordinate rules governing the release, licensing and recall of prisoners have been the subject of ceaseless change over the past 10–15 years. I shall confine my summary to the provisions directly relevant to these appeals. h

[19] The Parole Board has the duty under s 32(2) of the 1991 Act of advising the Secretary of State with respect to any matter referred to it by him which is connected with the early release or recall of prisoners. At the time when the Parole Board considered the release of the appellants after revocation of their licences, it was permitted under s 32(3) of the 1991 Act to hold an oral hearing (in the form of an interview by a Parole Board member) if it thought it necessary or desirable to do so, but was not expressly required to do so. By s 32(5) of the Act, the Secretary of State was empowered to make rules with respect to the proceedings of the Parole Board, but had made no rules relevant to these appeals. He was empowered by s 32(6) to give directions to the Parole Board as to the matters to be taken into account by it in discharging its functions: j



a '... and in giving any such directions the Secretary of State shall in particular have regard to—(a) the need to protect the public from serious harm from offenders; and (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.'

b [20] At the time when the appellant West's licence was revoked, the applicable directions given by the Secretary of State to the Parole Board were to this effect:

c '1. In deciding whether or not to recommend the recall of a short-term prisoner released on licence ... or to recommend the immediate release of such a prisoner who has been recalled, the Parole Board shall consider whether the prisoner's continued liberty or, as the case may be, immediate release, would present an unacceptable risk to the public of further offences being committed.

2. In considering this issue, the Board shall, in particular, take into account

d (a) whether the prisoner is likely to commit further offences, and

(b) whether the prisoner has failed to comply with one or more of his licence conditions or might be likely to do so in future.'

The directions applicable in the case of the appellant Smith were longer:

e '*Recall of Determinate Sentence Prisoners Subject to Licence*

Where an offender is subject to a custodial sentence, the licence period is an integral part of the sentence, and compliance with licence conditions is required. In most cases, the licences are combined with supervision by a probation officer, social worker or member of a youth offending team ...

The objectives of supervision are:

- f
- to protect the public
  - to prevent re-offending
  - to ensure the prisoner's successful reintegration into the community

Initial Recommendation for a Recall

g In determining whether or not to recommend to the Secretary of State (under Section 39(1) of the Criminal Justice Act 1991) the recall of a prisoner who is subject to licence, the Parole Board shall consider whether:

(a) the prisoner's continued liberty would present an unacceptable risk of a further offence being committed. The type of re-offending involved does not need to involve a risk to public safety; or

h (b) the prisoner has failed to comply with one or more of his or her licence conditions, and that failure suggests that the objectives of probation supervision have been undermined; or

(c) the prisoner has breached the trust placed in him or her by the Secretary of State in releasing him or her on licence, whether through failure to comply with one or more of the licence conditions, or any other means ...

j Each individual case shall be considered on its merits, without discrimination on any grounds.'

These directions were supplemented by directions on representations against recall: these were to very much the same effect, but also drew attention to the likelihood of compliance with licence conditions in future 'taking into account in particular the effect of the further period of imprisonment since recall'.

[21] Section 37(4) of the 1991 Act required a person subject to a licence to comply with the conditions of the licence. At the relevant time, the recall of short-term and long-term prisoners was governed by s 39 of the 1991 Act which, as amended, provided:

*'Recall of long-term and life prisoners while on licence.—(1) If recommended to do so by the Board in the case of a short-term or long-term ... prisoner who has been released on licence under this Part, the Secretary of State may revoke his licence and recall him to prison.*

(2) The Secretary of State may revoke the licence of any such person and recall him to prison without a recommendation by the Board, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.

(3) A person recalled to prison under subsection (1) or (2) above—(a) may make representations in writing with respect to his recall; and (b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.

(4) The Secretary of State shall refer to the Board—(a) the case of a person recalled under subsection (1) above who makes representations under subsection (3) above; and (b) the case of a person recalled under subsection (2) above.

(5) Where on a reference under subsection (4) above the Board—... (b) recommends in the case of any person, his immediate release on licence under this section, the Secretary of State shall give effect to the recommendation ...

(6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large.'

The House was shown the document given to the appellant Smith pursuant to s 39(3)(b): this informed him of his right to make written representations, but gave no hint that he or his solicitor might in any circumstances make oral representations to the Parole Board. The cases of both the appellants were referred to the Parole Board under s 39(4)(a).

[22] Before turning to the issues, I think it convenient to summarise certain uncontroversial but fundamental and relevant principles upon which the sentencing, licensing and recall regimes rest. First, the ordinary duty of the court when imposing a determinate sentence of imprisonment is to impose such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence or the combination of the offence and one or more offences associated with it: s 2(2)(a) of the 1991 Act. I need not address the small minority of cases in which a longer than commensurate sentence may be called for: s 2(2)(b) of the 1991 Act. In fixing this term, whether it be measured in days, months or years, the court will take account of all matters relevant to the art and science of sentencing and may, depending on the facts of the particular case, have regard to all the well-known objects of a custodial sentence (retribution, personal and general deterrence, incapacitation, reform, rehabilitation). But the predominant purpose of the sentence will be punitive and the sentence which the court imposes will represent the period which the court considers that the defendant should spend in custody as punishment for the crime or crimes of which he has been convicted. An appellate court reviewing the sentence will act on the same basis.

a [23] Secondly, the court which imposes a determinate sentence of imprisonment is of course aware of the statutory provisions governing early release, and should pursuant to *Practice Note (custodial sentences: explanation)* [1998] 1 All ER 733, [1998] 1 WLR 278 outline the effect of these to the defendant when passing sentence. But save in an exceptional case these provisions do not and should not influence the length of the sentence passed. The court does not  
b sentence a defendant to six years' imprisonment because it judges four years' to be the appropriate term, or three years' because it judges that the defendant should be incarcerated for 18 months.

[24] Thus, thirdly, the sentence passed is not (as it has not within living memory been) a simple statement of the period the defendant must spend in prison. The sentence is in reality a composite package, the legal implications of  
c which are in large measure governed by the sentence passed.

[25] While, fourthly, it is true that early release provisions have the practical effect of relieving overcrowding in the prisons, that is not their penal justification. But such justification exists. All, or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their  
d sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner. It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the chances of the  
e ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity. But of course there will be cases in which such professional supervision may not be, or appear to be, effective. If a prisoner is released, subject to conditions, before the expiry date of the sentence imposed by the court, and he does not comply, or appears not to comply, with the conditions to which his release was subject, a question will arise whether, in  
f the interests of society as a whole, he should continue to enjoy the advantages of release.

[26] Lastly, it is plain from the statutory provisions already quoted that the resolution of questions of the type indicated is entrusted, and entrusted solely, to the Parole Board. In exercising this very important function, it is recognised to  
g be an independent and impartial tribunal for purposes of art 6(1) of the convention. It is the primary decision-maker, not entitled to defer to the opinion of the Secretary of State or a probation officer: see *R v Parole Board, ex p Watson* [1996] 2 All ER 641 at 650, [1996] 1 WLR 906 at 916. As the materials already cited make clear, the Parole Board is concerned, and concerned only, with the assessment of risk to the public: it must balance 'the hardship and injustice of  
h continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury'. The sole concern of the Parole Board is with risk, and it has no role at all in the imposition of punishment: see *R v Sharkey* [2000] 1 All ER 15 at 18, 19, [2001] 1 WLR 160 at 162–163, 164.

j  
COMMON LAW

[27] The Parole Board's acceptance of a public law duty to act in a procedurally fair manner when resolving challenges to licence revocations prompts the inevitable question: what does fairness in this context require? Both sides referred to the answer given by Lord Mustill in *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560. He there made

plain that the requirements of fairness change over time, are flexible and are closely conditioned by the legal and administrative context. Mr Pannick QC, for the Parole Board, pointed out that Lord Mustill did not suggest that an oral hearing was called for, and the prisoners in that case raised no such claim. But the procedure in issue in that case—the administrative fixing by the Secretary of State of the punitive terms to be served by mandatory life sentence prisoners—was very different from the present. The procedure has since been superseded. Such terms are now judicially fixed. Where licence revocations are challenged by mandatory and discretionary life sentence prisoners and Her Majesty's pleasure detainees, the Parole Board now routinely holds oral hearings. So Lord Mustill's guidance must now be followed in a different legal and factual environment.

[28] Further guidance was given by Mason J in *Kioa v West* (1985) 159 CLR 550 at 572; sub nom *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321 at 347:

'In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ...'

[29] Mr Pannick relied on the statutory context. While s 32 of the 1991 Act expressly provided for oral hearings in some classes of case, those classes did not include cases such as the present in which oral hearings were permitted but not required. That, it was submitted, represented a legislative choice. But the maxim *expressio unius exclusio alterius* can seldom, if ever, be enough to exclude the common law rules of natural justice, as pointed out by McHugh JA in *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 349, and Kirby P in *Johns v Release on Licence Board* (1987) 9 NSWLR 103 at 111.

[30] In considering what procedural fairness in the present context requires, account must first be taken of the interests at stake. On one side is the safety of the public, with which the Parole Board cannot gamble: see *R v Parole Board, ex p Watson* [1996] 2 All ER 641 at 650, [1996] 1 WLR 906 at 916–917. On the other is the prisoner's freedom. This is a conditional, and to that extent precarious, freedom. In *Weeks v UK* (1988) 10 EHRR 293 at 307–308 (para 40), the European Court of Human Rights (the European Court) recognised the freedom enjoyed by a discretionary life sentence prisoner on licence as 'more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen' but as, none the less, a state of liberty for the purposes of art 5 of the convention. The value of freedom to the prisoner, even when conditional, was acknowledged by the Supreme Court of the United States in *Morrissey v Brewer* (1972) 408 US 471 (para 12), and by Dickson J, dissenting (although not on this point), in the Supreme Court of Canada in *Howarth v National Parole Board* (1974) 50 DLR (3d) 349 at 358. It is noteworthy that a short-term prisoner who has served half his sentence and a long-term prisoner who has reached his non-parole date have a statutory right to be free: a conditional right, but none the less a right, breach of which gives an enforceable right to redress (see *R v Governor of Brockhill Prison, ex p Evans* (No 2) [2000] 4 All ER 15, [2001] 2 AC 19).



a [31] While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision. The possibility of a detainee being heard either in person or, where necessary, through some form of representation has been recognised by the European Court as, in some instances, a fundamental procedural guarantee in matters of deprivation of liberty: see *De Wilde v Belgium (No 1)* (1971) 1 EHRR 373 at 407 (para 76), *Winterwerp v Netherlands* (1979) 2 EHRR 387 at 409 (para 60), *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71 at 83 (para 51), *Waite v UK* (2003) 36 EHRR 1001 at 1014–1015 (para 59). Although ruling in a very different legal context, the Supreme Court of the United States, in a judgment delivered by Brennan J in *Goldberg v Kelly* (1970) 397 US 254 at 269 helpfully described the value of an oral hearing:

d 'Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence.'

f [32] In Canada (s 140(1)(2) of the Corrections and Conditional Release Act 1992) and New Zealand (s 65 of the Parole Act 2002) statutory provision is made for oral revocation hearings. In the United States, most states had already made such provision when the Supreme Court held such hearings to be necessary: see *Morrissey v Brewer* (1972) 408 US 471 at 487–488, 491 per Burger CJ, fn 15, and Brennan J, respectively. In Australia, courts have repeatedly held that there must be an oral hearing: see *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 345, *Todd v Parole Board* (1986) 6 NSWLR 71 at 81–82, *Johns v Release on Licence Board* (1987) 9 NSWLR 103 at 116. In this country, as already noted, revocation hearings are routinely held in the cases of life sentence prisoners and Her Majesty's prison detainees.

h [33] The argument addressed to the Court of Appeal ([2003] 1 WLR 709) on behalf of the appellant West did not rely on the common law. Simon Brown LJ did however record (at [2]) that in the year ending 31 March 2002 the Parole Board had considered 516 cases in which determinate sentence prisoners had made representations against recall and had during that year held an oral hearing in only one. He observed (at [40]) that the Parole Board 'should be altogether j readier than presently they are to hold oral hearings if in truth their determination is likely to turn upon the resolution of important issues of fact'. But it appears that, in the judgment of the Parole Board, very few cases turn on such issues. In the 19-month period from 1 April 2003 to 31 October 2004, the House was informed, the Parole Board considered representations against the recall of determinate sentence prisoners in 1,945 cases but held oral hearings in only four.

[34] The appellant Smith did rely on the common law in his appeal to the Court of Appeal ([2004] 1 WLR 421). Kennedy LJ (at [37]) held that no oral hearing was required in his case, accepting that the correct test was that propounded by the Parole Board's witness, Mr McCarthy, in his statement:

'However, such hearings can be, and are in fact, held where the panel of the Board considering the case takes the view that it is necessary in the interests of fairness, for example where it cannot properly reach a decision on the papers. This might be the case where there is a disputed issue of fact, which is central to the Board's assessment and which cannot be resolved without hearing oral evidence.'

Kennedy LJ considered that in *Smith's* case the primary facts (at [37]) were not in dispute. Brooke LJ agreed (at [49]). Holman J also agreed (at [55]), relying on Lord Mustill's observations in *Doody's* case. There was, he held (at [56]), no objective need for an oral hearing, since there was no dispute on the primary facts, the Parole Board's task was the assessment of risk and the procedure adopted was not 'actually unfair'.

[35] The common law duty of procedural fairness does not, in my opinion, require the Parole Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Parole Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.

#### ARTICLE 5(1)

[36] Article 5(1) of the convention, so far as relevant, provides:

'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...'

It seems to me plain that in cases such as the appellants' the sentence of the trial court satisfies art 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall, since conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the court. This view may have founded the European Court's recent admissibility decision in *Brown v UK* App No 968/04 (26 October 2004, unreported), p 6. The same result was reached in *Ganusauskas v Lithuania* App No 47922/99 (7 September 1999, unreported), where no break was found in the causal link between the original conviction and the re-detention. But the revocation decision must comply with art 5(4), to which I now turn.

#### ARTICLE 5(4)

[37] Article 5(4) provides:

*a* 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

*b* It is accepted that for the purpose of revocation proceedings the Parole Board has the essential features of a court within the meaning of art 5(4), and although, under s 39(5)(b) of the 1991 Act, it can only recommend the release of a recalled discretionary sentence prisoner, its recommendation has the effect of an order since the Secretary of State must give effect to it. Convention jurisprudence establishes that the judicial review of the lawfulness of detention must be wide enough to bear on those conditions which, under the convention, are essential for the lawful detention of a person in the situation of the particular detainee: see *c* *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 at 461–462 (para 49), *Weeks v UK* (1988) 10 EHRR 293 at 315 (para 59), *Thynne v UK* (1991) 13 EHRR 666 at 695 (para 79), *E v Norway* (1994) 17 EHRR 30 at 51 (para 50). That means, for present purposes, that the Parole Board should be empowered (a) to examine whether circumstances have arisen sufficient in law to justify further detention of a *d* determinate sentence prisoner released on licence and, if so, (b) to decide whether the protection of the public calls for the further detention of the individual detainee. The Parole Board is empowered to discharge those functions. Its review will in my opinion satisfy the requirements of art 5(4) provided it is conducted in a manner that meets the requirement of procedural *e* fairness already discussed.

#### ARTICLE 6—CRIMINAL

*f* [38] Article 6 guarantees certain important rights to everyone in the 'determination ... of any criminal charge' against them. The appellants contended that the revocation hearing in effect involved the determination of a criminal charge against them. This argument was advanced by Mr Clayton QC for the appellant West, and was adopted by Mr Fitzgerald QC for the appellant Smith. It was the only argument relied on by Mr Clayton in the Court of Appeal, but he was permitted before the House to adopt the other arguments advanced by Mr Fitzgerald.

*g* [39] Mr Clayton referred to the features of a criminal charge identified in *Engel v Netherlands (No 1)* (1976) 1 EHRR 647 at 678–679 (para 82), which have been rehearsed and applied in many cases, attaching significance in particular to the third feature, 'the degree of severity of the penalty that the person concerned risks incurring'. It was necessary, he argued, 'to look beyond the appearances and the language used and concentrate on the realities of the situation': see *Ezeh v UK* (2003) *h* 15 BHRC 145 at 172 (para 123). The reality here was that the appellants were threatened with loss of liberty for a substantial period as a result of conduct alleged against them. There could be criminal charges for quite minor delinquencies (as in *Öztürk v Germany* (1984) 6 EHRR 409 and *Lauko v Slovakia* (2001) 33 EHRR 994) or where the defendant was subjected only to a fine (as in *AP v Switzerland* (1998) 26 *j* EHRR 541 and *Garyfallou AEBE v Greece* (1999) 28 EHRR 344). In contrast, the liberty of the appellants was at stake. As originally enacted, s 38 of the 1991 Act provided that a short-term prisoner who had been released on licence and had failed to comply with his licence conditions should be liable on conviction in a magistrates' court to a fine and to an order for his recall to prison for up to six months. The section had been repealed, and the treatment of short-term prisoners assimilated, in this respect, with that of long-term prisoners. The original section

made plain that recall was a penal process and the changed procedure had altered its appearance, not its reality.

[40] There are several steps in this argument which I would accept, but I would reject the conclusion for one determinative reason. The distinguishing feature of a criminal charge is that it may lead to punishment. A challenge to revocation of a licence may lead to detention imposed to protect the public but it cannot lead to punishment. It is of course true that the prevention of further offending, for a period, is always an effect and often an object of a determinate sentence of imprisonment, but the primary purpose of that sentence is punitive and that is true of most criminal sentences. The European Court has recognised this. In *Engel v Netherlands* (1976) 1 EHRR 647 at 678–679 (para 82), it observed that deprivations of liberty ‘liable to be imposed as a punishment’ ordinarily belonged to the criminal sphere. It repeated this opinion in *Campbell v UK* (1985) 7 EHRR 165 at 195 (para 72). In *Benham v UK* (1996) 22 EHRR 293 at 323 (para 56), it found that proceedings to enforce payment of the community charge had ‘some punitive elements’. In *Lauko v Slovakia* (2001) 33 EHRR 994 at 1011 (para 58) it described a fine imposed for nuisance as having ‘a punitive character, which is the customary distinguishing feature of criminal penalties’. In *Ezeh v UK* (2003) 15 BHRC 145 at 172 (para 124) the awards of additional days by the governor were rightly held to ‘constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability’. The contrast is clear. In *Ganusauskas v Lithuania* App No 47922/99 (7 September 1999, unreported), an admissibility decision, the recall of the applicant to prison was held not to involve the determination of any criminal charge against him. A similar view was taken in *Brown v UK* App No 968/04 (26 October 2004, unreported), pp 6–7. I would reject also the argument based on s 38 of the 1991 Act as originally enacted. A procedure providing for charge, trial and punishment in a criminal court was replaced by one conducted without charge, without trial and without punishment by a body whose sole remit is to protect the public. That is a change of substance, not form. It is not an answer to say that, whatever the reality, the outcome feels to the detainee like punishment.

[41] These are the reasons which led the Court of Appeal majority to reject Mr Clayton’s argument, which I would indorse. Although Hale LJ accepted the argument, she made very plain her discomfort in seeking to answer what she regarded as the wrong question (see [2003] 1 WLR 705 at [48], [49]).

#### ARTICLE 6(1)—CIVIL

[42] Certain rights, less extensive than in the determination of a criminal charge, are guaranteed by art 6(1) to anyone in ‘the determination of his civil rights and obligations’. The appellants contended that, if their challenges to revocation of their licences did not involve the determination of a criminal charge, they involved a determination of their civil rights and obligations within the meaning of art 6(1). The Parole Board said they did not.

[43] The strength of the appellants’ argument lay in their undoubted enjoyment, after release, of a conditional and revocable right to freedom. This could readily be regarded as a civil right, and in *Aerts v Belgium* (1998) 5 BHRC 382 at 403 (para 59) the European Court observed that ‘the right to liberty, which was thus at stake, is a civil right’. But the Parole Board pointed to decisions capable of supporting a different result. In *Aldrian v Austria* (1990) 65 DR 337 at 342 an admissibility decision, the European Commission of Human Rights held:



a 'The Commission recalls its constant case-law according to which proceedings concerning the execution of a sentence imposed by a competent court, including proceedings on the grant of conditional release, are not covered by Article 6 para. 1 of the Convention. They concern neither the determination of "a criminal charge" nor of "civil rights and obligations" within the meaning of this provision ...'

b There are some determinations, perhaps involving preventative measures, which do not fall within either limb of art 6(1): see *Maaouia v France* (2000) 9 BHRC 205 at 212–214 (paras 35–39), *Ferrazzini v Italy* [2001] STC 1314 at 1320–1321 (paras 28–30). A prisoner's challenge to recall was assumed but not held in *Brown v UK* App No 968/04 (26 October 2004, unreported), p 7, to be capable of engaging a civil right, but the applicant's claim under this head was found inadmissible, for reasons which are not immediately compelling.

c [44] It is not in my opinion necessary to resolve this question in the present cases since, whether or not the civil limb of art 6(1) is engaged, determinate sentence prisoners wishing to challenge the revocation of their licences have the protection of the Parole Board's common law duty of procedural fairness, and I am not persuaded that the civil limb of art 6(1), even if applicable, would afford any greater protection. I would therefore prefer to defer expressing a concluded opinion on this question until a case arises in which a decision will have some practical effect.

e CONCLUSIONS

f [45] In his representations against revocation the appellant West offered the Parole Board explanations, which he said he could substantiate, of his failure to keep an appointment with his probation officer and of the incident at his ex-partner's hostel. The Parole Board could not properly reject these explanations on the materials before it without hearing him. He admitted spending one night away from his approved address, staying (he said) with a cousin. While this was a breach of his licence conditions, it is not clear what risk was thereby posed to the public which called for eight months' detention. His challenge could not be fairly resolved without an oral hearing and he was not treated with that degree of fairness which his challenge required.

g [46] The resort to class A drugs by the appellant Smith clearly raised serious questions, and it may well be that his challenge would have been rejected whatever procedure had been followed. But it may also be that the hostels in which he was required to live were a very bad environment for a man seeking to avoid addiction. It may be that the Parole Board would have been assisted by evidence from his psychiatrist. The Board might have concluded that the community would be better protected by encouraging his self-motivated endeavours to conquer addiction, if satisfied these were genuine, than by returning him to prison for two years with the prospect that, at the end of that time, he would be released without the benefit of any supervision. Whatever the outcome, he was in my opinion entitled to put these points at an oral hearing.

j Procedural fairness called for more than consideration of his representations, on paper, as one of some 24 such applications routinely considered by a panel at a morning session.

[47] I would allow both appeals. I would in each case make a declaration that the Parole Board breached its duty of procedural fairness owed to the appellant by failing to offer him an oral hearing of his representations against revocation of his licence and was accordingly in breach of art 5(4) of the convention. The

Parole Board must pay the costs of the appellant Smith in the House and below. The parties are invited to make written submissions within 14 days on the appropriate costs order in the case of the appellant West. a

#### LORD SLYNN OF HADLEY.

[48] My Lords, it is perhaps not surprising that the Parole Board should have felt initially that it was right, or that through available resources they were constrained, to decide as many applications as possible by prisoners whose licence was revoked and who were recalled to prison, without anything approaching a court process, or even an oral hearing. Such a process is time consuming and expensive and some of the applications may on the face of it have appeared without merit. But the facts and the arguments addressed to your Lordships on behalf of the applicants in these two cases have made it plain that in respect of determinate sentence prisoners the decisions taken (where such revocation has been ordered) can have a serious effect on the liberty of the applicant. If the decision is taken on the basis of a misunderstanding of the law or of a failure to appreciate the facts relied on there can be a very serious interference with the prisoner's liberty albeit that liberty is a conditional right. There is a risk that if only written representations are looked at a decision may be taken without a full appreciation of what really matters. When we are told of the number of oral hearings which have been held in practice in respect of the very large number of applicants, it is clear that the risk is serious. b  
c  
d

[49] To alleviate this risk is well within the competence of the common law. On this aspect of the appeal I am in full agreement with the opinion of my noble and learned friend Lord Bingham of Cornhill which I have had the advantage of reading in draft. e

[50] There is no absolute rule that there must be an oral hearing automatically in every case. Where, however, there are issues of fact, or where explanations are put forward to justify actions said to be a breach of licence conditions, or where the officer's assessment needs further probing, fairness may well require that there should be an oral hearing. If there is doubt as to whether the matter can fairly be dealt with on paper then in my view the Parole Board should be predisposed in favour of an oral hearing. On any view the applicant should be told that an oral hearing may be possible though it is not automatic; if having been told this the applicant clearly says he does not want an oral hearing then there need not be such a hearing unless the Board itself feels exceptionally that fairness requires one. f  
g

[51] The greater part of the argument in these appeals has, however, centred on arts 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as incorporated in the Human Rights Act 1998 (Sch 1). It seems to me right therefore to express a view on these issues even though in most if not all cases compliance with the common law duty may be all that is required. h

[52] I gratefully refer to and do not repeat Lord Bingham's analysis of the decisions of the European Court of Human Rights (the European Court) and it is against that background that I can state my conclusions briefly. j

[53] Article 5 (1) of the convention as set out in Sch 1 to the 1998 Act provides:

‘... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court ...’

a [54] In the absence of a specific challenge to the conviction, when the prisoner begins his sentence, there is clearly lawful detention by a competent court. Furthermore that sentence is subject to all the provisions of release on licence and revocation provided for by statute and the rules applicable to determinate sentence prisoners. My initial view was that there are not two formal orders for detention; it is a combined sentence and, in the subsequent decisions as to licence  
b and revocation and recall, the Parole Board is giving effect to the initial sentencing of the trial judge. If that is right, recall from conditional release was itself empowered by the initial sentence of the court.

[55] I have, however, been persuaded by Mr Fitzgerald QC that this is too restrictive an approach and that recall, even of someone who has only a conditional right to his freedom under licence ('more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen' (*Weeks v UK* (1988) 10 EHRR 293), is a new deprivation of liberty by detention. The prisoner is therefore entitled to take proceedings by which the lawfulness of that detention can be decided speedily by a court under art 5(4). Review by the Parole Board of the recall decision, however, if conducted in accordance with the fairness which  
d the common law requires, is in my view a compliance with art 5(4) and therefore there is no breach of this article.

[56] Article 6 is divided into two parts. The second part is that in the determination of 'any criminal charge against him' everyone is entitled to the rights set out in art 6. The allegation against the prisoner released on licence is that he has breached the terms of his licence. The consequence is that he may be  
e recalled under rules made by the Secretary of State if he is likely to commit further offences or if his breach of conditions undermines his supervision which is intended to protect the public, to prevent the prisoner re-offending and to ensure his successful integration into the community. As Lord Bingham has stated, a primary purpose of sentence after trial is to punish. That is an essential  
f element of the sentence. In *Amand v Secretary of State for Home Affairs* [1942] 2 All ER 381, [1943] AC 147, where the question was whether the Divisional Court's dismissal of an application was a 'judgment in a criminal cause or matter', Lord Wright said:

'The principle ... is that if, the cause or matter is one which, if carried to its  
g conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or a fine, it is a criminal cause or matter.' (See [1942] 2 All ER 381 at 388, [1943] AC 147 at 162.)

Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences, though it may also in some cases lead to further  
h training which would enable the prisoner on a subsequent release to integrate more readily into the community. The Parole Board in reaching its decision is as a consequence not determining 'a criminal charge' even if (which for present purposes I assume) a recommendation by the supervising officer that the prisoner should be recalled, because in his opinion a licence condition has been breached,  
j is a 'charge' within the meaning of art 6 of the convention.

[57] The first part of art 6 on the other hand provides that the rights laid down in that article are enjoyed by everyone in the 'determination of his civil rights'. The European Court has categorised various rights recognised by the law as not being 'civil rights' within the meaning of the convention, even if they are not rights in respect of criminal proceedings—see, inter alia, decisions on tax disputes and immigration rulings. The fact that the Parole Board's decision is not

the determination of a criminal charge thus does not necessarily mean that it is the determination of his civil rights.

[58] The article clearly distinguishes between civil and criminal but the rights conferred in the latter context are those relative (ie limited) to the 'determination ... of any criminal charge against him'. What happens in cases like the present is not the determination of a criminal charge. It is a decision as to a procedure laid down for the carrying out of a lawful sentence of a court. The rights in that criminal procedure may attract a need for fairness under the common law. It does not necessarily convert them into 'civil rights' for the purpose of the convention.

[59] The European Court has not given a clear decision on this. Maybe *Aerts v Belgium* (1998) 5 BHRC 382 indicates that a 'civil right' is involved here though *Aldrian v Austria* (1990) 65 DR 337, a decision of the European Commission on Human Rights on admissibility points the other way. Perhaps the best indication of the European Court's approach is to be found in *Ganusauskas v Lithuania* App No 47922/99 (7 September 1999, unreported) and *Kerr v UK* App No 44071/98 (7 December 1999, unreported). In both of those although the European Court dealt with whether there was 'the determination of a criminal charge' it did not consider whether a decision to revoke a prisoner's early release and to return him to prison was the determination of a 'civil right'. I do not consider that the recent decision of the European Court in *Brown v UK* App No 968/04 (26 October 2004, unreported) conclusively determines this matter. The European Court said, 'Even assuming that the right to liberty is a civil right' (and it referred to *Aerts v Belgium*) before going on to comment on the rights of the citizen in domestic courts.

[60] I of course accept that this is still an open question as far as the European Court is concerned. My opinion on the arguments we have heard in these cases is that the convention has specifically limited the criminal aspect of the matter to the determination of a 'criminal charge' which these are not. Decisions as to recall are not within the meaning of art 6 concerned with 'civil rights'. Questions as to the deprivation of liberty by a body like the Parole Board (regarded as a court for this purpose) fall to be dealt with under art 5(4) and the common law rules relating to the fairness of proceedings. It is plain from Lord Bingham's recital of the facts that the review in these two cases was not conducted in accordance with the fairness which the common law requires so that detention on recall was not lawful for the purposes of art 5(4) of the convention as incorporated in the 1998 Act.

[61] As to the disposal of the two appeals I agree with my noble and learned friend Lord Bingham and would also make the order which he proposes.

#### LORD HOPE OF CRAIGHEAD.

[62] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I would allow these appeals, and I would make the same declaration in each of them as he proposes. My reasons are substantially the same as those that he has given, except that I differ from him about the need to reach a concluded view as to whether there was a breach of the civil limb of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998 (the Human Rights Act)).



## THE COMMON LAW

a [63] I can well understand the reluctance of the Parole Board to hold oral hearings in other than a very small proportion of those cases which fall outside the categories of mandatory and discretionary life prisoners, extended sentence prisoners and Her Majesty's prison detainees, for whom it has been decided that continuing judicial supervision of the detention is required to satisfy their art 5(1) and (4) convention rights. But I agree that the absence of an oral hearing in these b two determinate sentence cases was a breach of the duty to act fairly at common law. For reasons that I shall explain, I think that this means that the proceedings were not conducted in the way a court would be expected to conduct them and that it must follow that there was a breach of the appellants' art 5(4) convention rights.

c [64] It is, of course, more costly and time-consuming to deal with cases by means of oral hearings. Arrangements have to be made to ensure that they are conducted fairly. Notices must be given of the witnesses to be called and the substance of their evidence. They will almost always have to be held at the prison or other institution where the prisoner is held. A simple cost-benefit analysis, d looking at the matter from the Parole Board's point of view only, will no doubt show that its resources are better employed by dealing with these applications on paper. That, no doubt, is why the number of oral hearings that are being held in these cases is so tiny, despite Simon Brown LJ's observation in the Court of Appeal in *West's case* [2002] EWCA Civ 1641 at [40], [2003] 1 WLR 705 at [40] that the Parole Board should be altogether readier than presently they are to hold oral e hearings if their determination is likely to turn upon the resolution of important issues of fact.

[65] Commenting however on the fact that only four oral hearings were held out of the 1,945 cases falling outside the categories mentioned above during the period from 1 April 2003 to 31 October 2004, Mr Pannick QC said that the Parole Board's experience was that decisions in these cases almost never turn on f disputed issues of fact. I would make two comments on this explanation.

[66] First, the figures that we have been given appear to me to indicate that there is a long-standing institutional reluctance on the part of the Parole Board to deal with these cases orally. It would not be surprising if a consequence of that reluctance was an approach, albeit unconscious and unintended, which g undervalued the importance of any issues of fact that the prisoner wished to dispute. If the system is such that oral hearings are hardly ever held, there is a risk that cases will be dealt with instead by making assumptions. Assumptions based on general knowledge and experience tend to favour the official version as against that which the prisoner wishes to put forward. Denying the prisoner of h the opportunity to put forward his own case may lead to a lack of focus on him as an individual. This can result in unfairness to him, however much care panel members may take to avoid this.

[67] The second is that the test which Simon Brown LJ had in mind when he made his observation was whether the decision was 'likely' to turn upon the resolution of an important factual issue. The question is not whether the case j ultimately turns on a disputed issue of fact when the decision is taken. It is whether, when the papers are first looked at, it is likely to do so. This is a more exacting test than that which the Parole Board appears to have been adopting.

[68] I agree therefore that the common law test of procedural fairness requires that the Parole Board re-examine its approach. A screening system needs to be put in place which identifies those cases where the prisoner seeks to challenge the

truth or accuracy of the allegations that led to his recall, or seeks to provide an explanation for them which was not taken into account or was disputed when his recall was recommended by his supervising probation officer. Consideration then needs to be given to the question whether it is necessary to resolve these issues before a final decision is made as to whether or not the prisoner is suitable for release. If it is, an oral hearing should be the norm rather than the exception.

#### THE CONVENTION RIGHTS

[69] The fact that the issues which the appellants have raised can be dealt with under the common law does not answer the question whether the decisions that were taken were in breach of their convention rights. Section 8(1) of the Human Rights Act provides that, in relation to any act of a public authority which the court finds is unlawful under s 6(1) of that Act, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The appellants are no longer in custody. But this does not absolve the court of its responsibility, should it find that there was a breach of any of their convention rights, of considering what order, if any, it should make in recognition of the fact that their rights were breached.

[70] The articles of the convention which the appellants say were breached by the Parole Board's failure to hold an oral hearing in their cases are art 5(1) and (4), together with art 6 in its criminal or alternatively its civil aspects. In my opinion it is necessary for a decision to be taken as to whether the appellants' rights were breached under each of these articles. As the convention has its own self-contained structure, the question whether the requirements of the common law have been breached or satisfied raises issues which must be dealt with separately from issues about breaches of the convention rights. As for art 6, it is invoked on the alternative ground that there was here a determination of civil rights and obligations. So it is necessary to decide whether their rights under that aspect of the article were engaged as well as their rights under the criminal aspect.

[71] There is one other factor that indicates the need for a decision on the civil aspect of art 6(1). The right to a fair hearing under this article carries with it some ancillary rights that are not usually regarded as part of the general right to procedural fairness in common law. The right to a hearing within a reasonable time and the right to legal assistance of one's own choosing, for example, are expressly guaranteed by art 6. A consideration of the appellants' arguments is incomplete if the question whether they are entitled to invoke these ancillary rights is left undecided.

[72] I agree with what Lord Bingham has said about the application of art 5(1) and (4) to these cases. But I should like to say a bit more to explain why I too consider that, if its review is to satisfy the requirements of art 5(4), the Parole Board must conduct the proceedings in a manner that meets the requirement of procedural fairness at common law and why I would hold that, as the proceedings were not procedurally fair in these cases, the appellants' art 5(4) convention rights were violated.

[73] At first sight the proposition that the review by the Parole Board will satisfy the requirements of art 5(4) only if it is conducted in a manner that meets the requirements of procedural fairness at common law risks confusing two things that, out of respect for the structure of the law, ought to be kept separate. The common law is antecedent law: Clayton and Tomlinson *The Law of Human Rights* (2000) para 1.33. The introduction of the convention rights into our law

a by the Human Rights Act is a creature of statute. The Act protects convention rights in a way that differs from the way that common law rights are protected.

[74] It is unlawful for a public authority to act in a way which is incompatible with a convention right: s 6(1) of the Human Rights Act. And a member of the Scottish Executive has no power to act in a way that is incompatible with any of the convention rights: s 57(2) of the Scotland Act 1998. The protection which the  
b Human Rights Act provides in the case of a person's convention rights is designed to provide a minimum standard of human rights protection. But it does not restrict any other right or freedom which the law confers: s 11(a) of the Human Rights Act. This is where the common law steps in. The requirement of procedural fairness is part of the common law. It is a requirement that applies to  
c bodies in this jurisdiction which have the characteristics of a court within the meaning of art 5(4) because domestic law says so. Common law procedural fairness as such is not a convention requirement. But the convention can and does inform the common law, and the common law informs the convention.

[75] It is not enough to satisfy the requirement of art 5(4) that the lawfulness of the detention must be decided by a court to point simply to the Parole Board's  
d independence and to its impartiality. It is, of course, possible to say that the Parole Board is an appropriate body to conduct the review because it is impartial and independent of the executive. But art 5(4) requires that the proceedings themselves must be conducted in the way a court would be expected to conduct them. From this it follows that, to satisfy art 5(4), the Parole Board's procedure  
e for conducting reviews must embody the procedural fairness that the common law requires of a court. Procedural fairness is a requirement of the common law. It is not in itself a convention requirement. But it is built into the convention requirement because art 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies  
f acting judicially, as a court would act, must conduct their proceedings in a way that is procedurally fair. As Lord Bingham has explained, the common law duty of procedural fairness required that the appellants be offered an oral hearing into their representations against revocation of their licences. As this was not done, the review of their detention was not conducted as a court would be expected to conduct it, so there was, in my opinion, a violation of their art 5(4) convention  
g rights.

#### ARTICLE 6—CIVIL RIGHTS AND OBLIGATIONS

[76] For all the reasons that Lord Bingham has given, I agree that the appellants' rights under art 6(1) in its criminal aspect were not engaged by the  
h decisions that the Parole Board took in these cases. I wish however to examine more fully the question whether their rights were engaged under art 6 in its civil aspect.

[77] The appellants submit that the decisions which followed upon their representations against their recall to prison involved a determination of their  
j civil rights and obligations within the meaning of art 6(1) of the convention. In *Aerts v Belgium* (1998) 5 BHRC 382 the applicant had been detained, following his arrest for assault, in the psychiatric wing of a prison prior to his transfer to a social protection centre. He complained of an infringement of his right of access to a court for determination of the lawfulness of his detention because he had been refused legal aid for an appeal from the decision of the court of first instance on points of law to the Court of Cassation. The European Court (at 403 (para 59))

said that the question which was at issue was the lawfulness of the deprivation of liberty and that the right to liberty 'which was thus at stake' was a civil right. a

[78] Mr Fitzgerald QC submitted that it was clear, and established by this decision, that the right to liberty was a civil right within the meaning of art 6(1). He said that the appellants' civil right to liberty was engaged because they were in a state of actual liberty before they were recalled, and because they would have been entitled to sue for false imprisonment if they had not been released after they had completed the relevant proportion of their sentences: see *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 4 All ER 15, [2001] 2 AC 19. b

[79] In my opinion it does not follow from the fact that the right to liberty can be described generally as a civil right that the appellants' civil rights within the meaning of art 6(1) were engaged in this case. The question whether this convention right is engaged, if at all, has to be decided in the light of the proceedings that are in issue and the nature of the dispute. As I said in *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39 at [59], [2002] 4 All ER 593 at [59], [2003] 1 AC 787, it is possible that the proceedings that are in issue will fit neither of the two descriptions of rights in art 6(1)—criminal or civil. Various examples of cases falling outside the reach of art 6 are given in *Clayton and Tomlinson*, para 11.172. Furthermore, as the decision of the European Court in *Pabla Ky v Finland* [2004] ECHR 47221/99, reminds us, the question whether convention rights are infringed is a practical one, not one to be decided in the abstract. In para 29 of that decision the court emphasised that the question is always whether, in a given case, the requirements of the convention are met. The context is all-important. c

[80] This approach is further demonstrated by *Brown v UK* App No 968/04 (26 October 2004, unreported). In that case the applicant complained that his recall to prison was a breach of his rights under arts 5 and 6 of the convention. The European Court said: d

'Even assuming that the right to liberty is a civil right (for example, *Aerts v Belgium* (1998) 5 BHRC 382 at 403 (para 59)), the court notes that this applicant may bring proceedings in the domestic courts to assert the unlawfulness of his detention and claim damages at any time. The fact that the domestic courts might reject such claims, as happened in this case, does not affect the availability of access to court for the purposes of art 6.' e

In *Kerr v UK* App No 44071/98 (7 December 1999, unreported), the applicant complained among other things that he was denied a fair hearing of the revocation and continuance of his licence under art 6(1). The part of that article that was treated by the court as relevant to his case was the criminal part only. No mention was made of the civil part. In *Ganusauskas v Lithuania* App No 47922/99 (7 September 1999, unreported), the applicant alleged that the proceedings whereby he was recalled to prison violated art 6. The court observed that that provision was not applicable in his case 'for the proceedings did not involve the determination of "any criminal charge against him" within the meaning of art 6 of the convention'. Here too no mention was made of the civil part of that article. f

[81] The conclusion which I would draw from the observations which the court made in *Brown v UK*, and from the fact that in neither *Kerr v UK* nor in *Ganusauskas v Lithuania* was a breach of the art 6 civil right even contemplated, is that the art 6 civil right is not infringed by proceedings of the kind that are in issue in this case, so long as the individual has access to the domestic courts to assert g



- a his right to liberty. The proceedings of the Parole Board did not deprive the appellants of that right of access. What the Parole Board was doing was giving effect, in the performance of functions given to it by statute, to the sentences which had previously been imposed by the judge when the appellants were convicted. The sentencing procedure which he conducted satisfied the requirements of art 5(1)(a). When the appellants were recalled to custody the requirements of art 5(4) would have been satisfied by the review of their recall by
- b the Parole Board which, due to its independence from the executive and its impartiality, has the characteristics of a court for the purposes of that article if an oral hearing had been offered to them. None of the elements that were inherent in the sentence from the beginning were being enlarged or altered. I think that it is clear that the appellants were not entitled to invoke the additional protection
- c of the art 6(1) civil right in relation to the proceedings before the Parole Board in these circumstances.

#### HEADINGS AND SIDENOTES: THE PAROLE BOARD RULES 2004

- d [82] One of the issues that arose in *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113, [2004] 1 WLR 3141 was whether the headings to each group of sections and the sidenotes, or marginal notes, to each section were a legitimate aid to the construction of the sections to which they relate: see [31] of the Appellate Committee's report in that case. The conclusion which the Committee reached was that the headings and sidenotes, which are unamendable, are as much part of the contextual scene of the statute as the explanatory notes, which do not form
- e part of the Bill and are not endorsed by Parliament, and ought to be open to consideration as part of the enactment when it reaches the statute book: see [34].

- [83] The observation in [34] in *R v Montila* that these materials are unamendable was an important qualification. It is highlighted by an error in the Parole Board Rules 2004 which was identified in the course of the hearing of the appeal. I wish to add these words of explanation as to what that error was and
- f how it appears to have arisen, in the hope that the pitfall into which the draftsman of these rules fell may be avoided in future cases.

[84] The 2004 rules deal with cases before the Parole Board which fall into the categories identified by r 2(1), which provides:

g 'Subject to rule 24, these Rules apply where a prisoner's case is referred to the Board by the Secretary of State under section 28(6)(a), 28(7) or 32(4) of the [Crime (Sentences) Act 1997], or under section 39(4) or 44A(2) of the [Criminal Justice Act 1991], at any time after the coming into force of these Rules.'

- h Part IV, which is headed 'Proceedings with a hearing' applies to the cases identified by r 14(1), which provides:

j 'This part of the Rules applies in any case where a decision pursuant to rule 11(2)(a) or 13(2)(a) has been made, or where a notice under rule 12(2) or 13(5) has been served, or in any case referred to the board under section 32(4) of the 1997 Act or under section 39(4) or 44A(2) of the 1991 Act.'

[85] Mr Pannick said that the 2004 rules were not intended to confer a right to an oral hearing on determinate sentence prisoners. The Parole Board Rules 1992 had given the right to an oral hearing to discretionary life prisoners, following the decision of the European Court in *Thynne v UK* (1991) 13 EHRR 666. This right was extended to Her Majesty's prison detainees by the Parole Board Rules 1997, following the decision of the European Court in *Hussain v UK* (1996) 22 EHRR 1.

The 2004 rules were intended to extend the right to mandatory life prisoners and to prisoners sentenced to extended sentences: see *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, *R (Sim) v Parole Board* [2003] EWCA Civ 1845, [2004] QB 1288, [2004] 2 WLR 1170. It had not been suggested that it was necessary for short-term and long-term prisoners to be given that right, and it was not the intention to do this when the 2004 rules were brought into effect on 1 August 2004.

[86] The sidenote to s 32 of the 1997 Act is 'Recall of life prisoners while on licence'. The words 'any life prisoner' appeared in each of the subsections of that section when it was originally enacted. It dealt exclusively with life prisoners as defined in s 34(1) of that Act. A new sub-s (5) was substituted by the Criminal Justice Act 2003. It requires the Secretary of State to give effect to a direction by the Parole Board under that section for the immediate release on licence of the life prisoner whose case has been referred to the board under s 32(4). The section still deals with life prisoners only, so the sidenote remains an accurate description of its contents. The reference in r 14(1) to s 32(4) is in keeping with Mr Pannick's explanation of the purpose of the 2004 rules.

[87] The sidenote to s 39 of the 1991 Act is: 'Recall of long-term and life prisoners while on licence.' This was an accurate description of the contents of the 1991 Act when it was enacted. However, as a result of a complex series of repeals and associated savings by the 1997 Act and the Crime and Disorder Act 1998, s 39 no longer deals with life prisoners. It deals with short-term or long-term prisoners who have been released on licence under Pt II of the 1991 Act, as amended. The effect of these amendments has been to change the subject matter of s 39 of the 1991 Act from that which was identified by the sidenote. The reference to s 39(4) in r 14(1) has the effect of extending the benefit of oral hearings to prisoners who are serving determinate sentences. This is contrary to what Mr Pannick said was the intended effect of the 2004 rules.

[88] The explanation for this error is not hard to find. Section 39 of the 1991 Act appears in its amended form in *Halsbury's Statutes* and in the version of it which is available online. But the sidenote to the section is unchanged. This is because of the rule that sidenotes are not capable of being amended by Parliament. The editors of *Halsbury's Statutes* have been careful to point in a footnote that, in view of the amendments, the sidenote is no longer accurate. But the misleading impression that its preservation creates remains. It is enhanced by the fact that in 2001 sidenotes were moved from the side of each section in the Bill when it was introduced and in the Queen's Printers' copy of the enactment. They now appear, with greater emphasis as to their importance, as headings in bold type on the same line as the clause or section number. That is how they also appear in all the unofficial versions of the statutes that are now available.

[89] The 2004 rules may need to be amended to correct the error that has arisen, bearing in mind the effect of your Lordships' decision in this case that the common law right to procedural fairness does not require that determinate sentence prisoners be given the same absolute right to an oral hearing which has been given to prisoners in the other categories. But I suggest that similar misunderstandings could be avoided in the future if a section whose substance has been so changed as to make the sidenote an unreliable guide to its contents were to be repealed and replaced by an entirely new section—which would, of course, be provided, after consultation with parliamentary counsel, with its own appropriate sidenote. Consolidation would, no doubt, be the ideal. But, just as modern methods of updating make this less necessary, so there is a greater need

- a to adapt parliamentary practice and procedures to what these modern methods require if the updated legislation is to be presented in that way with sufficient clarity.

**LORD WALKER OF GESTINGTHORPE.**

- b [90] My Lords, I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with it, and for the reasons given by Lord Bingham I would allow both appeals and make the orders which he proposes.

**LORD CARSWELL.**

- c [91] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, and for the reasons which they have given I would allow the appeals.

*Appeals allowed.*

Kate O'Hanlon Barrister.

## R v Wang

[2005] UKHL 9

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD RODGER OF EARLSFERRY,  
LORD WALKER OF GESTINGTHORPE AND LORD CARSWELL

13 JANUARY, 10 FEBRUARY 2005

*Criminal law – Trial – Direction to jury – Verdict – Direction to return guilty verdict – Offence of having article with blade or point in public place – Defendant relying on defence of good reason for having article – Judge believing jury not able to find any verdict other than guilty and directing guilty verdict – Whether permissible direction – Criminal Justice Act 1988, s 139(1), (4), (5).*

The defendant was waiting at a railway station when his bag was stolen. It was found in the possession of a thief, who tried to deter the defendant from calling the police by suggesting that the bag contained items the defendant should not be carrying. From the bag the defendant produced a sheathed martial arts sword. The police were called, and on a further search of the bag a small Ghurkha style knife was found. In due course the defendant was indicted on two counts of having an article with a blade or point in a public place, contrary to s 139<sup>a</sup> of the Criminal Justice Act 1988. At his trial there was no issue about the defendant's possession of the sword and knife. The defendant testified that he was a Buddhist, and practised Shaolin, a traditional martial art; that Shaolin followers learned to help society and protect people, to which end they relied on Buddhist teaching; and that on the day in question he had taken the sword and knife with him because he did not like to leave them in the place where he was staying, and he liked to stop at remote and uninhabited places to practise Shaolin. At the conclusion of the defence case, and before speeches, the judge sent the jury out and told counsel that he could see no defence. Counsel for the defence made plain his reliance on s 139(4) of the 1988 Act, which provided a defence for a person charged with the offence to prove that he had good reason or lawful authority for having the article with him, and on s 139(5)(b), which provided a defence of religious reasons, and submitted that the defendant had advanced a lawful defence, which should be left to the jury. However, the judge recalled the jury and directed them to return guilty verdicts on each count. The defendant appealed. The Court of Appeal accepted a distinction between cases in which it was said that, on the evidence, an issue in respect of which the burden of proof lay on the prosecution could only rationally be decided against the defendant, and cases in which it was said that the defendant had failed to discharge an evidential burden lying on him, and dismissed the appeal. The defendant appealed to the House of Lords. The Crown contended that a direction to return a guilty verdict could be made in circumstances where the burden of raising a defence rested on the defendant, and he had failed to discharge the burden upon him, or when the facts were agreed at trial, there was nothing calling for adjudication, and there was no basis on which the defendant could properly avoid conviction on the uncontested facts.

<sup>a</sup> Section 139, so far as material, is set out at [6], below



- a** **Held** – There were no circumstances in which a judge was entitled to direct a jury to return a verdict of guilty. There was no distinction to be drawn between cases in which a burden lay on the defence and those in which the burden lay solely on the Crown. No matter how inescapable a judge might consider a conclusion to be, in the sense that any other conclusion would be perverse, it remained his duty to leave the decision to the jury and not to dictate what that verdict should be.
- b** Had the judge in the instant case left the case to the jury and directed them in the ordinary way, it seemed very likely that they would have convicted. But belief that the jury would probably, and rightly, have convicted did not entitle the conviction to be considered as other than unsafe when there were matters which could and should have been the subject of the jury's consideration. Accordingly, the appeal would be allowed (see [13], [16]–[18], below).
- c** *DPP v Stonehouse* [1977] 2 All ER 909 applied.

### Notes

For the trial judge's summing up, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1014, and for having article with blade or point in public place, see 11(1)

- d** *Halsbury's Laws* (4th edn reissue) para 168.

For the Criminal Justice Act 1988, s 139, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1008.

### Cases referred to in opinions

- e** *Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763, [1962] 3 WLR 694, HL.  
*DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55, [1977] 3 WLR 143, HL.  
*Joshua v R* [1955] 1 All ER 22, [1955] AC 121, [1955] 2 WLR 8, PC.  
*R v Beeby* (1911) 6 Cr App R 138, CCA.  
*R v Bown* [2003] EWCA Crim 1989, [2004] 1 Cr App R 151.
- f** *R v Challinor* (1984) 80 Cr App R 253, CA.  
*R v Cook* (1963) 48 Cr App R 98, CCA.  
*R v Draper* [1962] Crim LR 107, CA.  
*R v Eastwood* [1961] Crim LR 414, CA.  
*R v Ferguson* (1970) 54 Cr App R 415, CA.  
*R v Gent* [1990] 1 All ER 364, CA.
- g** *R v Gordon (Note)* (1987) 92 Cr App R 50, CA.  
*R v Guttridge* [1973] RTR 135, CA.  
*R v Hall, R v Hill* (1988) 89 Cr App R 74, CA.  
*R v Healey, R v Comerford, R v Owens, R v Smith* [1965] 1 All ER 365, [1965] 1 WLR 1059, CCA.
- h** *R v Hendrick* (1921) 15 Cr App R 149, CCA.  
*R v Kelleher* [2003] EWCA Crim 3525, [2003] All ER (D) 296 (Nov).  
*R v Kelly* [1970] 2 All ER 198, [1970] 1 WLR 1050, CA.  
*R v Larkin* [1943] 1 All ER 217, [1943] KB 174, CCA.  
*R v Morris* [1972] 1 All ER 384, [1972] 1 WLR 228, CA.
- j** *R v Pico* [1971] RTR 500, CA.  
*R v Thompson* [1984] 3 All ER 565, [1984] 1 WLR 962, CA.  
*R v Vickers* [1975] 2 All ER 945, [1975] 1 WLR 811, CA.  
*R v Waters* (1963) 47 Cr App R 149, CCA.  
*R v West* (1910) 4 Cr App R 179, CCA.  
*Woolmington v DPP* [1935] AC 462, [1935] All ER Rep 1, HL.

**Cases referred to in list of authorities**

*Bushell's Case* (1670) 1 Mod Rep 119, 86 ER 777. a

*DPP v Bayer* [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856, DC.

*DPP v Gregson* (1993) 96 Cr App R 240, DC.

*Haughton v Smith* [1973] 3 All ER 1109, [1975] AC 476, [1974] 2 WLR 1, HL.

*Horning v District of Columbia* (1920) 254 US 135, US SC.

*King v Shipley* (1784) 4 Dougl 73, 99 ER 774. b

*Mears v R* [1993] 1 WLR 818, PC.

*Pinner v Everett* [1969] 3 All ER 257, [1969] 1 WLR 1266, HL.

*R v Belgrave* [1995] Crim LR 326, CA.

*R v Davis and other appeals* [1993] 2 All ER 643, [1993] 1 WLR 613, CA.

*R v Deegan* [1998] 2 Cr App R 121, CA.

*R v Frampton* (1917) 12 Cr App R 202, CCA. c

*R v Galbraith* [1981] 2 All ER 1060, [1981] 1 WLR 1039, CA.

*R v Giles* [2003] EWCA Crim 1287, [2003] All ER (D) (Feb).

*R v Heyes* [1950] 2 All ER 587, [1951] 1 KB 29, CCA.

*R v Manning* [1998] Crim LR 198, CA.

*R v Martin* (1972) 57 Cr App R 279, CA. d

*R v Winn-Pope* [1996] Crim LR 521, CA.

*R v Wright* [1992] Crim LR 596, CA.

*Stirland v DPP* [1944] 2 All ER 13, [1944] AC 315, HL.

**Appeal**

Cheong Wang appealed, with leave of the House of Lords Appeal Committee given on 5 May 2004, from the decision of the Court of Appeal (Laws LJ, Curtis J and the Recorder of Cardiff) on 10 December 2003 ([2003] EWCA Crim 3228, (2004) 168 JP 224) dismissing his appeal against his conviction in the Chelmsford Crown Court on 28 August 2002 after a trial before Judge Pearson and a jury on two counts of the offence of being in possession of an article with a blade or point contrary to s 139(1) of the Criminal Justice Act 1988. The Court of Appeal certified the point of law of general public importance set out at [2], below. The facts are set out in the report. e  
f

*Karim Khalil QC and Andrew Shaw* (instructed by *THB Solicitors*, Chelmsford) for the appellant. g

*David Perry and Annabel Darlow* (instructed by the *Crown Prosecution Service*) for the Crown.

Their Lordships took time for consideration. h

10 February 2005. The **APPELLATE COMMITTEE** delivered the following report.

[1] This is the considered opinion of the Committee.

[2] The question of law of general public importance certified by the Court of Appeal to be involved in its decision in this case is: 'In what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty?' (See [2003] EWCA Crim 3228, (2004) 168 JP 224.) For the appellant it is contended that the judge may never do so in any circumstances. The Crown contests that view, while acknowledging that the circumstances in which such a direction may be given are rare and exceptional. Such j

a circumstances, it is said, exist where the burden of raising a defence rests on the defendant, and he has failed to discharge the burden upon him; or when the facts are agreed at trial, there is nothing calling for adjudication and there is no basis on which the defendant can properly avoid conviction on the uncontested facts.

b [3] Behind this clear but narrow issue dividing the parties lies an area of common ground which it may be helpful to identify, to obviate any possibility of misunderstanding. It is common ground that if a judge is satisfied that there is no evidence which could justify the jury in convicting the defendant and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit (see *DPP v Stonehouse* [1977] 2 All ER 909 at 919, 927–928, 940, [1978] AC 55 at 70, 79–80, 94; Devlin, Hamlyn Lectures, *Trial* c *by Jury* (8th series, 1956) p 78). It is agreed that a judge should withdraw a defence from the consideration of the jury if there is no evidence whatever to support it, and he need not direct the jury on an issue not raised by any evidence. The appellant accepts that in a case where, on applying the law as expounded by the judge to facts which have been agreed or not disputed at d trial, the only reasonable course is to convict, the judge may comment in stronger terms than would otherwise be permissible. But even in such a case the appellant submits that the judge may not direct the jury to convict; the Crown submits that he may in the limited circumstances identified above.

e THE FACTS

[4] The appellant was waiting for a train at Clacton-on-Sea railway station on 27 February 2002 when his bag was stolen. A search was made and the bag f found in the possession of a thief who tried to deter the appellant from calling the police by suggesting that the bag contained items the appellant should not be carrying. From the bag the appellant produced a curved martial arts sword, in its sheath. The police were called and on a further search of the bag a small Ghurkha style knife was found. In due course the appellant was indicted on two counts of having an article with a blade or point in a public place, contrary to s 139(1) of the Criminal Justice Act 1988, one count relating to the sword, the other to the knife.

g [5] The appellant was tried in the Crown Court at Chelmsford before Judge Pearson and a jury. There was no issue about the appellant's possession of the two articles on the day in question. But he testified that he was a Buddhist and that he practised Shaolin, a traditional martial art. Those who practised Shaolin were Buddhists and were called Shaolin followers. To learn h Shaolin, one was instructed how to behave and keep the spirit. It was necessary to have a good personality. Shaolin followers learned to help society and protect people, to which end they relied on Buddhist teaching, especially love without denominations or limitations. The sword was one of j eighteen weapons in which a Shaolin follower must become expert, and the knife was a 'willow leaf knife' the use of which depended on high skill. One who excelled would become the teacher of all followers in the future. To practise Shaolin was not to worship Buddha but to keep the spirit of the people. On the day in question he had been on his way to see his solicitor. He had taken the sword and knife with him because he did not like to leave them in the place where he was staying in Clacton, and he liked to stop at remote and uninhabited places to practise Shaolin.

[6] At the conclusion of the defence case, and before speeches, the judge sent the jury out and said to counsel that he could see no defence to these two counts. Mr Shaw, for the appellant, made plain his reliance on s 139(4) and (5)(b) of the 1988 Act, which provide:

‘(4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason ... for having the article with him in a public place.

(5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him—... (b) for religious reasons ...’

Mr Shaw submitted that the appellant had advanced a lawful defence, which should be left to the jury. Miss Davey, prosecuting, referred to ‘some hesitancy where one is, effectively, withdrawing a defence from the jury’, but acquiesced in the judge’s view that the jury should not, properly directed, find there was ‘any conceivable reasonable excuse’. The jury were then recalled, the judge told them that he would direct them to return guilty verdicts on both counts and he explained his reasons for doing so. He concluded:

‘As a matter of law, however, the offences themselves are proved and, under those circumstances, I direct that you return guilty verdicts on each of the two counts on this indictment.’

The following colloquy then took place:

*The clerk of the court:* Madam, will you, please, answer “guilty” to both of my questions? Members of the jury, you are agreed upon your verdicts. On his Honour’s direction, do you find the defendant Cheong Wang guilty on count 1 of charging him with having an article with a blade or point?

*The foreman of the jury:* Guilty.

*The clerk of the court:* On count 2, do you find the defendant guilty of having an article with a blade or point?

*The foreman of the jury:* Guilty.

*The clerk of the court:* Those are the verdicts of you all?

*The foreman of the jury:* Yes.’

The appellant was conditionally discharged for twelve months and forfeiture orders were made.

[7] The appellant appealed to the Court of Appeal (Laws LJ, Curtis J and the Recorder of Cardiff; [2003] EWCA Crim 3228, (2004) 168 JP 224), which accepted (at [8]) a distinction between (a) cases in which it ‘is said that on the evidence an issue as respects which the burden of proof lies on the prosecution could only rationally be decided against the defendant’ and (b) cases in which it is said that the defendant had failed to discharge an evidential burden lying on him. Reference was made to *R v Bown* [2003] EWCA Crim 1989, [2004] 1 Cr App R 151, as an example of a recent case in the second class, in which the Court of Appeal had upheld a direction to convict. In rejecting the appellant’s appeal the Court of Appeal said:

‘[12] After careful consideration we have come to the conclusion that on this material the Judge was justified in directing the jury to convict.



a The appellant's evidence was not capable of discharging the burden, which lay on him, of showing that he had the weapons with him for good reason (s.139(4), or for religious reasons (s.139(5)(b)). It is very far from clear that he had any settled intention to practise with them on the day in question; even if he did, there was on his own evidence no religious requirement that he do so, and in any event that was plainly not the predominant or only reason for his possessing them that day; the fact that b "there was no one at home to look after [them]" cannot, in our judgment, be a good reason for taking these weapons into public places. To borrow the words of Keene LJ in *Bown*: "[t]here was simply insufficient evidence to establish the defence to the degree of particularity which was requisite".

c [13] The facts here are unusual. Nothing we have said is intended to encourage trial Judges to direct convictions, even where the material issue is one on which the defendant carries the burden, unless it is plain beyond sensible argument that the material before the jury could not in law suffice to discharge the burden.'

d THE LAW

[8] Although a considerable volume of historical material was placed before the House on the hearing of this appeal, Mr David Perry, for the Crown, invited us to focus our attention on the criminal jury in its modern setting. This is an invitation we accept. The conduct of criminal trials has e been profoundly changed by according the defendant the right to testify, by establishing a criminal appellate court and by extending access to free legal representation. Little help is therefore gained from pre-twentieth century authority. But over the last century or so the conduct of a trial on indictment has been much as it is today. Thus the trial is by judge and jury working f together, although, as judges routinely explain, their functions are different. The judge directs, or instructs, the jury on the law relevant to the counts in the indictment, and makes clear that the jury must accept and follow his legal rulings. But he also directs the jury that the decision of all factual questions, including the application of the law as expounded to the facts as they find them to be, is a matter for them alone. And he makes plain that, whatever g views he may express or be thought to express, it is for them and not for him to decide whether, on each count in the indictment, the defendant is guilty or not guilty. It is, as Sir Patrick Devlin pointed out in his celebrated Hamlyn Lectures, *Trial by Jury* (1956), App II, p 194, a very unusual relationship:

h 'There is a fundamental difference between juries and other fact-finding bodies. The function of all other fact-finding bodies is to find the facts so that the judge can apply the law to them. This form of process enables the judge to reject as a matter of law a finding of fact that he considers to be unreasonable. If, for example, the primary facts proved permit as the only reasonable inference a judgment that the accused is driving a motor-car dangerously, the High Court would direct a bench of j magistrates to convict. So where statute creates one jurisdiction for finding the facts and another for the law, as under the Income Tax Acts, the court will set aside a finding apparently based on a view of the facts that could not reasonably be entertained; it will proceed on the assumption that the error was due to a misconception of the law. In trial by jury the process is the other way about. The jury does not tell the

judge the facts so that he can apply the law to them; the judge tells the jury the law so that they can apply it to the facts. The responsibility for its correct application is laid upon the jury and not upon the judge. If a judge wants to apply the law himself, the only way he can do it is by asking for a special verdict.'

[9] *Woolmington v DPP* [1935] AC 462, [1935] All ER Rep 1 is of course remembered above all for the affirmation by Lord Sankey LC of the onus lying on the prosecution to prove the defendant's guilt where issues of accident or provocation arise. But in reaching that conclusion he held ([1935] AC 462 at 480, [1935] All ER Rep 1 at 7) in terms with which the other members of the House agreed:

'If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law.'

Lord Oaksey, giving the judgment of the Privy Council in *Joshua v R* [1955] 1 All ER 22 at 25, [1955] AC 121 at 129–130, spoke to similar effect:

'On the second question, their Lordships are of opinion that it was for the judge to direct the jury as to the elements of the crime of effecting a public mischief (assuming that such a crime exists) and to direct them on the facts if he thought there was evidence to go to the jury, and it was for the jury to find whether the appellant was guilty on those facts. It was a misdirection to tell the jury as a matter of law that they must convict the appellant if they found he had spoken the words alleged. To do so was, in their Lordships' opinion, to usurp the function of the jury ... It is a general principle of British law that on a trial by jury, it is for the judge to direct the jury on the law and, in so far as he thinks necessary, on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.'

[10] The House had occasion to consider this topic in more detail in *Chandler v DPP* [1962] 3 All ER 142, [1964] AC 763, which arose from a prosecution under the Official Secrets Act 1911 in which the trial judge had refused to allow cross-examination and evidence concerning the appellants' beliefs. The Attorney General submitted ([1964] AC 763 at 783) that since the appellants' purpose had been to immobilise an airfield, which was a prohibited place, the judge should direct the jury to return a verdict of guilty and that any other verdict would be perverse. No member of the House acceded to that submission. Lord Reid ([1962] 3 All ER 142 at 147, [1964] AC 763 at 792) and Lord Radcliffe ([1962] 3 All ER 142 149–150, [1964] AC 763 at 796) favoured a direction that if the jury were satisfied that the elements of the offence had been established, then they should convict. Lord Devlin was more expansive:

'It is said that the jury could return only one answer to the question in this case. I must confess that I find it difficult to see how a sensible jury could have acquitted ... But I do not reach such a conclusion as a matter

a of law and I cannot accept that the judge is entitled to direct the jury how to answer a question of fact, however obvious he may believe the answer to be and although he may be satisfied that any other answer would be perverse. The Attorney General submitted that, while it is a question of fact for the jury whether the entry was for a purpose prejudicial, once it was proved that the purpose was to interfere with a prohibited place and  
b to prevent its operating, then a judge should be entitled to direct a jury to return a verdict of guilty. With great respect I think that to be an unconstitutional doctrine. It is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal ... A judge may of course give his opinion to the jury on a question of fact and express it as strongly as the circumstances permit, so long as he gives it as advice and not as direction. The trial judge indicated a fairly strong opinion in the present case, particularly at the end of his summing-up, when he hinted to the jury that there was only one verdict that they could in conscience return. But this was not improper, for even in relation to the limited facts which he left for their  
c consideration, he told them clearly several times that the question was for them to answer.' (See [1962] 3 All ER 142 at 154, [1964] AC 763 at 803-804.)

[11] The most extended treatment of this topic by the House is found in *DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55, in which the appellant  
e challenged his conviction on five counts of attempted obtaining by deception on the ground, among others, of judicial misdirection. The direction complained of was to the effect that:

'There is an attempt by the accused within the legal meaning of that word "attempt" if you are satisfied that the matters I have stated to you are proved.' (See [1977] 2 All ER 909 at 920, 927, 934, [1978] AC 55 at 72, 79, 87.)

A minority of the House upheld that direction. Lord Diplock ([1977] 2 All ER 909 at 919, [1978] AC 55 at 70) equated the judge's power to direct a conviction with his power to direct an acquittal, regarding the contrary view  
g as cynical and inconsistent with the proviso in s 2(1) of the Criminal Appeal Act 1968 as it then stood. But it would be very rare for such a direction to be permissible where the issue was one of proximity when an attempt was charged. Viscount Dilhorne also held ([1977] 2 All ER 909 at 920-923, [1978] AC 55 at 72-74) that the judge had not erred. He acknowledged that the effect of the direction, if the jury found the facts proved, was not that those  
h facts could constitute an attempt, but that they would. The direction was proper because, if those facts were found to be proved, there was no room for more than one conclusion and any other conclusion would be perverse. But such a direction would only be permissible in exceptional cases.

[12] The majority of the House took a different view. Lord Salmon, having  
j quoted the direction complained of, continued:

'The criticism of that passage was that the judge should have explained to the jury the legal meaning of an attempt and directed them that if they were satisfied beyond a reasonable doubt that the facts proved established the attempt charged, then they should find the accused guilty, otherwise they should acquit him. I agree with that criticism. So

did counsel for the Crown who conceded that there had been the technical misdirection of which counsel for the appellant had complained. The learned judge conducted this trial lasting 70 days with outstanding ability and patience. The direction complained of came towards the end of a most fair, accurate and lucid summing-up. It concerned a matter which was as plain as a pikestaff. No reasonable jury could have failed to find that the facts proved clearly established the attempt charged and convicted the appellant accordingly. It has never been suggested that when the appellant faked his death, he may not even have been giving his wife a thought and did what he did do solely to escape from being arrested and charged with the 13 other counts to which he had no defence and of which he was convicted. Anyone in the judge's position might easily have made the slip which he did of not leaving the jury to decide whether the facts proved amounted to the attempt charged. However obvious it may be that they did and that the accused was guilty, technically, the judge should still have left it to the jury to decide whether or not the evidence established the attempt charged and to have found him guilty or not guilty accordingly. The technical slip on the part of the judge certainly made no difference to the result of the trial. There is no possibility that any reasonable jury could have had the slightest doubt that the facts proved did establish the attempt charged and accordingly would certainly have brought in a verdict of guilty. I am completely satisfied that no miscarriage of justice could have resulted from what technically was a misdirection and that therefore the proviso to s 2(1) of the Criminal Appeal Act 1968 should be applied. With the greatest respect to my noble and learned friends, Lord Diplock and Viscount Dilhorne, and the Court of Appeal, I am afraid that I cannot agree with their views on this aspect of the case. Whilst there is no doubt that if a judge is satisfied that there is no evidence before the jury which could justify them in convicting the accused and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit. This rule, which has long been established, is to protect the accused against being wrongly convicted. But there is no converse rule, although there may be some who think that there should be. If the judge is satisfied that, on the evidence, the jury would not be justified in acquitting the accused and indeed that it would be perverse of them to do so, he has no power to pre-empt the jury's verdict by directing them to convict. The jury alone have the right to decide that the accused is guilty. In an appropriate case (and this was certainly such a case) the judge may sum up in such a way as to make it plain that he considers that the accused is guilty and should be convicted. I doubt however whether the most effective way of doing so would be for the judge to tell the jury that it would be perverse for them to acquit. Such a course might well be counter-productive.' (See [1977] 2 All ER 909 at 927-928, [1978] AC 55 at 79-80.)

Lord Edmund-Davies was of the same mind:

'Eveleigh J approached this part of his very onerous task as if he were interpreting a statute containing the word "attempt" and regarded himself as entitled to direct the jury that, as a matter of pure law, the acts itemised (if proved) *did* constitute the "actus reus". But just as it was for



a the jury and not the judge to decide whether the necessary mens rea had been established, so also it was for them to decide whether the proved acts of the accused were such as to constitute an attempt to commit the full offence of obtaining by deception ...' (See [1977] 2 All ER 909 at 934, [1978] AC 55 at 87–88.)

b Lord Edmund-Davies considered—

the erroneous direction in the instant case [to be] but one example of a prevalent (though fortunately not universal) tendency in our courts in these days to withdraw from the jury issues which are solely theirs to determine.'

c Lord Keith of Kinkel was the third member of the majority and said:

d 'In the second place it was argued that the trial judge misdirected the jury in respect that he failed to leave it to them to decide whether in their view the appellant's acts were sufficiently proximate to constitute an attempt or were merely preparatory. The learned trial judge did indeed direct the jury that if they were satisfied that the appellant falsely staged his death by drowning, dishonestly intending that a claim should be made and the policy moneys obtained in due course, then in law there had been an attempt to commit the offence. I am of opinion that it should properly have been left to the jury to say whether what the appellant did amounted to an attempt, and indeed this was accepted by e counsel for the [Crown]. It is the function of the presiding judge at a trial to direct the jury upon the relevant rules of law. This includes the duty, if the judge takes the view that the evidence led, if accepted, cannot in law amount to proof of the crime charged, of directing the jury that they must acquit. It is the function of the jury, on the other hand, not only to f find the facts and to draw inferences from the facts, but in modern practice also to apply the law, as they are directed on it, to the facts as they find them to be. I regard this division of function as being of fundamental importance, and I should regret very much any tendency on the part of presiding judges to direct juries that, if they find certain facts to have been established, they must necessarily convict. A lawyer may g think that the result of applying the law correctly to a certain factual situation is perfectly clear, but nevertheless the evidence may give rise to nuances which he has not observed, but which are apparent to the collective mind of a lay jury. It may be suggested that a direction to h convict would only be given in exceptional circumstances, but that involves the existence of a discretion to decide whether such circumstances exist, and with it the possibility that the discretion may be wrongly exercised. Thus the field for appeals against conviction would be widened. The nicer and sounder course, in my opinion, is to adhere to the principle that, in every case where a jury may be entitled to j convict, the application of the law to the facts is a matter for the jury and not for the judge. I see no reason to doubt that the good sense and responsible outlook of juries will enable them to perform this task successfully.' (See [1977] 2 All ER 909 at 940–941, [1978] AC 55 at 94.)

[13] Certain important points must be made on the majority opinions in *DPP v Stonehouse*. First, they are plainly authority for what they decide,

binding on lower courts and on the House itself unless and until departed from. Secondly, while they are consistent with previous authority in the House and the Privy Council, and with some previous Court of Criminal Appeal and Court of Appeal authority such as *R v West* (1910) 4 Cr App R 179; *R v Beeby* (1911) 6 Cr App R 138; *R v Hendrick* (1921) 15 Cr App R 149; *R v Waters* *R v Waters* (1963) 47 Cr App R 149; *R v Cook* (1963) 48 Cr App R 98; *R v Guttridge* [1973] RTR 135 and *R v Vickers* [1975] 2 All ER 945, [1975] 1 WLR 811, they are not easily reconcilable with such earlier decisions as *R v Larkin* [1943] 1 All ER 217, [1943] KB 174; *R v Eastwood* [1961] Crim LR 414; *R v Draper* [1962] Crim LR 107; *R v Healey*, *R v Comerford*, *R v Owens*, *R v Smith* [1965] 1 All ER 365, [1965] 1 WLR 1059; *R v Kelly* [1970] 2 All ER 198, [1970] 1 WLR 1050; *R v Ferguson* (1970) 54 Cr App R 415; *R v Pico* [1971] RTR 500 and *R v Morris* [1972] 1 All ER 384, [1972] 1 WLR 228. To the extent that these last cases are irreconcilable with the majority opinions in *DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55 they are no longer to be regarded as authoritative. Thirdly, the majority opinions give no support to the distinction drawn by the Court of Appeal in the present case between cases in which a burden lies on the defence and those in which the burden lies solely on the Crown. That distinction is indeed inconsistent with the rationale of the majority opinions, which is that no matter how inescapable a judge may consider a conclusion to be, in the sense that any other conclusion would be perverse, it remains his duty to leave the decision to the jury and not to dictate (to use the language of *R v Hendrick* (1921) 15 Cr App R 149 at 155) what that verdict should be. Fourthly, the majority opinions reject the argument of Lord Diplock based on the proviso to s 2(1) of the 1968 Act as enacted, before amendment by the Criminal Appeal Act 1995. In his essay *The Judge and the Jury* (*The Judge* (1981) 117 at 142), Lord Devlin convincingly explained why application of the proviso is not inconsistent with denial of a power or duty to direct conviction:

'Looked at in this way, it does not at all follow that the propriety of a summing-up is to be tested in the same way as the application of the proviso. The latter, as I have said, necessarily involves some invasion of the jury's province. When the necessity is lacking, there can be no justification for the invasion. If a point depends upon the decision of a particular tribunal and the tribunal is still open, it must be better, however obvious the answer is thought to be, to get the tribunal itself to give it. It is only when the tribunal is closed, when the jury that decided the case is *functus officio*, and there is no way of getting another one, that the judges are forced themselves to determine what a jury might think.'

[14] The majority opinions of the House in *DPP v Stonehouse* have been faithfully followed in such later decisions as *R v Thompson* [1984] 3 All ER 565, [1984] 1 WLR 962, *R v Challinor* (1984) 80 Cr App R 253, *R v Gordon* (*Note*) (1987) 92 Cr App R 50, *R v Gent* [1990] 1 All ER 364; and *R v Kelleher* [2003] EWCA Crim 3525, [2003] All ER (D) 296 (Nov), the last of these cases being heard and decided by the Court of Appeal very shortly before the judgment now under appeal and containing, in the judgment of Mantell LJ, a very lucid and accurate exposition of the law. *R v Hall*, *R v Hill* (1988) 89 Cr App R 74 is not easy to reconcile with the majority opinions. If in those cases there was in truth no evidence of lawful excuse which the jury could be asked to consider, the trial judges were entitled to withdraw that issue from the jury. But the relevant conclusion appears to have been (at 77)—

a 'that the causative relationship between the acts which [the defendant] intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively.'

b Like the issue of proximity in *DPP v Stonehouse*, this was a question to be left to the jury, however predictable the outcome might reasonably be thought to be. In any event, the juries should not have been directed to convict, as they evidently were (see (1988) 89 Cr App R 74 at 81).

[15] In contending for the limited exceptions specified in [2], above, Mr Perry was able to rely on the powerful support of Auld LJ (*Review of the Criminal Courts of England and Wales* (2001) pp 173–176 (paras 99–108)), and on a formidable body of academic literature including Professor Glanville Williams *The Proof of Guilt* (3rd edn, 1963) pp 261–262, Professor Griev c *Directions to Convict* [1972] Crim LR 204 and *Summing up the Law* [1989] Crim LR 768 and Professor McConville *Directions to Convict—A Reply* [1973] Crim LR 164. He drew attention to the question posed by Professor Glanville d Williams (p 262): 'If we really wish juries to give untrue verdicts, why do we require them to be sworn?' Mr Perry advanced a number of reasons why the power of juries to return untrue or perverse verdicts of not guilty should be constrained to the limited extent which he contended for. This, he said, involved no objectionable erosion of the jury's role. It would not undermine public confidence in the jury, but would instead enhance it, by eliminating e the risk of obviously unjust acquittals where the victim of the crime was for any reason the subject of public hostility, perhaps on grounds of race, ethnic origin, religion or sexual propensity. Denial of the right to direct conviction might, indeed, encourage prosecutors to frame charges not offering the option of jury trial, or encourage the legislature to provide that new offences f should be triable only summarily for fear that juries might not convict. It was for Parliament to enact the law, and not for juries to resist the enforcement of laws duly enacted. There was no need to provide a safeguard against judicial tyranny.

[16] The answer to Professor Glanville Williams' question is of course that we wish juries to give true and not untrue verdicts, and that is why we require g them to be sworn. It is obviously true, as Professor Glanville Williams went on to point out, that in some countries a jury system has proved to be inoperable. But in England and Wales it has been possible to assume, in the light of experience and with a large measure of confidence, that jurors will almost invariably approach their important task with a degree of conscientiousness h commensurate with what is at stake and a ready willingness to do their best to follow the trial judge's directions. If there were to be a significant problem, no doubt the role of the jury would call for legislative scrutiny. As it is, however, the acquittals of such high profile defendants as *Ponting*, *Randle* and *Pottle* (see *R v Ponting* [1985] Crim LR 318 and *R v Central Criminal Court, ex p j Randle and Pottle* [1992] 1 All ER 370, [1991] 1 WLR 1087) have been quite as much welcomed as resented by the public, which over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges. That the last word should rest with the jury remains, as Sir Patrick Devlin, writing in 1956, said (*Hamlyn Lectures, Trial by Jury* (8th series) pp 160, 162)—

'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement ... The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average member of Parliament or of the average jurymen. I know of no other real checks that exist to-day upon the power of the executive.'

Mr Perry did not invite the House to depart from its decision in *DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55. In our opinion it covers this case. We are not persuaded by the policy considerations advanced by Mr Perry that that decision should be revised.

[17] Had the learned judge left the present case to the jury and directed them in the ordinary way, it seems very likely that they would have convicted. There could then have been no effective appeal. As it is, the Court of Appeal's judgment highlights the dangers of judicial intervention. It may well have been 'very far from clear' what the appellant's intentions were. The nature and extent of the appellant's religious motivation had been the subject of evidence. The appellant's evidence of not wanting to leave the weapons at home with no one to look after them may well have given rise to nuances (to adopt the language of Lord Keith of Kinkel in *DPP v Stonehouse*) not recognised by the judicial mind. These were pre-eminently matters for evaluation by the jury. Belief that the jury would probably, and rightly, have convicted does not in our judgment entitle us to consider this conviction to be other than unsafe when there were matters which could and should have been the subject of their consideration.

[18] We would accordingly allow the appeal, quash the appellant's conviction and answer the certified question by saying that there are no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty.

*Appeal allowed.*

Kate O'Hanlon Barrister.



a **Hanoman v Southwark London Borough Council**

[2004] EWHC 2039 (Ch)

b CHANCERY DIVISION

PETER SMITH J

22 JUNE 2004

*Housing – Local authority houses – Tenant’s right to buy – Tenant claiming right to buy – Local authority imposing time limit for provision of further information by tenant – Tenant failing to comply – Local authority treating tenant’s application as withdrawn without further notice to tenant – Whether breach of statutory duty – Housing Act 1985, s 124.*

d In November 1999 the defendant local housing authority, as landlord, received a notice from the claimant tenant claiming to exercise his right to buy under the Housing Act 1985. Under s 124<sup>a</sup> of the 1985 Act the authority was required, unless the notice was withdrawn, to serve on the tenant within a specified period a written notice either admitting his right, or denying it and stating the reasons why, in the opinion of the authority, the tenant did not have the right to buy. The specified period applicable was four weeks. The authority considered that the signature on the notice did not correspond with the signature on the tenant’s original tenancy agreement in 1984 and in mid-January 2000 wrote to the tenant asking him to attend their offices for identification purposes, bringing with him two forms of identification from a list of specified documents. The tenant contacted the authority, explaining that he had none of the specified documents and suggesting that confirmation of his identity could be obtained from housing officers. The authority’s response was that it needed documentary evidence. The tenant was told that someone from the authority would get back to him. The next month the authority wrote to the tenant giving him seven days to provide identity documentation. The tenant never received the letter. The authority treated his application as withdrawn. It did not communicate that decision to the tenant. Some two years later the tenant sought relief against the authority’s decision. The county court judge held, inter alia, that the tenant’s inactivity had amounted to withdrawal of his application. The tenant appealed.

g **Held** – A landlord had a continuing duty under s 124 of the 1985 Act to serve a written notice on the tenant admitting or denying his right to buy. There was no duty on the tenant to do anything other than wait for the landlord’s decision. In the instant case the local housing authority had had no power to treat the application to exercise the right to buy as withdrawn because the tenant had failed to provide information requested by the authority in relation to his entitlement within a short period of time under a unilaterally imposed deadline. The authority had been in breach of its duty before it had contacted the tenant regarding his application; it had not sought to consensually defer its decision and absent such deferral there was no statutory power whereby that

a Section 124, so far as material, is set out at [13], below

decision could be deferred. Accordingly, the appeal would be allowed (see [10], [11], [17], [19], [21], [45], [47], [49], [64], below). a

*Sutton London BC v Swann* (1985) 18 HLR 140 and *Kensington and Chelsea Royal London Borough v Hislop* [2004] 1 All ER 1036 considered.

### Notes

For landlord's notice admitting or denying right to buy, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1651. b

For the Housing Act 1985, s 124, see 21 *Halsbury's Statutes* (4th edn) (1997 reissue) 157.

### Cases referred to in judgment

*Armia Ltd v Daejan Developments Ltd* 1979 SC (HL) 56, HL. c

*Dance v Welwyn Hatfield DC* [1990] 3 All ER 572, [1990] 1 WLR 1097, CA.

*Enfield London BC v McKeon* [1986] 2 All ER 730, [1986] 1 WLR 1007, CA.

*Graham v Northern Joint Police Board* 2000 SLT (Lands Tr) 7, Lands Tr (Scot).

*Kensington and Chelsea Royal London Borough v Hislop* [2003] EWHC 2944 (Ch), [2004] 1 All ER 1036. d

*Lousada & Co Ltd v JE Lesser (Properties) Ltd* 1990 SC 178, Ct of Sess.

*Muir Group Housing Association Ltd v Thornley* (1992) 91 LGR 1, CA.

*Peyman v Lanjani* [1984] 3 All ER 703, [1985] Ch 457, [1985] 2 WLR 154, CA.

*Sutton London BC v Swann* (1985) 18 HLR 140, CA.

*Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204, CA. e

### Appeal

The claimant, Mr Hanoman, appealed with permission of Lindley J, from the decision of Judge Cowell at the Central London County Court on 5 June 2003 dismissing his claim for relief against the decision of the respondent defendant, the London Borough of Southwark, that his notice to exercise his right to buy under Pt V of the Housing Act 1985 dated 31 October 1999 had been withdrawn. The facts are set out in the judgment. f

The appellant appeared in person.

*Donald Broatch* (instructed by *Deborah Holmes*) for the respondents. g

### PETER SMITH J.

[1] This is an appeal against the decision of Judge Cowell sitting in the Central London County Court on 5 June 2003. The case had been transferred from Lambeth County Court. The appellant had brought proceedings under the right to buy provisions of Pt V of the Housing Act 1985 against the respondents, London Borough of Southwark. He had been seeking relief against the respondents' decision that his application under Pt V had been withdrawn. There were ancillary claims for damages against the respondents for breach of the provisions of Pt V but they had been struck out. The judge dismissed the claim and refused the appellant permission to appeal. Subsequently Lindley J granted the appellant permission to appeal. h j

[2] I should say something about the factual summary. On 14 November 1999, the respondents received a right to buy form. The form was signed by the person claiming the right to buy and the appellant contends that it is his signature. It is a statutory right to buy in respect of 83 Northfield House, Eckham Park Road, London SE15, 'the premises' in the rest of this judgment.

a [3] On 17 January 2000 the respondents wrote to the appellant asking him to attend for the purpose of identification and to bring two items of identification from a list of documents. He telephoned on 18 January, spoke to a Mrs Ward, and said that he did not have any of the documents and raised the possibility of obtaining confirmation as to his identity from housing officers. The issue that had concerned the respondents was that when  
b comparison was made to the signature on the notice of application, it was considered that the signature did not look like the signature on the original tenancy agreement of 16 March 1984. The respondents were therefore concerned as to whether or not the applicant was truly the secure tenant under the original tenancy agreement. If he was not then two things arose consequentially. First, the appellant would have no right to buy under the  
c right to buy regime because that is only available to secure tenants and, second, in effect, he would be attempting to obtain a property right by some kind of deception.

[4] There was no handwriting expert afforded to the respondents at the trial nor was the signature put in issue at the trial. The judge, as an  
d experienced layman, acknowledged that the signatures were different but signatures can be different for many reasons.

[5] Having received the letter of 17 January, the judge found that the appellant had asked Mrs Ward why she could not obtain information from the housing officers and her response was that she needed documentary evidence to confirm his identity. The appellant also told her that he was the chairman of the tenants' association. The evidence of the appellant, accepted  
e by the judge, was that she would get back to him.

[6] The matter thereafter rested from the appellant's point of view in that he heard nothing more from the respondents about his right to buy—apart from arranging an inspection on 10 February 2000, that being discovered by him after  
f the trial, because up until the trial he believed that inspection had taken place in 1999—until he added a claim for the failure to process the right to buy, in effect, in his particulars of claim in January 2002, that is to say some two years after the question of the signature was raised by the respondents.

[7] The respondents did not do much better themselves. As I said, the  
g judge found that the appellant was expecting that Mrs Ward would get back to him. She wrote on 17 February 2000 as follows:

'Dear Mr Hanoman, regarding the signature discrepancy with your right to buy application, in a previous letter you were informed of the discrepancy with your signature and asked to call into this office with two  
h forms of identification in order to re-sign the application form. You were given seven days in which to do this and we still have not received any response. Therefore, you are granted a further seven days in which to come into the office and bring two of the following ...'

j She then listed a number of other items including a credit or debit card. The letter then concluded:

'If we do not hear from you in this time I regret to inform you that you will have no other choice but to withdraw your application for the right to buy. If you have any further queries I can be contacted at the above number.'

They heard no more and the reason why they heard no more is because the appellant, the judge found, never received the letter. a

[8] What they did is set out in the witness statement of Miss Marcella Baptiste, who gave evidence on behalf of the respondents. She said that Mrs Ward made it clear in the letter, that is to say the letter of 17 February, that his application would be withdrawn if he failed to make contact. The respondents did not hear anything within the time limit and as such his application was treated as withdrawn, the case was therefore closed and the papers filed. b

[9] So from a short time after 17 February 2000, the respondents treated his application as withdrawn. They never communicated the fact of that decision to him. They imposed a unilateral timetable for the provision of information and stated in default of him complying with that, his application was treated as withdrawn. The difficulty with the exercise and imposition of deadlines like that, when the post is used, is that sometimes letters are not received. The respondents therefore believed mistakenly that the appellant had withdrawn his application because he had failed to respond to their demand. That is the way they put it but, of course, that is not what they said in their letter because in their letter, in a phrase which Mr Broatch, who appears for the respondents, described as unfortunate, the letter actually says that unless he provides the information they will withdraw his application. Now, there is no power to do that on the part of the respondents. c

[10] Mr Broatch said that the spirit of the letter was that it would mean that they would treat the application as withdrawn but in truth there is no power on the part of the respondents, under the statutory regime as I shall set out below, to treat an application as withdrawn because an applicant has failed to provide information within a short period of time of a unilaterally imposed deadline. In the context of the present case the seven-day time limit, in any event, was plainly unreasonable. The respondents, as I have said, had received the application on 14 November 1999. Under the provisions of s 124(2) of the 1985 Act, as we will see, they are obliged to provide a decision on that right to buy within four weeks of that date, that is to say 12 December 1999. The first time they contacted the appellant about his right to buy was the letter of 17 January 2000, that letter having been sent some five to six weeks outside the statutory limit. In the context of that delay on their part, for them to seek to unilaterally impose a seven-day time limit on the appellant under pain of a threatened deemed withdrawal, does not seem to me to be reasonable conduct on their part. d

[11] The factual position, therefore, is that the appellant's case is that he was expecting to hear from Mrs Ward from January 2000, and heard nothing. The respondents' case is that they expected to hear from the appellant by 24 February, failing which they would deem his application to have been withdrawn or to use their language, they would withdraw it. e

[12] It is against that background that I say something about the statutory regime. Under s 122 of the 1985 Act, a secure tenant has a right to seek to exercise the right to buy by serving a written notice to that effect on the landlord. Under s 122(3) it is provided that the notice may be withdrawn at any time by notice in writing served on the landlord. I mention that because there is an argument put forward by the appellant that none of the supposed withdrawal by him can be effective because only a withdrawal in writing is possible. f



a [13] Upon receipt of the notice the landlord's duties are set out under s 124 and that provides:

b '(1) Where a notice under section 122 (notice claiming to exercise right to buy) has been served by the tenant, the landlord shall [and I emphasise the word 'shall'], unless the notice is withdrawn, serve on the tenant within the period specified in subsection (2), a written notice either—(a) admitting his right, or (b) denying it and stating the reasons why, in the opinion of the landlord, the tenant does not have the right to buy.'

c Under sub-s (2) in this case the period for serving a notice under this section is four weeks which, as I say, is four weeks from 14 November 1999.

d [14] There are procedures, therefore, as to the preliminaries as to the setting out of the right to buy. The first stage of that is an evaluation of the application, and local authorities have been given some guidance as to the evaluation of applications. This is important for a number of reasons: first, as a local authority holding a property they, of course, owe fiduciary duties in respect of that property. For example, under s 123 of the Local Government Act 1972, they can only dispose of property at the best price reasonably obtainable. They have no power, of course, to deal with property otherwise than in accordance with statutory powers. They, therefore, can only transfer property, pursuant to a right to buy, if the person is a secure tenant and is entitled to and has properly exercised the right to buy.

e [15] The Department of the Environment (DoE) has issued a circular 21/84 on 15 August 1984 and para 45 of that circular refers to the new RTB1, that is to say the right to buy form:

f 'The new form RTB1 has been redesigned so that inter alia the claimant is prompted to give details of all periods of tenancy/occupation relevant to the calculation of his entitlements under the new rules. It does not, however, attempt to set out every detail of qualification and discount rules. Where there is doubt about a tenant's entitlements, it is again for landlords to decide what steps should be taken to obtain additional information.'

g [16] In this case, and there is no appeal against this, Mrs Ward formed the view that there was a doubt, based on the discrepancy between the signatures, as to whether or not the appellant was entitled to exercise a right to buy. The guidance in the DoE circular is not a statutory requirement as such, it is guidance. The last sentence of para 45 makes it quite clear that it is for the local authority to decide what they wish to do in order to satisfy themselves as to the entitlement. That, however, to my mind has to be measured against the backcloth of their statutory duty.

h [17] What is their statutory duty in a case like this? It is a statutory duty to give a decision within four weeks. The wording of s 124(1) could not, in my mind, be plainer: they shall give a decision which is either in favour of accepting it or denying the right to buy. This does not actually pose any difficulty on the part of the respondents in this case because although they did not follow that procedure in this application, they did follow that in respect of a later application. If the application is such that the information leads them to conclude that there is a doubt as to the authenticity of the application, there is therefore sufficient material in their minds, for them to

deny the right to buy. I do not accept Mr Broatch's submission that it is necessary for them to defer the decision so as to avoid acting in breach of their fiduciary duties about the preservation of the property that they hold, because it is inconceivable that if there was a doubt they would simply ignore the doubt and accede to the application.

[18] It might be a matter of common sense that where a four-week time limit cannot be met, the parties can agree an extended period. By way of analogy, under the provisions of the Town and Country Planning Act 1990, for example, an application for planning permission is deemed to be refused, if a decision is not made on it within three months. Those applications are regularly consensually deferred, to avoid a deemed refusal, because the applicant for planning permission knows the consequences of a deemed refusal means that he has to appeal to the Secretary of State against the deemed refusal. As the process of considering a planning application might take considerably longer than that three-month period, in particular in respect of complicated applications, the parties to a planning application regularly agree a consensual deferral but the matters are done in a consensual way.

[19] There is no consensual way agreed in this case. As I have set out in the chronology, the respondents were already in breach of their statutory duty before they ever contacted the appellant. They never sought an indefinite deferral, or even a deferral for a reasonable period, to enable them to decide whether or not to acknowledge the right or to deny it. Absent that, Mr Broatch was unable to point to any statutory power, within the 1985 Act or elsewhere, whereby the local authority could defer and, in effect, extend time under the statutory time limit set out under s 124.

[20] The position, in my judgment, is analogous to that of landlords faced with an application for licence to assign under the Landlord and Tenant Act 1988. There the landlord has an obligation to give consent within a reasonable time. That reasonable time can be extended to deal with inquiries that it is reasonable for the landlord to make because of the inadequacy of an application. If the tenant participates in that extension of time, by dealing with the provision of further information reasonably requested, the period of reasonableness becomes extended consensually for the period covered. None of that happened in this case, as I say, because the respondents imposed a unilateral seven-day deadline by their letter of 17 February.

[21] Those are the primary obligations. What remedies are available to an applicant where the time limit has passed? Mr Broatch submits that judicial review would not be available because there is a statutory remedy. The statutory remedy is to go to the county court and seek a declaration that there has not been an answer to the notice exercising the right to buy. There is no power under the 1985 Act to grant an injunction to compel the local authority to answer. Nevertheless, the position seems to me to be quite clear, absent a possible consensual deferral; a failure on the part of the respondents is a breach of their statutory duty to provide an answer within four weeks. There is nothing in the Act which enables them to extend that four-week period.

[22] I should say that there is another remedy available to a tenant and that is to serve a notice under s 153A of the 1985 Act saying that there has been delay. That has been referred to but the precise details of the section have not been explored in submissions before me. However, I accept Mr Broatch's submission that the net effect of the section appears to be that if a tenant

a serves a notice of delay under that section and he establishes that there has been delay then, in effect, he is entitled to a rebate of the rent that he has paid over because there has been a delay in completion from the date when the completion should have taken place down to the date of actual completion. So he gets a rebate of his rent, as I understand it, from the date of the notice.

b [23] None of these remedies, of course, provides a direct sanction for failure to comply with a duty under s 124. There is no power to go to court to seek an order compelling the authority to respond. There is no power even to go to the Divisional Court, on Mr Broatch's submissions, to seek an order compelling the local authority in that court. The 1985 Act does not say that if the response is not served within the time limit it is deemed to be refused or deemed to be granted but, nevertheless, I come back to the clear rule that the local authority c has a statutory duty to comply within that time limit.

[24] I do not see, as Mr Broatch submits, that the DoE's circular must be ultra vires because of my decision. It seems to me that the circular does nothing more than set out what ought to be done in respect of a response to a notice claiming the right to buy. It leaves it to the local authority to decide d how it should respond and it seems to me that the circular cannot impact on the statutory obligations to apply, to make a decision yea or nay within the four-week period.

[25] Mr Broatch says that might cause hardship to some applicants who, through one reason or another, do not provide enough information to enable e an informed decision to be made as to whether or not they genuinely have a right. He submits that in that situation, forcing the local authority to come to a decision to reject, in effect, within the four-week period, deprives such applicants of providing sufficient information and drives the parties unnecessarily into court, because the applicant would have to go to court to seek an establishment of the rights, much like the appellant is seeking now.

f [26] The short answer to that is the possibility of a consensual deferral. I see no difficulty in there being a consensual deferral in appropriate circumstances which is mutually beneficial. I stress that there is no such consensual deferral in the present case so anything I say on that is obiter. However, I do not see why there should not be the ability of the parties to agree consensually a mutual deferral. The reason for that is twofold. Section 124 does not bring g down a guillotine. It does not say that the notice is either deemed to be accepted or refused, and, therefore, I accept Mr Broatch's submission that although there is a breach from the failure to comply within the four-week period, that is a continuing duty to comply which the local authority can subsequently comply with at a later time. That is not an extension of the time h limit, nor does it deflect from the fact that a failure to comply within the four-week period is a prima facie breach of the statutory duty, albeit conferring no effective remedy on the persons who are wronged by that breach.

[27] I come on now to consider the findings of the judge against that statutory background. He found as a fact that the appellant received the j letter of 17 January and that he telephoned Mrs Ward the following day and said that he had none of the proofs, that is to say, the four items mentioned in the letter. He said he was known to the housing office and, as I have said earlier in this judgment, asked her to obtain confirmation as to his identity from the housing officers.

[28] The crucial point, however, is the judge's finding that Mrs Ward indicated she would get back to him. Mrs Ward did not get back to him

beyond sending a letter which the judge found he never received. He says, 'Unfortunately, the letter of 17 February 2000, was not received,' and he found as a fact that the appellant did not receive the letter. It follows, therefore, that the respondents' basis for closing the file was not justified. It was not justified, in any event, for the reasons I have already said in this judgment but it was not correct because they were not entitled to assume that the appellant had acquiesced or waived his rights and to treat his application as withdrawn. Nothing could be further from the truth. a

[29] The appellant is vehement in his statement that he was desirous of exercising his rights and the only basis on which the respondents complain that he could be treated as abandoning his rights is on two factors. The first is a failure to respond to the letter. I do not see how that can be said to be evidence of a failure, indicating an intention on his part to abandon his application, because he never received the letter. The second, and perhaps more significant time limit relied upon by the respondents, and which found favour with the judge, is of course the fact that between January 2000, when the appellant was waiting for a response, and January 2002 he made no attempt to contact the local authority whatsoever beyond arranging the inspection in February. That, Mr Broatch submitted, categorised a suggestion of somebody being active in pursuing his rights as being absurd. The delay, Mr Broatch says, was self-evidently indicative of showing that the appellant did not intend to proceed with his application. That I think is the way the judge looked at it. b

[30] The judge said, and this was summarising Mr Broatch's submissions: c

'Put very shortly, what the landlord says is that the notice was withdrawn by the inactivity of the tenant in taking any further steps to establish his identity in accordance with the request from the defendant council so that by his inactivity he withdrew the notice.' d

[31] He summarised the arguments of the appellant as follows: e

'The claimant argued that what the council is concerned about is his entitlement as a tenant, that is for how long he has been there and that is the important point. In my judgment, all points are important or can be important. Not only the points that determine the size of discount and that sort of thing but also the most fundamental question of all, whether the application is being made by a secure tenant because it is only a secure tenant who can exercise the right.' f

Pausing there, I agree with the judge's analysis in that regard. g

[32] He says: h

'I am aware that the claimant entertains the belief the council is doing all it can to frustrate the right to buy process but the initial impression I get from the facts of this case is quite simply that Mrs Ward, who is not on the council and not one of the political councillors, was doing no more than her ordinary duty as an employee to look at the agreement, check that there were no possession orders and see if the signatures looked alike in order to check whether Colin Hanoman was a secure tenant. There are a number of problems that arise: if, for example, there is a joint tenancy and only one is applying, that sort of thing. Quite clearly she noticed what appear to be differences in signature. It was not for her at that stage to come to any particular conclusion whether it was j



a the same or whether it was different. It was her duty to raise the point. That is the point she raised. Quite clearly by the letter that was received by the claimant, she was seeking some evidence.'

b Pausing there, I can see no basis for criticising the judge's conclusion in that regard. It is quite clear in my mind that the respondents are entitled to satisfy themselves that the application is both in order and that the person is entitled to make the application for the reasons that I have already set out in this judgment.

[33] The crucial part of the judgment is:

c 'In all the circumstances of this case, it seems to me by taking the matter no further, by providing no evidence, not even a credit card (that must have been mentioned during the telephone conversation) and by not even beginning to satisfy the landlord's reasonable requirement for evidence to establish his entitlement, which entitlement included his identity as a secure tenant, that such inactivity can amount to withdrawal and did in this case amount to withdrawal on the part of the tenant. Not only that but the circumstances were also such to lead the landlord to believe that the notice had been withdrawn. That is the answer to the second question that I posed at the very beginning of the judgment.'

e For the sake of completeness the two questions were: should the appellant be treated as withdrawing his application? Has he, in fact, withdrawn it?

f [34] Now, it is necessary, in addressing those questions, to deal first with the primary submission of the appellant that an application can only be withdrawn in writing. It is correct, as he says, that s 122(3) says that the application may be withdrawn in writing. It does not say the application can only be withdrawn in writing, nor does it say the application must be withdrawn in writing. The judge rejected the appellant's submissions that s 122(3) provided a sole and exhaustive method of withdrawing of applications. I reject the appellant's submissions in that regard although it is a point that is by no means easy and is not, in my view, clearly established on authorities.

g [35] There are a number of authorities to which I should make reference in this regard. First, in the case of *Sutton London BC v Swann* (1985) 18 HLR 140, the Court of Appeal considered the status of a right to buy. Put shortly, the tenant there was a secure tenant at the time that he served the notice and the right to buy procedure was being gone through and the respondents, the local authority, had admitted his right to buy. Ackner LJ, as he then was, said (at 144):

j 'In March 1982 Mr. Swann was entitled to serve a notice under section 5 of the Housing Act 1980 [and that is to say the predecessor section to that under s 121] claiming the right to buy, because he was a secure tenant, and this was admitted by the notice in reply served by the respondents. The respondents provided Mr. Swann with a perfectly straightforward offer for him to accept so the matter could proceed. He took no further step. The matter did not proceed. Accordingly, the offer which the respondents were obliged to make under the statute lapsed by efflux of time. When Mr. Swann returned to the charge a year or more later, that offer, as I have indicated, having lapsed, he was no longer a

secure tenant and therefore he no longer was entitled to apply under section 5 of the Act to buy the premises.'

[36] Now that decision has one clear basis for it and one less clear basis for it. The clear basis for it is, in effect, that a secure tenant, exercising a right to buy, must maintain that status up until the time when the property is to be transferred to him pursuant to the rights. If he loses the status, after having given the notice, he loses the rights. He could lose the status in a number of ways. One might be that he commits breaches of his tenancy obligation so that the respondents seek and obtain an order for possession thereby putting an end to his secure tenancy. Second, a secure tenant has to occupy the property as his main residence. If he ceases to do that, for example, by sub-letting the property or going somewhere else, he loses his status as a secure tenant and he loses his right to buy. Equally, and there are some unfortunate cases in this regard, the tenant might die between the giving of the notice and its acceptance and the conclusion of the conveyance. There are conflicting cases as the result of such an important exercise.

[37] The *Sutton London BC* case has received comment on its effect and I was referred to a book, Josephine Henderson *Rights to Buy and Acquire—Law and Practice in the Management of Social Housing*. The author says (p 102):

'The claim by the tenant may be withdrawn. The landlord does not have to take any further steps if the claim is withdrawn in writing. In addition, inaction by the tenant may amount to withdrawal. The landlord's notice of admission lapses if no further action is taken by the tenant within a reasonable time. (See [the *Sutton London BC* case]). In certain circumstances the statute penalises inactivity by deemed withdrawal [none applicable here]. Under Section 125(e), for example, if the tenant failed to give notice of intention to proceed and if warning has been given, notice of claim is deemed to have been withdrawn.'

That commentary is not echoed in several other texts. I found no commentary on this part in either *Woodfall on Landlord and Tenant* or *Hill and Redman's Law of Landlord and Tenant*. Mr Broatch said that there is a note in the *Housing Law Encyclopaedia* which makes observations on the possible consequences of the *Sutton London BC* case but nothing more.

[38] The *Sutton London BC* case was considered by the Court of Appeal in *Muir Group Housing Association Ltd v Thornley* (1993) 91 LGR 1. It is quite clear, however, that the Court of Appeal there addressed one aspect of the *Sutton London BC* case only. Glidewell LJ said (at 12):

'Finally, I agree that we are bound by the decision of this court in [*Sutton London BC v Swann* (1985) 18 HLR 140] to conclude that a person who was no longer a secure tenant was no longer entitled to the right to buy. The decision in [*Enfield London BC v McKeon* [1986] 2 All ER 730, [1986] 1 WLR 1007] and [*Dance v Welwyn Hatfield DC* [1990] 3 All ER 572, [1990] 1 WLR 1097] were concerned with a different question, namely, at what stage in the process towards a conveyance does the right to buy of a person who is at all relevant times a secure tenant become indefeasible? There is therefore nothing in those two decisions which prevents us from arriving at the decision we have announced.'

a It will be seen that Glidewell LJ made no reference to the alternative basis that appears in the *Sutton London BC* case.

[39] The appellant referred me to a Scottish case, *Graham v Northern Joint Police Board* 2000 SLT (Lands Tr) 7. The date of the judgment is 11 April 2000. One has to bear in mind that the law of the title to land and its conveyance in Scotland is very different from the procedure within this jurisdiction. Part of the judgment, however, does seem to me to be of assistance in my determination of this aspect of the case. Reference is made (at 12) to the submissions. Lord McGhie says:

c 'Unless the respondents' contentions in relation to waiver were upheld, the tribunal should proceed to make a formal offer. He submitted that there was no substance in the defence of waiver. The law of waiver should now be seen to be based on the decision in *Armia Ltd v Daejan Developments Ltd* (1979 SC (HL) 56). There were two essential elements: conduct on the part of the applicant which could reasonably justify the inference that he had waived his rights; and proof that the respondents had, in some way, changed their position in reliance on that conduct. In response to the tribunal, he said that there was a conceptual difference between an express abandonment and waiver or abandonment implied by conduct. If waiver was to be inferred from conduct there had to be actings on behalf of the party seeking to rely on the waiver which could be shown to have been in such reliance. Reliance required proof of change. It did not need to be to the prejudice of the respondent. The fundamental difficulty for the respondents was that their actings were based entirely in reliance on their policy and understanding of the law. Nothing they did was in any way attributable to reliance on any change of heart by the appellant. They had not changed their position in any way. The need for proof of reliance by way of some change in the conduct of affairs was well established since *Armia v Daejan*.'

[40] He referred to *Lousada & Co Ltd v JE Lesser (Properties) Ltd* 1990 SC 178 at 189:

g 'In response to counsel for the respondents' submissions, he elaborated his initial submissions on this point by stressing a need not only for a conscious conclusion by the respondents that there had been abandonment but a causal connection between abandonment and their own actings. There had to be an overt act of acceptance. Waiver was a bilateral conceptual concept.'

h [41] The language used is very different to the language found in these courts but, nevertheless, it shows that the courts in Scotland consider that a right can be abandoned by what they call waiver or abandonment. When one analyses the criteria necessary for those, it is quite clear that the concepts there are very similar to concepts that are well known within this jurisdiction, that is to say waiver or estoppel. Without going into those areas in any great detail but generally if A conducts himself as if a certain position is to be taken and B is aware of that and acts on it, then generally A will not be entitled to resile from that position. It is important, however, that if A is giving up his rights, and in the context of the present case it is giving up his right to exercise his right to buy, a person must know that he is doing it. That much we can see from the well-known Court of Appeal decision of *Peyman v Lanjani* [1984]

3 All ER 703, [1985] Ch 457, a decision in 1984, where a tenant, under a Landlord and Tenant Act 1954 tenancy, was held not to have waived his rights because at the time, without legal advice, he was unaware that he had any rights. Equally, the person who wishes to claim the benefit of that must act on the basis that the person has given up his rights. a

[42] It seems to me that the respondents by shutting their file after non-receipt of a reply to their letter of 17 February, did not take any further steps or conduct themselves thereafter on the basis that they believed the application was withdrawn. They treated it as having been withdrawn because of the failure to comply with their unilateral deadline. b

[43] The position of the appellant appears to be this, it is true he did not respond or make inquiries about his application for nearly two years. His answers for that are twofold, it seems to me. First, he believed that the respondents were going to get back to him. Two years it might be said with some force is an awful long time for people to come back to him but his answer to that is that he believed the respondents' procedures were slow. Second, he also believed the respondents' procedures were slow because he believed that the respondents' attitude was that they would do all they could to frustrate the right to buy process. The judge rejected that as being a correct analysis of the respondents' conduct and I have no basis for suggesting that the authority and Mrs Ward acted other than perfectly properly in seeking to evaluate the appellant's application and to satisfy themselves that he had a right to exercise under the 1985 Act. However, that does not deflect from the fact that the appellant had such a belief, nor does it deflect from the fact that the respondents had sent a letter imposing a deadline which he never received. c  
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[44] Now, as part of this analysis the appellant referred me to a decision of Lindsay J in *Kensington and Chelsea Royal London Borough v Hislop* [2003] EWHC 2944 (Ch), [2004] 1 All ER 1036, in particular at [23]. The facts of the case are far removed from the present facts because the judge there found that there was a deliberate decision made by the council to obstruct the tenant's rights. As I have already said, the appellant's belief in that regard was unfounded in the present case. Nevertheless, it is instructive to analyse this situation. f

[45] The judge in that case determined that there was no need, in effect, to exercise further rights of default nor chase up parties in considering the exercise of their statutory duties. Applying that to the present case we have a situation where the respondents are in the process of discharging their statutory duty to serve a response to the appellant's request seeking his right to buy. They sent a letter on 17 February which he never received. They never sent a letter saying that the process was now concluded and that their file had been shut. That letter might, of course, have gone the same way as the letter of 17 February and not been received. Of course, there are methods of ensuring that it is received, by sending it recorded delivery, for example. g  
h

[46] Nevertheless, as I have said earlier in the judgment, I do not see that the respondents have any statutory power to defer their decision. They were already in breach of their statutory duty by the time of their first letter on 19 January. That was a continuing duty and it was to be discharged. There is no power, in effect, not to make a decision, so far as I can see, unless they no longer have to make a decision. They only no longer have to make a decision if it is established that there is no right. Before they come to make a decision, j



a let us suppose a prospective tenant dies or if the tenant withdraws his application. Other than that, it seems to me plain they have to make a decision either to accept or reject with reasons, the notice claiming the right to buy.

[47] I do not see that the appellant has any duty, whether statutory or otherwise, to in effect require the respondents to carry on the process of complying with their duty. He is perfectly entitled, having served his notice, b to require them to make the decision. If they require more information they can request it. He is not under an obligation to provide it. He is entitled to say I will not provide any more information. However, that does not relieve them of their obligation to make the decision because it does not follow that c he is withdrawing his application. He is simply not responding to extra-statutory requests for information. Faced with that, it is not a difficult exercise for the respondents. They simply say, as you have not provided sufficient information, we do not accept that you are entitled to exercise the right to buy and we deny the right.

[48] If that proceeds to litigation it might be established that that was correct or it might be established, on the basis of fresh evidence on the part d of the relevant applicant, that it was incorrect. As regards that it is inevitably going to be the case that if an applicant acted unreasonably in failing to provide information which was available, he is going to be damned in costs.

[49] When we look at the present scenario, it seems to me that there was no duty on the part of the appellant to do anything other than wait for a decision on the part of the respondents to respond to his notice claiming the right to buy. It follows, therefore, that, with respect to the judge, to my mind e he fell into error in failing to address the significance of the statutory duty on the respondents to make a decision. For that reason alone it seems to me that hearing the appeal I would conclude, with respect to the judge, that his judgment is wrong.

[50] However, when one looks at his findings, and in particular the findings that the appellant was waiting for communication from the respondents, that he never received any communication, I do not see that there is any material that could lead the judge, on those factors alone, nor on the fact of delay over a two-year period, given the explanations put forward by the appellant, whether accepted or not, for him to conclude that the g appellant has withdrawn his application. He plainly did not withdraw his application because he clearly wished to proceed with it at all times.

[51] I do not see that the respondents can conclude his application had been withdrawn because it was based on a false premise, namely that they had had no response to a letter which he had never received.

[52] There may be other cases where an applicant so conducts himself that he will have put it out of court, for him to be able to continue to assert his rights. That might be in a number of ways. First, he might lose the rights because he fails to satisfy the statutory criteria. That, in my judgment, is the true ratio of the *Sutton London BC* case. Second, he might lose his rights if he has conducted himself in such a way as to amount to a waiver of his rights or j to operate as an estoppel against him enforcing his rights or such that it might be unconscionable for him to seek to enforce his rights. All of those are well-known and well-established principles known to the law in this jurisdiction.

[53] I am comforted in that part of my judgment on *Graham v Northern Joint Police Board* 2000 SLT (Lands Ct) 7. I do not find that, for example, mere

delay is a sufficient factor. If one looks at the doctrine of laches, for example, which is delay in another word, it is well established that mere delay is not sufficient. There must be some prejudice which has been caused to the other person by delay. It has not been said in this case, in the pleadings or at the trial, that there has been any prejudice caused by the delay in processing the application by the respondents.

[54] To my mind the judge did not, with respect to him, sufficiently analyse the nature of the conduct required to enable the respondents to be able to submit, as they did, that the circumstances were such as to lead them to believe that the notice had been withdrawn. Their belief was fundamentally flawed because of their mistaken belief that the appellant had chosen not to respond to a letter when, in fact, he had never received it.

[55] It would be unfair in my view, when looking at the overall pattern where the respondents are in breach of their statutory duty, to penalise the appellant by denying him his rights because he has failed, in effect, to remind the local authority that he is expecting a decision in discharge of their duty. That appears from the *Kensington and Chelsea Royal London Borough* case and I adopt what Lindsay J said in that. It would be quite wrong if his rights were taken away.

[56] Of course, there may be other cases which might lead to a different conclusion. Let us suppose, for example, the appellant had received the letter of 19 February and had written back and said I am not going to provide any more information. That would enable the respondents then to make the decision. He might have received the letter and done nothing. In those circumstances a claim for abandonment or withdrawal would be more appropriate. Another way might be if the letter is received and he gives the impression informally that he is not going to proceed and then, like the applicant in the *Sutton London BC* case, seeks to revive it at a later date. In those circumstances he may well be estopped from seeking to assert the right.

[57] In this context, of course, it is important to remember—and this caused me some difficulty in the arguments—that these kinds of principles, whilst they might affect the appellant, will not affect the respondents because the respondents cannot, by way of waiver or estoppel, bargain away their statutory rights and obligations. That much we see from the well-known case of *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204: a local authority cannot by estoppel surrender its discretions. So in the present case, for example, I do not see how the local authority could waive any of its statutory rights and duties. For example, it could never sell the property to somebody who was not a secure tenant who was entitled to exercise the right to buy. That is why I do not think there was ever any realistic problem or difficulty because, in effect, the local authority would err on the side of caution. Unless the right is clearly established, they would decline to acknowledge the right.

[58] Now, an appeal is a review but it does seem to me that, with respect to the judge, he focused too much on the period of delay without asking the question as to why the delay occurred or where the responsibilities, at that time in the exercise, fell. It follows that I am of the view that he could not have come reasonably to this decision even if he had applied the law correctly, and the appeal will, therefore, be allowed.

[59] I should say that there are a number of other arguments which have been raised by the appellant. The first one is what is becoming a catch-all, namely that his human rights have been infringed. For the reasons set out in

a Mr Broatch's detailed skeleton argument there would have been, in my judgment, no infringement of his property rights so as to infringe his human rights. Second, he submits that the local authority respondent is estopped from challenging the decision by reason principally of his fresh evidence which consisted of discovering that the respondents had actually inspected the premises in February. Putting aside the legal principle which I have already adverted to, namely that I do not see how the respondent can estop itself against exercising its statutory duties, that act, even if that principle was capably implied, cannot to my mind amount to any form of estoppel.

b [60] He also submits that there was a power to establish his right to buy otherwise, drawing on the words to be found in s 125 which says: '(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established (whether by the landlord's admission or otherwise) ...' That does not, to my mind, enable the appellant to establish his right to buy in a different way. He has to follow the procedures and the part in parenthesis merely deals not with how he can prove his right but how the landlord can acknowledge his right, which is an entirely different proposition.

c [61] He raised in his skeleton argument an argument based on s 177 of the 1985 Act but he did not proceed with that.

d [62] It follows, therefore, for the reasons that I have set out in my judgment, that the appeal must be allowed. I appreciate that that might cause concerns on the part of local authorities faced as they are with demands from large numbers of obligations that are put upon them, which are not necessarily always matched in a corresponding availability of resources to deal with all of those duties. I am sympathetic to that position but however sympathetic I am, I cannot use that as a basis not to give effect, to my mind, to the clear consequences of the duty imposed on the local authority under s 124 to provide an answer within four weeks.

e [63] If the local authority breaks that for understandable reasons, then it will not suffer any consequences because, in effect, the claimants do not have any immediate remedies. Nevertheless, it is a duty which they should seek to comply with, and if they have difficulties complying with it, they should draw their difficulties to the attention of would-be applicants and seek an accommodation from them. If that procedure is gone through, I do not see that they can be criticised, and I do not see it can be said that they are therefore in breach of a duty which is actionable at the behest of any party. But simply to do nothing, which is what happened in this case, for many weeks and then to impose a unilateral deadline is not the way to do it.

f [64] I come, therefore, to the question of the relief and I accept g h Mr Broatch's submissions that all I can grant is a declaration, a negative declaration, namely that the appellant's notice, seeking to exercise his right to buy, has not lapsed or been withdrawn and is still valid and subsisting.

*Appeal allowed.*

Pamela Hardisty Barrister (NZ).

# R (on the application of Bleta) v Secretary of State for the Home Department

[2004] EWHC 2034 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

CRANE J

9 AUGUST 2004

*Extradition – Request for extradition – Valid request – Valid request containing statement that person unlawfully at large – Whether Secretary of State may examine whether request containing statement – Extradition Act 2003, s 70(4)(b).*

In his absence the claimant was convicted in Albania of murder. The government of Albania made a request for his extradition and the Secretary of State certified pursuant to s 70<sup>a</sup> of the Extradition Act 2003 that the request was valid. Albania was a category 2 territory for the purposes of the 2003 Act. Under s 70 of that Act the Secretary of State had to issue a certificate if, inter alia, the request contained a statement that the person was alleged to be unlawfully at large after conviction by a court in a category 2 territory of an offence specified in the request. The extradition certificate contained no explicit statement that the claimant was unlawfully at large. He applied for judicial review, contending that while the actual words of the 2003 Act were not required, if there were no statement, or equivalent expression indicating a liability to immediate arrest following the relevant conviction, an extradition request could not be valid. The Secretary of State (and the government of Albania as interested party) contended, inter alia, (i) that the Secretary of State was entitled to look at a request and accompanying papers in order to determine whether it was in effect stating that the person was unlawfully at large; and (ii) that the request, being made 'in reliance to' an article of the European Convention on Extradition 1957 (as set out in the European Convention on Extradition Order 2001) (the extradition convention) which stated that a request was to be supported by the original or an authenticated copy of the 'conviction and sentence or detention order immediately enforceable', represented that the requirements of that article were fulfilled.

**Held** – Where a request for a person's extradition did not contain a statement in the actual words of s 70(4)(b) of the 2003 Act or in equivalent words the Secretary of State could examine whether the request contained the necessary statement by looking at the request itself, together with the documents incorporated into it by reference. It was only in a clear case that he should conclude, in the absence of a statement by the requesting state, that the person was not only at large but unlawfully at large. In the instant case, in the absence of a statement that the claimant was unlawfully at large, or the equivalent statement, it was unsafe to conclude that he was unlawfully at large. Despite the reference in the request to the extradition convention, and fully accepting the proposition that in the absence of evidence to the contrary the good faith of the requesting state could be assumed, all states were capable of errors, and it was not impossible that the claimant was not unlawfully at large in the United Kingdom in the sense that he

<sup>a</sup> Section 70, so far as material, is set out at [2], below



- a was liable to immediate arrest in Albania. Accordingly, the application would be allowed (see [13], [14], [27]–[29], [31], [32], below).

*Re Ismail* [1998] 3 All ER 1007 and *Urro v Governor of Brixton Prison* (22 May 2000, unreported) applied.

### Notes

- b For the Extradition Act 2003, s 70, see 17 *Halsbury's Statutes* (4th edn) (Current Statutes Service) 68.

### Cases referred to in judgment

*Arton, Re* (No 2) [1896] 1 QB 509, DC.

- c *Government of Belgium v Postlethwaite* [1987] 2 All ER 985, sub nom *R v Governor of Ashford Remand Centre, ex p Postlethwaite* [1988] AC 924, [1987] 3 WLR 365, HL.  
*Ismail, Re* [1998] 3 All ER 1007, [1999] 1 AC 320, [1998] 3 WLR 495, HL.  
*R v Governor of Ashford Remand Centre, ex p Beese* [1973] 3 All ER 250, [1973] 1 WLR 969, DC; *aff'd* sub nom *Beese v Governor of Ashford Remand Centre* [1973] 3 All ER 689, [1973] 1 WLR 1426, HL.
- d *R v Jones* [2002] UKHL 5, [2002] 2 All ER 113, [2003] 1 AC 1, [2002] 2 WLR 524.  
*R (Guisto) v Governor of Brixton Prison* [2002] EWHC 1441 (Admin), [2004] 1 AC 101, [2003] 2 WLR 157; *rvsd* [2003] UKHL 19, [2003] 2 All ER 647, [2004] 1 AC 101, [2003] 2 WLR 1089.  
*Sarig, Re* [1993] COD 472, DC.
- e *Urro v Governor of Brixton Prison* (22 May 2000, unreported), DC.

### Cases referred to in skeleton arguments

- Al-Fawwaz, Re, Re Eiderous* [2001] UKHL 69, [2002] 1 All ER 545, sub nom *R (Al-Fawwaz) v Governor of Brixton Prison, R (Abdel Bary) v Governor of Brixton Prison, R (Eiderous) v Governor of Brixton Prison* [2002] 1 AC 556, [2002] 2 WLR 101.
- f *Anderson, Re* [1993] Crim LR 954, DC.  
*Barone, Re* (7 November 1997, unreported), DC.  
*Cavallo, Re* (13 March 1997, unreported), DC.  
*Ginova v Govt of the Czech Republic* [2003] EWHC 2187 (Admin), [2003] All ER (D) 387 (Jul), DC.
- g *R v Secretary of State for the Home Dept, ex p Adan, R v Secretary of State for the Home Dept, ex p Aitseguer* [2001] 1 All ER 593, [2001] 2 AC 477, [2001] 2 WLR 143, HL.  
*R v Secretary of State for the Home Dept, ex p Fininvest SpA* [1997] 1 All ER 942, [1997] 1 WLR 743, DC.  
*Rey v Govt of Switzerland* [1999] AC 54, [1998] 3 WLR 1, PC.
- h

### Application for judicial review

- The claimant Fatmir Bleta applied with permission of the Divisional Court given on 27 July 2004 to quash a certificate issued by the Secretary of State pursuant to s 70 of the Extradition Act 2003 following a request for the extradition of the claimant by the government of Albania. The facts are set out in the judgment.
- j The government of Albania appeared as an interested party.

*Robin Pearse Wheatley* (instructed by *Arora Lodhi Heath*) for the claimant.

*Khawar Qureshi* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Mark Summers* (instructed by the *Crown Prosecution Service*) for the government of Albania.

**CRANE J.**

[1] In these proceedings the claimant seeks to quash a certificate issued by the Secretary of State pursuant to s 70 of the Extradition Act 2003. On 19 July Harrison J directed an oral hearing of the application for permission. Then, on 27 July, a Divisional Court granted permission subject to the amendment of the claim form to raise the present issue, which is the only remaining issue. This is the hearing of the application for judicial review.

[2] The request for permission by the government of Albania arises under Pt 2 of the 2003 Act. It is common ground that Albania is a category 2 territory. The scheme of s 70 is that there should be an extradition request and then a certificate issued by the Secretary of State. Section 70 reads, as far as is relevant, as follows:

‘(1) The Secretary of State must issue a certificate under this section if he receives a valid request for the extradition to a category 2 territory of a person who is in the United Kingdom ...

(3) A request for a person’s extradition is valid if—(a) it contains the statement referred to in subsection (4), and (b) it is made in the approved way.’

I pause to say that there is no issue that this request was made in the approved way. Subsection (4) reads:

‘The statement is one that the person—(a) is accused in the category 2 territory of the commission of an offence specified in the request, or (b) is alleged to be unlawfully at large after conviction by a court in the category 2 territory of an offence specified in the request.’

The request here was made pursuant to s 70(4)(b), namely on the basis that there had been a conviction and, by implication at least, that the claimant was unlawfully at large.

[3] The certificate issued read as follows:

‘CERTIFICATE ISSUED PURSUANT TO SECTION 70 OF THE EXTRADITION ACT 2003.

Under section 70 of the Extradition Act 2003, the Secretary of State hereby certifies that the request from Albania, being a territory designated for the purposes of Part 2 of that Act, for the extradition of Fatmir Blea is valid and has been made in the approved way.’

[4] If one goes to the request, it is common ground that there is no explicit statement in that request that the claimant was unlawfully at large.

[5] Some reliance has been placed, at least in the skeleton arguments, on the legislative history of Pt 2 of the 2003 Act. Under the previous Act, the Extradition Act 1989, it was a requirement, if there was to be extradition on the present basis, that the claimant should be, following conviction, unlawfully at large. The difference was that there was no requirement in the 1989 Act for a statement to that effect.

[6] I have been referred to the convention which underlies the 2003 Act. That is the European Convention on Extradition (Paris, 13 December 1957; TS 97 (1991); Cmnd 1762), which is to be found in the European Convention on Extradition Order 2001, SI 2001/962. Under Sch 1 to the 2001 order, the convention is set out. So far as is relevant, it reads as follows:

## ARTICLE 1

## OBLIGATION TO EXTRADITE

The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.'

Under art 12, headed 'The Request and Supporting Documents', para 1: 'The request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party ...' Then other channels of communication are referred to. Paragraph 2:

'The request shall be supported by:

(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party ...'

There are then other requirements for documents supporting the request.

[7] The convention basis for this limb of the obligation to extradite is to be found, first of all, in art 1 in the words, 'wanted by the said authorities for the carrying out of a sentence' and in the wording of art 12, referring to a 'conviction and sentence or detention order immediately enforceable'.

[8] As is pointed out on behalf of both the Secretary of State and the Republic of Albania, there is no provision in the convention for a statement specifically confirming that the relevant person is unlawfully at large.

[9] There were some submissions in the skeleton argument provided on behalf of the Secretary of State that the requirement of a statement in Pt 2 of the 2003 Act was, in effect, a drafting error. That submission has not been pursued, or at least emphasised, and I accept the submission of Mr Pearse Wheatley, on behalf of the claimant, that that insertion must be assumed to be deliberate; indeed, it has a clear purpose, namely to simplify the process of extradition, and, if such a statement is included, to remove the need for the Secretary of State to inquire further into the law of the requesting state. That is particularly relevant since the Secretary of State is under an obligation to issue a certificate if certain requirements are fulfilled.

[10] I have been helpfully referred to two authorities on the proper approach to the construction of extradition treaties and legislation giving effect to such treaties. In *Government of Belgium v Postlethwaite* [1987] 2 All ER 985 at 991-992, sub nom *R v Governor of Ashford Remand Centre, ex p Postlethwaite* [1988] AC 924 at 946-947 Lord Bridge of Harwich said:

'In approaching the main issue two important principles are to be borne in mind. The first is expressed in the well-known dictum of Lord Russell CJ in *Re Arton (No 2)* [1896] 1 QB 509 at 517 where he said: "In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent." I also take the judgment in that case as good authority for the proposition that in the application of the principle the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would "hinder the working and narrow the operation of most salutary international

arrangements" ... The second principle is that an extradition treaty is "a contract between two sovereign states and has to be construed as such a contract. It would be a mistake to think that it had to be construed as though it were a domestic statute": *R v Governor of Ashford Remand Centre, ex p Beese* [1973] 3 All ER 250 at 254, [1973] 1 WLR 969 at 973 per Lord Widgery CJ. In applying this second principle, closely related as it is to the first, it must be remembered that the reciprocal rights and obligations which the high contracting parties confer and accept are intended to serve the purpose of bringing to justice those who are guilty of grave crimes committed in either of the contracting states. To apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose.'

Lord Bridge was referring to a difference between the construction of extradition treaties and domestic legislation. However, in *Re Ismail* [1998] 3 All ER 1007 at 1011, [1999] 1 AC 320 at 326–327, Lord Steyn, in the House of Lords, extended that principle of a broad and generous construction of extradition treaties to extradition statutes. I fully accept, in the light of those authorities, that a purposive construction should be adopted in construing the 2003 Act.

[11] I turn to the wording of s 70 of the 2003 Act. The first question is whether a specific statement in the actual words of the 2003 Act is required. Mr Pearse Wheatley, in my view correctly, conceded at an early stage that the actual words of the 2003 Act were not required. If there was an equivalent expression indicating a liability to immediate arrest following the relevant conviction, that would, he concedes, be sufficient. However, he submits that if there is no such statement or equivalent statement, then the request cannot be valid.

[12] In response to a question whether, in the circumstances of this case, to which I shall return later, there were any realistic possibilities other than the claimant being unlawfully at large, he listed various possibilities: firstly, that there might have been an amnesty; secondly, there might have been a withdrawal of the complaint by the family of the victim of the murder of which the claimant was convicted; thirdly, that there might have been, despite the description of the conviction as becoming final, the possibility of an appeal, or at least a request for reconsideration, bearing in mind that the conviction was in the claimant's absence; fourthly, that there might be some statute of limitations; fifthly, there might be some provision for early release, which might in some way operate even if the claimant had not been in custody, and one might add also, it seems to me, there might be a requirement of some further order, in the absence of evidence that the claimant ever became aware of his actual conviction, before he became liable to immediate arrest.

[13] The submissions on behalf of the Secretary of State and the government of Albania are that even if there is no equivalent statement or a statement in the actual words of the 2003 Act, the Secretary of State is entitled to look at the request, together with the documents incorporated in it by reference, in order to determine whether the request is in effect stating that the claimant is unlawfully at large following a conviction.



a [14] Those latter submissions on behalf of the Secretary of State and the government of Albania, I accept in principle. Even if the actual words of the 2003 Act are not incorporated in the request, and even if there is no equivalent wording, in my view, at least in a clear case, it is permissible for the Secretary of State to look at the request itself and its supporting documents to see whether the matter is clear. Adopting a purposive  
b interpretation of the 2003 Act, it seems to me that that is, in effect, an examination of whether the request contains the necessary statement.

c [15] It therefore becomes necessary to look at the request itself further in this case. The request, which was dated 11 May 2004, is headed 'Request for extradition from United Kingdom to the Republic of Albania of the Albanian citizen Fatmir Bleta' and is addressed to the Home Office of the United Kingdom. Then the following paragraph:

'Ministry of Justice of the Republic of Albania, in reliance to Article 12 of European Convention on Extradition, forwards its request for extradition from the United Kingdom of the Albanian citizen Fatmir Bleta ...'

d (The omitted words refer to details of his identity, but identity is not in dispute.)

[16] The defendant, and the interested party in particular, rely on the words used in that paragraph 'in reliance to Article 12'. The argument, particularly of Mr Summers, is that the Republic of Albania, by referring to art 12, was representing that the requirements of art 12 were fulfilled. To that submission I  
e shall return.

[17] There is then set out in the request a short description of the proceedings, which related to the death of a man called Zenuni on 15 September 1998. The request goes on to note that in reliance on the evidence submitted to the judicial hearing, the first instance court at Tirane, through its decision on 19 May 1999, decided as follows: 'Convicting the citizen Fatmir Bleta and sentencing him to 13 years imprisonment for the criminal offence of "murder" and "illegal weapon possession" committed on 15.09.1998.' There are then set out the documents attached, namely: the decision of the first instance court; the decision imposing the security measure 'arrest in prison'; a report on the criminal offence by the district  
f prosecutor; the birth certificate of Fatmir Bleta; and, the text of applied legal provisions. The legal provisions included simply related to the available sentences for the relevant offences.

[18] The decision of the Tirane District Court reveals that the proceedings were in the absence of the present claimant, although he was represented by  
h Pelivan Luci, who one assumes, although I do not think it is anywhere set out, was representing him as his lawyer. The nature of the conviction and the sentence of 13 years for the two offences are then set out. The record of the proceedings continues:

j 'Complaint can be taken against this decision at the Appeal Court of Tirane, within 10 days since the following day of pronouncement of this decision.

Tirane, 19.05.1999.'

Then there are signatures and there is a note that the document contains a seal certifying that the decision has become final. Indeed, if one looks at the document in Albanian, it is clear that, although the original order was dated

19 May 1999, there is certainly at least some kind of stamp and a handwritten date, 29 May 1999, which would be entirely consistent with the note at the bottom of the translation. a

[19] The 'Decision: "Imposing on security measure"' was made on 9 December 1998, in other words following the alleged offences but of course before the hearing. In effect, there was what, in English terms, would be a warrant of arrest. b

[20] I do not think anyone quarrels with the implication that that was never executed, and that the proceedings at court took place in the absence of the present claimant.

[21] Some reliance has been placed on the existence of that warrant of arrest, as I shall call it, but in my view that is by no means conclusive as far as the defendant is concerned, or indeed the government of Albania. It is quite clear that it is the conviction that is relied on, and as to the conviction, of course, there is no doubt. The question is whether, following that conviction, the claimant was unlawfully at large. It would be speculation to know whether in Albanian law, as in English law, following conviction the liability to arrest arises as a result of that conviction or whether the warrant of arrest continues to have any effect. c  
d

[22] There is also reliance on the part of the Secretary of State and of the government of Albania on the note that the decision of the first instance court had become final.

[23] In that connection I was referred to *R (Guisto) v Governor of Brixton Prison* [2002] EWHC 1441 (Admin), [2004] 1 AC 101. That was a decision of the Divisional Court presided over by Rose LJ. The decision involved a consideration of Sch 1 to the Extradition Act 1989. In that case the applicant had been convicted in his absence. It therefore became relevant to know whether he was liable to extradition under the relevant United States of America (Extradition) Order 1976, SI 1976/2144 as someone who had been convicted for contumacy, in which case he was to be regarded as an accused person, or whether he was to be regarded as a 'fugitive criminal' in the wording of the 1989 Act. The context, therefore, was somewhat different, but in the judgment of Gibbs J, with which Rose LJ agreed, the court said: e  
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g

[49] In my judgment, the test of whether a conviction is for contumacy involves examining the nature of the conviction itself and the extent to which it is regarded as final in the jurisdiction of the requesting country. As is pointed out in the cases cited, there is no statutory definition of contumacy. It is a question of fact to be based on expert evidence about the law of the requesting country. The mere fact that the "conviction" in question is recorded as a conviction until set aside is not determinative. Nor is the fact that there are procedures open to the applicant to challenge the conviction. g  
h

[50] If, on the one hand, the courts of the requesting country regard the conviction as provisional, and subject to automatic revocation on the applicant's submission to the jurisdiction, or susceptible as a matter of course to successful challenge by the applicant, then, no doubt, the conviction will be regarded as "for contumacy". But where the law and procedures make it quite clear that the court regards its decision as final, then it will not be regarded as for contumacy; of itself, the availability of j

a procedural rights to apply to have it set aside, or of appeal, will not alter the essence of the conviction.

[51] I do not consider it helpful to adopt the two-stage approach suggested by Mr Hines. In my view the correct approach should be that already cited from the judgment of Evans LJ in *[Re Sarig [1993] COD 472]*, namely to examine the nature of the conviction itself.

b [52] On the facts of this case there is, in my view, no doubt that this conviction, although arrived at in absentia, was intended to be final. The facts relating to the trial, as described by Mr Morgenthau, make this absolutely clear. The applicant was warned that if he voluntarily absented himself he would be tried and sentenced in his absence. He did voluntarily absent himself. Nevertheless, time was allowed for him to appear; when he failed to appear, the trial went ahead but he was provided with counsel to represent him. Witnesses were called and cross-examined, counsel addressed the jury, the judge summed up, and the jury convicted.

d [53] On the evidence it is well established in United States law (as in recent times in the law of England and Wales: see *R v Jones (Anthony)* ([2002] UKHL 5, [2002] 2 All ER 113, [2003] 1 AC 1)) that a trial may proceed in a defendant's absence if he has voluntarily absented himself. The evidence about United States law shows that there are established procedures to ensure fairness to a defendant in those circumstances, as already outlined. The evidence lodged on behalf of the respondents, as well as the applicant, indicates nothing to suggest that the conviction is to be regarded as anything but final. There is nothing in the relevant parts of the 1989 Act to place convictions in absentia in a special category (unlike a provision in the Fugitive Offenders Act 1967, now repealed).

f [54] In my view, therefore, the finding of the district judge that this was a conviction for contumacy was in error.'

[24] I have set out the quotation in relation to finality in some detail because counsel relied on it, but it is to be noted that the notion of finality may have various meanings in the laws of various states, and in *Guisto's* case the court was considering the law of the United States, a law with similar origins to that of England and Wales, and in a case where there was evidence about the nature of the proceedings themselves and their legal significance.

g [25] I have also been referred, initially by Mr Pearse Wheatley, to *Urru v Governor of Brixton Prison* (22 May 2000, unreported), a decision of the Divisional Court, of which I have been provided with a transcript. The principal judgment was delivered by Lord Bingham CJ. There are certain parallels, although also certain differences, from the present proceedings. In that case the applicant for habeas corpus was an Italian national who had been convicted of extradition crimes in Italy. In that case the relevant decision under attack was the decision of the magistrate, who had reached the conclusion, as he put it, 'taking the whole picture together' (para 14) that the government had established that that defendant was unlawfully at large. The Italian government faced the difficulty that not all their evidence pointed in the same direction, and there was a specific letter which referred to the defendant as 'never' having been unlawfully at large, but Lord Bingham CJ went on as follows (paras 25–27):

"The second problem is that a second duly authenticated order of enforcement was made against the applicant on 21 February 1998 ... At the end of the order in the translation before us the public prosecutor at the Court of Turin orders:

"Members of the Police Forces, therefore, to ensure the identity of the one convicted and, after handing him a copy of the present order, to take him to the nearest custodial centre, there to serve the above-mentioned punishment."

26. That language may indicate that the applicant is already regarded as unlawfully at large and therefore liable to arrest which, if so, would of course support the government's case. But it may, as it seems to me, be authority to arrest him when he has been found and when he had been handed a copy of the order, which would suggest that he was not unlawfully at large until those steps had been accomplished. In the absence of expert evidence of Italian law I do not know how the magistrate could, or how we can, chose between those hypotheses.

27. In our own country the rules are clear and well understood by English lawyers. A sentence of imprisonment ordinarily takes effect when passed. It cannot be ordered to take effect at a date earlier than that on which it is passed. It cannot be ordered to take effect on any date later than that on which it is passed, unless it is ordered to be served consecutively to another sentence. Unless the defendant is released on bail, in which event there is a clear obligation to surrender to custody at a given time and place, a sentence of imprisonment takes effect immediately. It is tempting for an English lawyer to suppose that other jurisdictions follow the same rules. It is, however, notorious that they do not. The applicant, it seems, was lawfully at liberty during and after his trial in 1993 in Turin. When his conviction and sentence were confirmed in 1995 he was not present and there is no material to suggest that he was liable to immediate incarceration if he had been present. We do not know what the order of 8 May 1996 provided, but if it was in similar terms to the order of 21 February 1998 its effect is open to doubt.'

[26] As I have already noted, one difference between *Urru's* case and the present case is that there was a specific letter contradicting the case of the government of Italy. The other important difference, of course, is that Mr Urru had never been actually in custody, and therefore the question arose at what stage, if at all, he became unlawfully at large.

[27] Having noted those differences, it seems to me that the warning of Lord Bingham CJ about the dangers of supposing that other jurisdictions follow the same rules as in England and Wales is to be heeded. There is undoubtedly a temptation to conclude in the present case, in the absence of any positive evidence, that Albanian law may, by the conviction of the claimant, even in his absence, have imposed an obligation for immediate surrender. However, the 2003 Act is new. I am told that this particular provision has not come before the court before. Mr Pearse Wheatley is undoubtedly correct in stressing that the need for the Secretary of State to concern himself with the law of the requesting state is removed if the statement as to the relevant defendant being unlawfully at large is included.



a [28] My conclusion is that it is only in a clear case that the Secretary of State should conclude, in the absence of a statement by the requesting state, that the relevant defendant is not only at large but unlawfully at large.

b [29] I return to the submission made on the basis that because the government of Albania in its request specifically referred to art 12, it should therefore be assumed that the provisions of art 12 were complied with. I fully  
c accept the proposition that, in the absence of evidence to the contrary, the good faith of the requesting state can be assumed—no doubt the good faith of the government of Italy was assumed in *Urru's* case. But all states are capable of errors, including, I have to say, as we all know, our own country. In my view, although some of the alternative possibilities put forward by Mr Pearse Wheatley are undoubtedly very much less likely than others, it is, in my view, in the absence of a statement that this claimant was unlawfully at large, or the equivalent statement, unsafe to fill in the gap.

d [30] When Mr Qureshi was making submissions, I taxed him with the suggestion that he was, in effect, submitting that, in the absence of evidence to the contrary before the Secretary of State, the Secretary of State was entitled to assume that the claimant was not only at large, but unlawfully so. In my view, his submissions came very near to making that assertion, although he would not accept, I think, that he went that far.

e [31] Here one has the position that there was a conviction of the claimant. There is no dispute that the inference is he has never been in custody in connection with that. There is no evidence before the court, and none before the Secretary of State in the request, that the claimant ever became aware of his conviction or its terms, and in my view there are possible situations in which, although he was at large in the United Kingdom, as is obvious, he was not unlawfully so in the sense that he was liable to immediate arrest in Albania. It is by no means impossible that there were procedures which would need to be gone through, or proceedings that had been gone through, which would make that proposition doubtful.  
f

g [32] The provisions of 2003 Act have made it potentially simple and obvious and beyond argument that a claimant convicted is unlawfully at large. In my view the court should hesitate before seeking to fill a gap which could so easily have been filled. For those reasons, I have come to the conclusion that the certificate issued by the Secretary of State falls to be quashed. I will consult counsel on what order should follow.

*Application allowed.*

Martyn Gurr Barrister.

# Bamber v Eaton and others

[2004] EWHC 2437 (Ch)

CHANCERY DIVISION

PUMFREY J

6 OCTOBER 2004

*Company – Member – Unfair prejudice to member's interests – Member alleging unfair prejudice – Whether requirement that proceedings be brought by way of petition – Companies Act 1985, s 459(1) – CPR 3.10.*

The claimant, who was a serving prisoner, was a minority shareholder in a family company. He issued a claim form and particulars of claim seeking a money payment, alleging unfair prejudice by the defendant majority shareholders in that the company had paid no dividends to members while the defendants had received directors' fees. The defendants applied for the claim to be struck out on the grounds (i) that s 459(1)<sup>a</sup> of the Companies Act 1985 granted a power to a member of a company to apply to the court by petition on the ground that the company's affairs were being conducted in an unfairly prejudicial manner, and that the claimant's proceedings, having been commenced by claim form, were therefore a nullity; and (ii) that there were no underlying merits which would support properly constituted proceedings. The claimant contended, inter alia, that the provisions of CPR 3.10<sup>b</sup>, under which, where there had been an error of procedure, the error did not invalidate any step taken in the proceedings unless the court so ordered and the court could make an order to remedy the error, enabled the court to dispense with the requirement for a petition.

**Held** – (1) If there were a power to dispense with the statutory requirement that proceedings by a member of a company for relief against unfair prejudice be brought by petition, such a dispensation would have to be by means of a provision with statutory force. The words 'error or procedure' in r 3.10 related to errors in the procedure established by the CPR and r 3.10 did not empower the court to dispense with the requirements of s 459 of the 1985 Act (see [13]–[15], below).

(2) In order to support a claim in respect of unfair prejudice in a quasi-partnership company such as that in the instant case, it would have been necessary for the petitioner to show either a concluded agreement between members or something which would make it inequitable for the majority shareholders to depart from an established practice to pay the minority sums of money arising from the conduct of the business. In the instant case, there was no evidence of such an agreement or understanding. Accordingly, there was no allegation which could have supported a properly constituted petition under s 459 of the 1985 Act. The application would therefore succeed and the proceedings would be struck out (see [18], [20], [22], below).

a Section 459, so far as material, is set out at [1], below

b CPR 3.10 is set out at [14], below

**Notes**

- a** For protection of company's members against unfair prejudice, see 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) paras 923–927, and for the general power of the court to rectify matters where there has been an error of procedure, see 37 *Halsbury's Laws* (4th edn reissue) para 459.
- b** For the Companies Act 1985, s 459, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 508.

**Cases referred to in skeleton argument**

*Elder v Elder & Watson Ltd* 1952 SC 49, Ct of Sess.  
*Harrison (Saul D) & Sons plc, Re* [1995] 1 BCLC 14, CA.

**c Application to strike-out**

- d** The defendants, Sarah Jane Eaton, Christine Ann Eaton, Pamela Boutflour and Robert Woodwiss Boutflour, the majority shareholders in Osea Road Campsites Ltd (the company) applied to strike out proceedings commenced by way of a claim form brought against them by Jeremy Nevill Bamber, a minority shareholder in the company, for the sum of £325,709 and interest. The facts are set out in the judgment.

*Andrew De La Rosa* (instructed by *Sparling Benham & Brough*, Colchester) for the defendants.

- e** The claimant appeared in person.

**PUMFREY J.**

[1] Section 459 of the Companies Act 1985 provides by subsection (1)—

- f** 'A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission
- g** of the company (including an act or omission on its behalf) is or would be so prejudicial.'

- h** [2] On 26 November 2003, Mr Jeremy Nevill Bamber issued a claim form seeking payment of £325,709 and interest upon that sum, alleging unfair prejudice against him by 'paying him nothing from Osea Road Campsites Limited', in which he owned 7.5% of the company. The defendants to this claim form were Sarah Jane Eaton, Christine Ann Eaton, Pamela Boutflour and Robert Woodwiss Boutflour.

- j** [3] The particulars of claim, which, as I understand it, were drafted by Mr Bamber himself and accompanied by the usual certificate of truth, were as follows (omitting a purely formal allegation)—

'5. Originally Osea Road Campsites Limited was set up and owned by Leslie Speakman and Mabel Speakman, the Claimant's grandparents.

6. In the 1970s Leslie Speakman gave 750 one pound shares to the Claimant and 750 one pound shares to the Defendant.'

[4] In fact, I think, although it does not matter, the position is that the transfer to the claimant, Mr Bamber, was by his grandmother, Mabel Speakman. The particulars of claim continue— a

‘7. It was always intended that the profits from Osea Road Camp Sites Limited would be divided equally between Speakmans’ two daughters and their children: 50% to June Bamber, that was to say the Claimant’s mother and the Claimant and 50% to [the Second and Third] Defendants, that is to say to Pamela Boutflour, who is the Claimant’s aunt, and the Second Defendant, Christine Ann Eaton. This was the intention and what happened in practice.’ b

[5] The particulars of claim then continue— c

‘8. In 1985 the Claimant came to prison where he currently remains.

9. Since 1985 the Claimant has received no financial remuneration from the Company. This is contrary to the intentions of Leslie Speakman.

10. The Claimant is being frozen out of the company by the actions of [the Second, Third and Fourth] Defendants. These [second, third and fourth] Defendants take vast sums in Directors’ Fees and pay no dividends. In the accounts [to] 31st December 2000, [the Second] Defendant received £47,604, [the Third] Defendant received £49,788 and [the Fourth] Defendant received £46,509. The Claimant received nothing.’ d

I shall return to that allegation later, but it should be noted for present purposes that the figures that Mr Bamber sets out in the particulars of claim are in fact the amounts of the directors’ respective loan accounts. e

[6] Paragraph 12 appears to base the particulars of claim firmly upon the provisions of s 459 of the Act. There is a bald statement that the defendants are treating the claimant in a prejudicial manner and that the claimant is entitled to minority protection relief from unfair prejudice. He then sets out the actual receipts of the company and its profits and explains that the directors do not work at the caravan site. f

[7] Then, in para 19, it says:

‘Since 1985 it is realistically estimated that the Claimant’s co-owners of Osea Road Camp Sites Limited have paid themselves £2,090,236 and paid him nothing at all.’ g

[8] On 19 December 2003, the defendants’ solicitors wrote a letter to the court which, as it neatly encapsulates the defendants’ views of these proceedings, I shall set out. Having objected to the continuation of these proceedings in the Queen’s Bench Division and by claim form accompanied by particulars of claim, they request the court to exercise its own case management powers under CPR 3.3 and continue— h

‘There are a number of background matters relating to the dispute between the Claimant and the Defendants named in these proceedings, and which we set out below, as briefly as possible. However, none need be relied upon to adopt the course that we put forward. The documents on the court file are sufficient.’ j

(1) On 28th October 1986 the Claimant was found guilty of murdering his adoptive parents (Ralph and June Bamber), his adoptive sister (Sheila Caffell) and her six year old twins sons (Nicholas and Daniel). The murders took



a place on 7th August 1985. The trial judge described the Claimant as 'evil almost beyond belief'. Leave to appeal against the conviction was refused on 20th March 1989 by an Appellate court presided over by the then Lord Chief Justice, Lord Lane. The matter was referred back to the Court of Appeal in 2002 and which, by a Judgment dated 12th December 2002, dismissed all grounds of that appeal.

b (2) The Claimant has commenced separate proceedings in the Chancery Division, and the number is given, against Robert Boutflour, Pamela Boutflour, Christine Eaton (all of whom are Defendants in the proceedings the subject of this letter) and David Boutflour. These proceedings are equally muddled and are also procedurally flawed. Those proceedings originally claimed a vast sum of money in damages (but have been  
c assumed to be proceedings for revocation of the grant of probate) and contend that the execution of the last will of his grandmother, Mabel Speakman, was procured by the undue influence of those named Defendants, and allege that he has thus been deprived of benefit. Almost  
d all of the factual bases upon which he relies are denied but, as a preliminary issue, the method by which he could have taken benefit under the previous will of Mabel Speakman was by the result of his murder of his family. In any event, any such proceedings, have been brought some 17 years after the event, should be barred by laches. An application to strike out the claim is listed to be heard by Master Bragge (to whom the case has been assigned) on 12th January 2004. After representations from solicitors who are  
e advising the Claimant, Master Bragge has ordered that the hearing be in person, with the consequence that the Claimant will be brought from prison (in York) to London.

(3) The Claimant appears now to have also commenced separate proceedings in the Chancery Division ... this time claiming damages for libel  
f against Christine Eaton. Such a claim is clearly procedurally flawed. So far as we are aware the Claim Form has not been served but a copy has been provided to us by the Claimant, Jeremy Bamber (so as to be included in the Application Bundle in the application to be heard by Master Bragge on 12th January).

g (4) In a letter to us by the Claimant on 4th December 2003 he concluded by saying "There were two further claims being drawn up and I will advise you of them prior to service to comply with the pre-action protocol".

h (5) We are bound to point out that our clients have suffered enormous anguish by the actions of the Claimant, when he murdered his family (and their relatives) 17 years ago. That anguish continues today, not least because of the continuing actions of the Claimant who, from the safety of his prison cell, is able to bring one civil action after another, presumably unhindered by time, concern for the litigants, court rules or fees.'

That then is the defendants' view of the proceedings.

j [9] On 12 January 2004, the proceedings in respect of the will of Mabel Speakman were struck out by Master Bragge, who summarily assessed the costs of the applicants in that application as £18,000.

[10] On 6 February, the defendants in this action, in so far as they overlap with the successful parties in the contentious probate proceedings, obtained an interim charging order on Mr Bamber's shares in the company, an order which was made absolute on 24 March. In accordance with the provisions for pre-emption

contained in the company's articles, these shares were transferred to the second defendant, Christine Ann Eaton, and the claimant is no longer a member of the company. a

[11] The defendants now apply to strike out the claim on the footing first that it is irretrievably procedurally flawed and, secondly, that it has no merits.

[12] The procedural point is a short one. Section 459(1) of the 1985 Act grants a power to a member of a company to apply to the court by petition for a specified relief. Mr Bamber's proceedings were not a petition. They were proceedings by claim form accompanied by particulars of claim, and so it is said these proceedings are a nullity. Secondly, it is said that there is no power to amend the proceedings as they are now constituted (or to give appropriate directions to permit them to continue) as a s 459 petition. Thirdly, it is said that, furthermore, Mr Bamber no longer is a member of the company and, accordingly, cannot start fresh proceedings by way of presentation of a petition under s 459 of the 1985 Act. In that event, the defendants contend that, on these purely procedural grounds, this action should be brought to a halt now. b c

[13] If there is a power to dispense with the requirement of the statute that these proceedings be by way of petition, then it seems to me that the dispensation must be by means of a provision which has statutory force. The first question is, of course, whether the requirement to commence proceedings by petition is mandatory or merely directory. It seems to me plain that the requirement that a petition be used is mandatory is clear from the manner in which subsection (1) is framed. There is only one gateway through which a member of a company who alleges unfair prejudice may pass, and that is through the gateway of a petition to the court. One turns, therefore, to find if there is any provision which may enable the court to dispense with that requirement. d e

[14] The only provision to which I was directed is that of CPR 3.10, which provides as follows: f

'Where there has been an error of procedure such as a failure to comply with a rule or practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.' g

[15] It seems to me, as a matter of construction, that the words 'error of procedure' relate here to errors in the procedure established by the Civil Procedure Rules themselves. It does not seem to me that the words are apt to relate to requirements imposed by statute other than the statutes underlying the Civil Procedure Rules perhaps, but in any event not to apply to s 459(1) of the 1985 Act. Failure to use the prescribed route to commence proceedings in relation to unfair prejudice does not seem to me to be merely an error of procedure. It seems to me to be a failure to use the mechanism provided for the purpose. I am, therefore, quite satisfied that r 3.10 does not give me jurisdiction to dispense with the requirements of s 459(1). h

[16] That is not, however, entirely the end of the matter, since it is, I think, possible to conceive of a series of amendments which might possibly have the effect of making the claim form look like a petition. j

[17] For the reasons I shall discuss when I come on to the merits of the case, if such a power exists, then this is not a case in which it should be exercised. But I should point out that CPR 17.3, although giving what appears to be a wide power

a to amend, does not give a power sufficiently wide to enable one form of procedure to be transformed at a later date into another. Be that as it may, the reasons why I would not permit such an amendment to be made in the exercise of my discretion will become clear when I consider the merits of the underlying dispute to which I now turn.

[18] The pleaded case, as I have indicated, really turns upon two allegations. The first is that it was the intention of the Speakmans that 'both sides of the family', as Mr Bamber put it, that is to say the families of their two daughters, should benefit equally from the income derived from the caravan site, which is the principal asset of the company. Then it is said that the company has paid Mr Bamber no dividends and that that treatment is prejudicial to him and is unfair, thereby founding potentially the jurisdiction under s 459. The evidence is that the company does not pay dividends as a matter of practice. It has done so during one financial year, but during one financial year only.

[19] It seems to me that, in order to support a claim in respect of unfair prejudice in a quasi-partnership company representing family interests it would be necessary for the petitioner to show either a concluded agreement between the respective members or, alternatively, something, albeit less than an agreement, which would make it inequitable for the majority to depart from an established practice to pay the minority sums of money arising from the conduct of the business. While there is an infinite number of types of unfair prejudice, these are the only two with which I would be concerned in this case.

[20] However, there is no adequate pleading, and indeed no evidence, either of any such agreement or which would enable any court to conclude that there was such an understanding as would make it inequitable now for the majority shareholders to deprive the minority of its income. Assuming that since he received his shareholding from his grandmother in 1977 Mr Bamber had received a regular income (as to which there is indeed little evidence), it is not possible on the material before me to find any prejudice which is not the consequence of being, firstly, a minority shareholder who cannot participate (by reason of his imprisonment) in the day-to-day management of the company and which could not be attributed to the lack of any policy in the company to pay dividends at any time. It might well be possible to see that an allegation that Mr and Mrs Speakman intended equally to favour the families in the receipts derived from the caravan site would constitute, in a proper case, sufficient to form the basis of an unfair prejudice petition, but I think it is right, as Mr De La Rosa submits, that considerations of this sort could not survive the events of 1975 and the subsequent conviction of Mr Bamber in relation to those terrible crimes. It is difficult to see how any obligation of an equitable nature could survive the murder of the parent by reason of whose existence the obligation had come into existence. With the conviction for this crime, it seems to me that it must be now impossible for Mr Bamber to set up any equity as might support an allegation of unfair prejudice.

[21] Before me, Mr Bamber, who appears in person, did not advance any legal argument. He did, however, contend, firstly, that the price paid on the auditor's certificate for his shares was open to challenge. This allegation forms no part of his particulars of claim and, were the petition properly constituted, I would not permit amendment to raise it. There is simply insufficient material to suppose that the auditor's assessment of the price of the shares is open to any form of challenge. Secondly, Mr Bamber, reiterated the allegation that the intention of the Speakmans that there should be equal division between the two sides of the

family was an intention upon which the court should now act. This I have already dealt with above. a

[22] Accordingly, I do not consider that there are any allegations which could support a properly constituted petition under s 459 of the Act. That being so, I would in any case refuse any application to amend the existing proceedings, were that possible, to reconstitute them as a petition. In the circumstances, therefore, it seems to me that not only are these proceedings fatally procedurally flawed, but there are no underlying merits which would support properly constituted proceedings under s 459 of the Act. Therefore, the defendants' application must succeed and I will hear the parties upon the appropriate way forward. b

*Application allowed.* c

Victoria Ellis Barrister.



# West (Inspector of Taxes) v Trennery and other appeals

[2005] UKHL 5

## HOUSE OF LORDS

LORD STEYN, LORD HOFFMANN, LORD MILLETT, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

15 NOVEMBER 2004, 27 JANUARY 2005

*Capital gains tax – Settlement – Interest in the settlement — Derived property – Anti-avoidance provision treating settlor as having interest in settlement if any ‘derived property’ payable for his benefit – Whether derived property ceasing to be such property on passing out of chargeable settlement – Taxation of Chargeable Gains Act 1992, s 77.*

In one of five linked appeals which had similar facts and depended on the same point of law, the respondent taxpayer had embarked on a plan which was intended to reduce from 40% to 25% the rate of capital gains tax (CGT) chargeable on the gain accruing from the proposed sale of his shares in a company. The plan involved the following steps: (i) in the 1994–95 year of assessment the taxpayer created a settlement (the first settlement) of which he was both a trustee and a beneficiary, and which gave the trustees powers to exclude beneficiaries and transfer capital of the trust fund to any other settlement for the benefit of any of the beneficiaries; (ii) a few days later, but still within the same year of assessment, the taxpayer transferred the bulk of his shares to the trustees of the first settlement; (iii) on the same day, he created a second settlement with similar trusts and powers, but with different trustees; (iv) again on the same day, the trustees of the first settlement made a highly-g geared borrowing from a bank on the security of the shares, and then transferred the advance, amounting to about three quarters of the value of the shares, to the trustees of the second settlement; (v) on the following day, but still within the 1994–95 year of assessment, the trustees of the first settlement executed a deed which excluded them from any beneficial interest under that settlement; and (vi) a few days later, but now within the 1995–96 year of assessment, the trustees of the first settlement sold the shares and paid off the bank loan. That plan was designed to ensure that the CGT in the 1995–96 year of assessment on the gain accruing on the sale of the shares was payable by the trustees of the first settlement at the 25% trustees’ rate, not by the taxpayer at the 40% rate payable by a settlor, under s 77(1)<sup>a</sup> of the Taxation of Chargeable Gains Act 1992, where the settlor had an interest in the settlement during the year of assessment in which the trustees made a chargeable gain from the disposal of the settled property. In contending that it had not achieved that aim, the Revenue relied on s 77(2) of the 1992 Act which provided that a settlor was to be regarded as having an interest in a settlement if any property comprised in the settlement or any ‘derived property’ was payable to or applicable for the benefit of the settlor, or the settlor enjoyed a benefit deriving directly or indirectly from any property which was comprised in the settlement or any ‘derived property’. Section 77(8)

<sup>a</sup> Section 77, so far as material, is set out at [28], below

provided that 'derived property', in relation to any property, meant income from that property or any other property directly or indirectly representing 'proceeds' of, or income from, that property or income therefrom. The Revenue contended that the income payable to the taxpayer from the moneys comprised in the second settlement during the 1995–96 year of assessment, being income from the proceeds of the mortgage of the shares, constituted 'derived property' within the meaning of s 77, and that accordingly the taxpayer was liable for CGT on the shares at the 40% settlor's rate. That contention was rejected by the Special Commissioners, but accepted by a High Court judge on the Revenue's appeal. His decision was reversed by the Court of Appeal which held that 'proceeds' in s 77(8) referred to property which was conferred in the chargeable (ie first) settlement, and that accordingly 'derived property' ceased to be such property when it passed out of that settlement. The Revenue appealed to the House of Lords.

**Held** – On the true construction of s 77 of the 1992 Act, 'derived property' did not cease to be such property when it passed out of the chargeable settlement. A conclusion to the contrary would emasculate s 77(2) and deprive the elaborate provisions relating to derived property of all effect. Those provisions were not aimed at property which remained in the relevant settlement, in regard to which they would be otiose. Rather, they were aimed at property held outside the settlement, but which was derived property in relation to property comprised in it. In the instant case, the proceeds of the mortgage of the shares started off as derived property (and was also, for a matter of hours or minutes, property comprised in the first settlement). It continued to be derived property after it was appointed out of the first settlement. The taxpayer continued to enjoy income from those proceeds during the 1995–96 year of assessment, and it was immaterial that he obtained his right to income under the trusts of the second settlement. Both on the natural meaning of s 77(2) and (8), and in normal parlance, the taxpayer was, in 1995–96, beneficially interested in property derived from the shares which remained in the first settlement. It followed that the rate of tax chargeable in respect of the gain accruing on the disposal of the shares was the settlor's highest marginal rate of income tax and not the lower settlement rate. Accordingly, the appeal would be allowed (see [1], [2], [16], [17], [19]–[23], [40], [42], [43], [50], below).

### Notes

For attribution of gains to settlor and interest in the settlement, see 5(1) *Halsbury's Laws* (4th edn) (2004 reissue) paras 131–132.

For the Taxation of Chargeable Gains Act 1992, s 77, see 42 *Halsbury's Statutes* (4th edn) (2002 reissue) 1236.

### Cases referred to in opinions

*Craven (Inspector of Taxes) v White* [1988] 3 All ER 495, [1989] AC 398, [1988] 3 WLR 423, HL.

*IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259, HL.

*IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991, HL.

*Leedale (Inspector of Taxes) v Lewis* [1982] 3 All ER 808, [1982] 1 WLR 1319, HL.

*Pilkington v IRC* [1962] 3 All ER 622, [1962] AC 612, [1962] 3 WLR 1051, HL.

- a Ramsay (WT) Ltd v IRC, Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300, [1981] 2 WLR 449, HL.  
*Roome v Edwards (Inspector of Taxes)* [1981] 1 All ER 736, [1982] AC 279, [1981] 2 WLR 268, HL.

### Cases referred to in list of authorities

- b Billingham (Inspector of Taxes) v Cooper* [2001] EWCA Civ 1041, [2001] STC 1177.  
*Coxe v Employers' Liability Assurance Corp Ltd* [1916] 2 KB 629.  
*IRC v Mills* [1974] 1 All ER 722, [1975] AC 38, [1974] 2 WLR 325, HL.  
*Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 All ER 589, [2000] 1 WLR 799, HL.

### *c Appeal*

- The Commissioners of Inland Revenue (the Crown) appealed with permission of the Appeal Committee of the House of Lords given on 20 May 2004 from the decision of the Court of Appeal (Kennedy, Jonathan Parker and Longmore LJ) on 18 December 2003 ([2003] EWCA Civ 1792, [2004] STC 170) allowing an appeal by the respondent taxpayers, Stephen Graham Trennery, Christine Mary Trennery, Roger Granville Davies, Eileen Francis Lim and David Powell, from the decision of Peter Smith J on 1 April 2003 ([2003] EWHC 676 (Ch), [2003] STC 580) allowing an appeal by the Crown from the decision of the Special Commissioners (Dr John F Avery Jones CBE and Malcolm Gammie QC) on 23 May 2002 ([2002] STC (SCD) 370) allowing appeals by the taxpayers against assessments to capital gains tax for 1995–1996 by Graham West, Colin Edward Wood and Robert Bray (inspectors of taxes). The facts are set out in the opinion of Lord Walker of Gestingthorpe.

- f Brian Green QC and David Ewart* (instructed by *Brachers*, Maidstone) for the taxpayers.  
*Christopher McCall QC and Michael Gibbon* (instructed by the *Solicitor of Inland Revenue*) for the Crown.

Their Lordships took time for consideration.

- g* 27 January 2005. The following opinions were delivered.

### LORD STEYN.

- h* [1] My Lords, I have read the opinions of my noble and learned friends Lord Millett and Lord Walker of Gestingthorpe. I agree with their opinions. I would allow the appeal and make the order which Lord Walker proposes.

### LORD HOFFMANN.

- j* [2] My Lords, I have had the privilege of reading the speeches of my noble and learned friends, Lord Millett and Lord Walker of Gestingthorpe in draft. I too would allow the appeal and make the order which Lord Walker proposes.

### LORD MILLETT.

[3] My Lords, the question in this appeal is whether a tax avoidance scheme known as 'the flip-flop scheme' or 'the two settlement route' to reduce the rate of capital gains tax payable in respect of a chargeable gain succeeded in its object

or was struck down by statutory provisions which, at least at first sight, appear designed to counter just such arrangements. a

[4] Capital gains tax on chargeable gains accruing to an individual is charged at the taxpayer's highest rate of income tax, usually 40%. Tax on chargeable gains accruing to the trustees of a settlement, however, is charged at the lower rate of 25%. In order to protect the revenue, it is obviously necessary to prevent taxpayers from obtaining the benefit of the lower rate of tax by transferring assets pregnant with capital gains into a settlement in which they retain an interest before procuring the trustees to dispose of them. b

[5] This stratagem is dealt with by s 77(1) of the Taxation of Chargeable Gains Act 1992. This provides that where (i) in any year of assessment the trustees of a settlement make a chargeable gain from the disposal of all or any of the settled property and (ii) the settlor has an interest in the settlement at any time during that year then the trustees are not to be chargeable to tax in respect of the gain but the settlor is to be chargeable as if the gain had accrued to him. c

[6] There is no necessary connection between (i) the settlor's interest, which may be remote, or its value, which may be small, and (ii) the property disposed of, in which the settlor may have no interest and the value of which may be very great. To this extent the section may be said to operate harshly: a settlor who has any interest however small in a settlement is at risk of being charged to tax in respect of capital gains accruing to the trustees even from the disposal of assets in which he has no interest at all. Section 78, however, entitles the settlor to recover the amount of any tax which he has paid from the trustees, so the effect of the section is not to alter the ultimate incidence of the tax but to ensure that the tax is charged at the appropriate rate. The appropriate rate depends on whether the settlor has an interest in any of the settled property during the relevant year of assessment. d

[7] Section 77(2) is an anti-avoidance provision which extends the scope of s 77(1) in order to prevent taxpayers circumventing it. It does this by directing that a settlor shall be regarded as having an interest in a settlement in a number of situations in which, absent the subsection, he would not be so regarded. Thus it provides that a settlor is to be regarded as having an interest in a settlement if any property which may at any time be comprised in the settlement is or will or may become payable to or applicable for the benefit of the settlor or his spouse in any circumstances whatsoever. The relevant provisions on which the Revenue rely in the present case are those which bring in 'derived property'. Omitting words which are immaterial for present purposes, a settlor is to be regarded as having an interest in a settlement if (a) any property ... comprised in the settlement or any derived property is ... payable to or applicable for the benefit of the settlor; or (b) the settlor ... enjoys a benefit deriving directly or indirectly from any property which is comprised in the settlement or any derived property. e

[8] 'Derived property' is defined by s 77(8) as follows:

'In this section "derived property", in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or income from, that property or income therefrom.' f

[9] The taxpayer submitted that the subsection merely extends the scope of the section to income. 'Derived property', he submitted, means income from (i) that property or (ii) any other property ... g



a [10] This is a possible way of reading the subsection, but I have no doubt that the Court of Appeal (Kennedy, Jonathan Parker and Longmore LJ) (see [2003] EWCA Civ 1792, [2004] STC 170) were right to reject it. The subsection is concerned with the extraction of value from a settlement for the benefit of the settlor or his spouse before the year in which a chargeable gain accrues to the trustees of the settlement. On the taxpayer's construction the subsection catches the extraction of value in the form of income but not of capital. It is impossible to ascribe to Parliament so capricious an intention, which not only leaves a gaping hole in the protection which the section is intended to afford the revenue but makes no sense. It is more natural, as well as making more sense, to read the subsection as referring to (i) income from that property or (ii) any other property directly or indirectly representing proceeds from, or income of, that property or c (iii) income therefrom.

d [11] In my opinion the provisions of the section are carefully crafted to catch the extraction of value in any form for the benefit of the settlor or his spouse without introducing an undesirable degree of overkill. The Revenue must work their way through the section and satisfy a number of requirements before they can charge the tax at the settlor's rate.

e [12] The first question is whether a chargeable gain has accrued to the trustees of a settlement from the disposal of all or any part of the settled property (see s 77(1)(a)). In the present case the answer is Yes: a chargeable gain accrued to the trustees of the first (or 'flip') settlement during the 1995–1996 tax year when they sold the Einkorn shares. This disposal identified the first settlement as the relevant settlement and the 1995–1996 tax year as the relevant year.

[13] The next question is whether the settlor had an interest in that settlement during the relevant year. The answer is No: he had divested himself of all interest in the first settlement before the year began.

f [14] That is not, however, an end of the story. The next question is whether the settlor *is to be regarded* as having an interest in the first settlement during the relevant year even though he did not have one in fact. The Revenue say that the answer to this question is Yes: he was entitled to receive derived property (see s 77(2)(a)) or was enjoying a benefit derived directly or indirectly from the property comprised in the first settlement (see s 77(2)(b)) during the relevant year.

g [15] To make this good the Revenue must first identify the property which they allege was payable to or applicable for the benefit of the settlor or from which he was deriving a benefit during the relevant year. For this purpose they identify the income of the moneys comprised in the trust fund of the second (or 'flop') settlement which was payable to the settlor. Secondly they must identify h the property which was still comprised in the first settlement during the relevant year in which they allege the settlor is to be regarded as having an interest. The only property which was still comprised in the first settlement during the relevant year (pending their disposal) was the Einkorn shares. The Revenue identify these as the property in relation to which ('in relation to any property') the moneys j comprised in the trust fund of the second settlement and the income therefrom were derived property (see s 77(8)).

[16] The final question is whether the Revenue are correct in contending that the moneys comprised in the trust funds of the second settlement during the relevant year and the income therefrom which was payable to the settlor constituted derived property within the meaning of s 77(8) in relation to the

Einkorn shares. There can be only one answer to this: of course they do. The moneys comprised in the trust fund of the second settlement directly represented the proceeds of a mortgage of the Einkorn shares and the income payable to the settlor during the relevant year represented the income therefrom. If the trustees of the second settlement had invested the moneys in stocks and shares, these would have indirectly represented those proceeds. It will be observed that I have equated the proceeds of a mortgage of property with the proceeds of the property itself. But the subsection does not refer to 'the proceeds of a sale of that property', but to 'the proceeds of that property'; and this covers any process, whether sale or mortgage or otherwise howsoever, by which value is extracted from one property and transferred to another.

[17] The taxpayer contended that he did not derive any benefit from the proceeds of the mortgage of the Einkorn shares during the relevant year. He had obtained the benefit of those proceeds once and for all when they were transferred to the trustees of the second settlement during the previous year. Thereafter he derived benefit exclusively under the trusts of the second settlement. The difficulty with this argument is that it does not deal with the relevant question: whether in relation to the proceeds of the mortgage of the Einkorn shares the moneys comprised in the second settlement constituted derived property. They plainly did when they were received by the trustees of the first settlement; they did not change their character when they were transferred to the trustees of the second settlement; and the settlor continued to enjoy the income from them during the relevant year. The fact that the settlor obtained his right to income under the trusts of the second settlement is immaterial if the income represented the income of the proceeds of property comprised in the first settlement.

[18] The taxpayer submitted that this was an extravagant application of the statutory provisions, since whatever assets were comprised from time to time in the trust funds of the second settlement they would never cease to represent, directly or indirectly, the proceeds of the mortgage of the Einkorn shares. That is true, but once the Einkorn shares were sold the assets in the second settlement and the income therefrom would cease to constitute derived property in relation to any property for the time being comprised in the first settlement.

[19] Accordingly I would rule that the rate of tax chargeable in respect of the gain accruing on the disposal of the Einkorn shares was the settlor's highest marginal rate of income tax and not the lower settlement rate.

[20] The Court of Appeal reached the contrary conclusion. They reasoned that the word 'proceeds' in s 77(8) referred to property which was comprised in the chargeable (ie the first) settlement; once the proceeds of the mortgage left the first settlement, they ceased to retain their character as proceeds. In my opinion there is no warrant whatever for such a construction, which emasculates s 77(2) and deprives the elaborate provisions relating to derived property of all effect. These are not aimed at property which remains in the relevant settlement, in regard to which they would be otiose, but at property held outside the settlement but which is derived property in relation to property comprised in it.

[21] While the proceeds of the mortgage of the Einkorn shares remained in the first settlement they were both property comprised in the settlement in their own right and property representing the proceeds of such property, viz the Einkorn shares; and (pending his exclusion from all benefit under the settlement) the settlor had an interest in the first settlement without recourse to s 77(2). Once

a they left the first settlement they ceased to be property comprised in that settlement with the result that the settlor had no interest in that settlement during the relevant year. But they continued to represent the proceeds of the mortgage of the Einkorn shares (what else could they represent?) with the result that the settlor fell to be regarded as having an interest in the first settlement by virtue of s 77(2) so long as the Einkorn shares continued to be comprised in it.

b [22] For these reasons I too would allow the appeal and make the order which my noble and learned friend Lord Walker of Gestingthorpe proposes.

#### LORD RODGER OF EARLSFERRY.

c [23] My Lords, I have had the privilege of reading the speeches of my noble and learned friends, Lord Millett and Lord Walker of Gestingthorpe in draft. I agree with them and for the reasons they give I am satisfied that the construction of s 77 of the Taxation of Chargeable Gains Act 1992 adopted by the Court of Appeal is unsound. I would accordingly allow the appeal and make the order as to costs which Lord Walker proposes.

#### d LORD WALKER OF GESTINGTHORPE.

e [24] My Lords, these appeals are concerned with capital gains tax (CGT) claimed in respect of a chargeable disposal of settled property which occurred during the 1995–1996 year of assessment. There are five linked appeals which have similar facts and all depend on the same point of law. In each appeal the issue is not whether CGT is payable, but whether it is payable at the trustees' rate (25%) or at the settlor's rate (40%). Your Lordships have to construe s 77 of the Taxation of Chargeable Gains Act 1992 as substituted by the Finance Act 1995. The legislation has since been changed again, by the Finance Act 2000, which introduced into the 1992 Act a new s 76B and Sch 4B tailor-made to frustrate the scheme which the taxpayers used in this case. Another way of putting the issue f in the appeals is whether the changes made in 2000 were strictly necessary.

g [25] The parties' written cases, and the oral submissions of Mr Green QC (whom the House heard first on behalf of the respondent taxpayers), have developed some refined and complex points. Before I address those there are some more basic points to be made about the scheme and structure of the CGT legislation. CGT was introduced nearly 40 years ago in a relatively simple code set out in Pt III of the Finance Act 1965. The legislation has since become very much more complicated. One feature of the tax which has survived unchanged is the rule that the creation of a mortgage or charge as security for a debt is not a disposal for CGT purposes, even though the equity of redemption may be worth h only a fraction of the full value of the mortgaged property (or may even be worthless). The other side of this coin is that a sale of mortgaged property is treated as a disposal of the whole property by the mortgagor, even if it is a sale effected by the mortgagee under a power of sale. In an extreme case a hopelessly insolvent mortgagor may be liable to pay CGT as a result of a sale from which he personally gets nothing. These rules are now found in s 26 of the 1992 Act.

j [26] The CGT legislation has from its inception treated trustees of settled property as a taxable unit. The trustees of a settlement are regarded as 'a single and continuing body of persons (distinct from the persons who may from time to time be the trustees)': see s 69(1) of the 1992 Act. 'Settled property' is defined in s 68 (any property held in trust other than property held by a nominee or bare trustee) and the expression 'settlement' reflects the meaning of 'settled property'.

A settlement for CGT purposes is therefore (in broad terms) what a Chancery lawyer would call a settlement, as opposed to the very wide definition ('includes any disposition, covenant, agreement, arrangement or transfer of assets') used for income tax purposes and now found in s 660G of the Income and Corporation Taxes Act 1988 (the 1988 Act). In *Roome v Edwards (Inspector of Taxes)* [1981] 1 All ER 736, [1982] AC 279 this House considered the meaning of 'settlement' in the CGT legislation, and in particular whether the establishment of a new appropriated fund leads to the creation of a separate settlement, whose trustees are a separate taxable unit (see [1981] 1 All ER 736 at 739, [1982] AC 279 at 292–295 per Lord Wilberforce). Since *Roome's* case there have been other decisions exploring this area, but it is unnecessary to go into them. It is common ground that for CGT purposes property can pass from one settlement to another, not only as a result of a resettlement effected by one or more of the beneficiaries, but also (as occurred in these appeals) as a result of trustees exercising powers of appointment or advancement.

[27] Initially CGT was charged at a flat rate of 30%, subject to a modest annual exemption for individuals (and an even more modest annual exemption for trustees and personal representatives). But in 1988 Parliament decided to charge an individual's net chargeable gains at income tax rates and as the top slice of income. So if an individual makes very large gains (not offset by allowable losses) he pays CGT at a marginal rate of 40% and at an average rate very little if any lower. The rate paid by trustees of a settlement with a subsisting interest in possession was however fixed at 25% (until recent changes not relevant to these appeals). So in 1995–1996 there was a clear advantage to taxpayers if any large chargeable gains could be taxed, not as gains of individuals, but as gains of trustees of an interest in possession settlement.

[28] If an individual owned assets with a large unrealised gain which was likely to be realised shortly, he had an incentive to try to shelter the assets in an interest in possession settlement (if they could be put into the settlement tax-free, especially by claiming holdover relief for business assets), to have the gain realised by the trustees, and later (as a beneficiary of the settlement) to enjoy access to the proceeds. But if he was to achieve that aim he and his advisers had to find a way around s 77 of the 1992 Act (charge on settlor with interest in settlement). That section in its original form was a consolidation of Sch 10, paras 1–4 of the Finance Act 1988. As amended by the 1995 Act (and I shall come back to the circumstances and effect of that amendment) s 77 of the 1992 Act, so far as directly material, was in the following terms:

'(1) Where in a year of assessment—(a) chargeable gains accrue to the trustees of a settlement from the disposal of any or all of the settled property, (b) after making any deduction provided for by section 2(2) [allowable losses] in respect of disposals of the settled property there remains an amount on which the trustees would, disregarding section 3 [annual exemptions], be chargeable to tax for the year in respect of those gains, and (c) at any time during the year the settlor has an interest in the settlement, the trustees shall not be chargeable to tax in respect of those but instead chargeable gains of an amount equal to that referred to in paragraph (b) shall be treated as accruing to the settlor in that year.

(2) Subject to the following provisions of this section, a settlor shall be regarded as having an interest in a settlement if—(a) any property which may at any time be comprised in the settlement, or any derived property is,



a or will or may become, payable to or applicable for the benefit of the settlor or his spouse in any circumstances whatsoever, or (b) the settlor or his spouse enjoys a benefit deriving directly or indirectly from any property which is comprised in the settlement or any derived property ...

b (8) In this section “derived property”, in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income therefrom.’

The dispute between the parties centres on the definition of ‘derived property’.

c [29] The taxpayers whom the Revenue wish to tax under s 77 were all shareholders in an unquoted company, Einkorn Ltd (Einkorn), which ran buses. At the beginning of 1995 they were negotiating to sell their shares in Einkorn to a company called North British Buses Ltd (North British). The shareholder whose case was taken as typical was Mr Stephen Trennery. He had 10,000 Einkorn shares. He was married to Mrs Christine Trennery and they had two children, David and Andrew, then aged 19 and 17. Mr and Mrs Trennery, and the other shareholders and their wives, embarked on a plan devised by their solicitors and accountants with a view to achieving a 25% rate of CGT on the bulk of the shares intended to be sold.

e [30] The plan was described in an advice letter dated 20 April 1995 written by the shareholders’ solicitors and it was carried into effect by a number of documents executed between 30 March and 5 April 1995. The steps are described in detail in an agreed statement of facts set out in the Special Commissioners’ decision (see [2002] STC (SCD) 370 at 373–375) and also annexed to the judgment of Peter Smith J (see [2003] EWHC 676 (Ch), [2003] STC 580 at 602–606). Before the Special Commissioners and in the Chancery f Division there were some subsidiary issues which are no longer live. It is sufficient to give a short summary of the essential steps taken by Mr and Mrs Trennery. (1) On 1 April 1995 Mr Trennery settled £10 on trust for himself for life, with power for the trustees to pay capital to him, and then on trusts and powers primarily for his children and remoter issue. The details are unimportant except that cl 7 contained a power exercisable by the trustees g (subject to various constraints) to pay or transfer capital or income of the trust fund to any other settlement for the benefit of any of the beneficiaries; and cl 12 gave the trustees power to exclude beneficiaries. The trustees of this settlement (the first settlement) were Mr and Mrs Trennery. They had previously applied to National Westminster Bank for an advance of £770,000, h describing themselves as ‘trustees of a life interest settlement trust’; and the bank had agreed to make the advance. (2) On 4 April Mr Trennery transferred 8,000 of his 10,000 Einkorn shares to himself and his wife as trustees of the first settlement. (3) Also on 4 April Mr Trennery made another settlement (the second settlement) with a second nominal sum of £10. Its trusts and powers j were similar, but not identical, to those of the first settlement. Its trustees were two partners in Mr Trennery’s solicitors. (4) Also on 4 April Mr and Mrs Trennery, acting as trustees of the first settlement, drew down the advance of £770,000 and authorised their solicitors to hold the share certificates in respect of the settled shares (or the proceeds of sale of those shares) as security for the bank loan. They then proceeded to execute a deed of appointment of

this sum, in exercise of the cl 7 power, to the trustees of the second settlement to the intent that the sum should—

‘from that time cease to be held upon and with and subject to the trusts powers and provisions of the [First] Settlement and shall (with all future income of the same) for all purposes become subject to the trusts powers and provisions contained in the Second Settlement and form part of the Trust Fund of the Second Settlement as a separate settlement for all purposes.’

The transfer was effected by entries in the solicitors’ client account. (5) On 5 April Mr and Mrs Trennery, as trustees of the first settlement, executed a deed excluding themselves as beneficiaries and replacing their interests with life interests in possession conferred on their two sons. (6) On 13 April Mr and Mrs Trennery, as trustees of the first settlement, sold their 8,000 Einkorn shares to North British at £130.58 per share (a very small proportion of which was deferred for one year). The rest of the purchase price was paid on 18 April and the bank loan was paid off.

[31] The agreed statement of facts included the facts that all the steps down to (and including) 5 April 1995 were ‘preordained’ but the sale to North British was not ‘preordained’ (in each case, in the sense described in *Craven (Inspector of Taxes) v White* [1988] 3 All ER 495, [1989] AC 398). In your Lordships’ House the parties agree that no issue arises ‘under the so-called *Ramsay* doctrine’ (see *WT Ramsay Ltd v IRC*, *Eilbeck (Inspector of Taxes) v Rawling* [1981] 1 All ER 865, [1982] AC 300). The issue is one of statutory construction, to be determined in accordance with the principles stated by the House in *IRC v McGuckian* [1997] 3 All ER 817, [1997] 1 WLR 991.

[32] I approach the parties’ competing contentions on the issue of statutory construction by examining the six successive steps summarised in the penultimate paragraph. Much of the analysis is uncontroversial. At step one Mr Trennery created a settlement for CGT purposes. He and his wife were the first trustees (probably because no one else was willing to undertake the borrowing of such a large sum on the security of a minority holding of shares in an unquoted company) but as trustees they were regarded as a separate taxable unit. At step two Mr Trennery made a disposal of 8,000 Einkorn shares, but he avoided CGT because he could claim holdover relief for business assets under s 165 of the 1992 Act. The shares became settled property and the settlor had an interest under the settlement, so that s 77 of the 1992 Act certainly applied during the 1994–1995 year of assessment. At step three Mr Trennery created another, separate settlement for CGT purposes. Its trustees were another separate taxable unit. The stage was then set for the essential steps which were to follow.

[33] At step four the trustees of the first settlement made a highly-g geared borrowing on the security of their Einkorn shares. This was not a disposal of the shares, which still had to be regarded, for CGT purposes, as retaining their full value (s 26 of the 1992 Act). The trustees of the first settlement then transferred £770,000 to the trustees of the second settlement, but there was no immediate CGT consequence as it was cash that was transferred.

[34] At step five (still, it is to be noted, within the 1994–1995 year of assessment) Mr and Mrs Trennery were excluded from any beneficial interest under the first settlement (the effectiveness of their exclusion was previously in

a issue, but that point is no longer taken by the Revenue). It is common ground that, had s 77 not referred to 'derived property', that section would have ceased to apply to the first settlement at the end of the 1994–1995 year of assessment. The issue is whether the 'derived property' provisions produce a different result.

b [35] At step six the trustees of the first settlement disposed of their 8,000 Einkorn shares for a total of about £1m. They accept that they must pay CGT of the order of £250,000 (more precise figures are set out in para 10 of the Special Commissioners' decision) but they resist the Revenue's claim that Mr Trennery must pay CGT of the order of £400,000, with a right to reimbursement (under s 78 of the 1992 Act) from himself and his wife in their capacity as trustees of the first settlement. If CGT is payable at the higher rate, c the remaining resources of the first settlement are insufficient to make reimbursement in full. But Mr Trennery remains a beneficiary who can receive income or capital under the second settlement.

d [36] The issue of construction has already been argued and decided three times, and the parties' fortunes have fluctuated. The Special Commissioners (Dr J F Avery Jones CBE and Mr Malcolm Gammie QC) decided it in favour of the taxpayers (see [2002] STC (SCD) 370 at 380). On appeal by the Inspectors of Taxes, Peter Smith J reached the opposite conclusion (see [2003] STC 580 at 599–600). On further appeal by the taxpayer the Court of Appeal (Kennedy, Jonathan Parker and Longmore LJ) (see [2003] EWCA Civ 1792, [2004] STC e 170) reversed Peter Smith J and restored the decision of the Special Commissioners. It is unnecessary to embark on a summary of their reasons, since (apart from Mr Green's primary submission to your Lordships, mentioned below) essentially the same arguments have been put forward at every level. They centre on whether the correct interpretation of s 77 is that any 'derived property' must remain comprised in the relevant settlement, and f ceases to be derived property if it passes out of that settlement.

[37] The structure of s 77 is rather awkward (Jonathan Parker LJ, who gave the leading judgment in the Court of Appeal, used stronger language) and it is important to keep in mind how the different subsections fit together. Subsection (1) focuses on a year of assessment (in these appeals, 1995–1996) in g which chargeable gains accrue to trustees and lays down the general rule that the settlor of the relevant settlement ('the chargeable settlement') is to be liable to CGT if 'at any time during the year the settlor had an interest in the settlement'. Subsection (2) explains the meaning of those words by reference to two paragraphs, (a) and (b), which broadly correspond to (a) the settlor's h entitlement to any sort of beneficial interest, whether present or future and whether fixed or discretionary; and (b) the settlor's actual receipt of a benefit. (Each of these references to the settlor must be taken as including the settlor's wife or husband; this extension should be read in throughout the following discussion.) It is hard to see what para (b) adds to the very wide language of para (a). Mr Green suggested that it covered a benefit conferred in breach of j trust, and that may well be so. The paragraph may also cover the possibility of an assignment of a beneficial interest made to the settlor (without any impropriety) by a beneficiary (that possibility is to be disregarded, unless and until it happens, under s 77(4)(b), a provision which was not referred to in the course of argument and which may reduce the disquiet engendered by some of Mr Green's more extreme examples). On any view, however, there is probably

an overlap between paras (a) and (b). Such an overlap is not unusual in taxing statutes (see for instance, out of many possible examples, sub-ss (2) and (3) of s 739 of the Income and Corporation Taxes Act 1988, relating to transfers of assets abroad). To my mind the important point about s 77(2) is that (the chargeable settlement and the relevant year of assessment having been identified) it requires beneficial entitlement of some sort, in that year, in respect of property comprised in the settlement 'or any derived property'. That sends the reader to the definition in sub-s (8), which I repeat:

'In this section "derived property", in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income therefrom.'

[38] Mr Green's primary submission was that in this definition the words 'income from' (where they first occur) govern all the following phrases. He advanced this argument in the Court of Appeal, although it had not been advanced before the Special Commissioners, and indeed a different analysis had apparently been conceded (see para 17 of the Special Commissioners' decision and para [49] of the judgment of Jonathan Parker LJ). I agree with the Court of Appeal in rejecting it, for the reasons which they gave. The only natural reading of sub-s (8) is that its structure has five elements: that 'derived property' in relation to any property (P), means:

- (i) income from P;
- (ii) any other property directly or indirectly representing proceeds of P;
- (iii) income from any such other property at (ii), above;
- (iv) any other property directly or indirectly representing proceeds of income from P; and
- (v) income from such other property at (iv), above.

[39] The taxpayers' next main point is that if s 77 is to apply through any of these five elements the property or income in question must, in the relevant year of assessment, be comprised in the chargeable settlement. Any other interpretation would, it is said, give s 77 an almost unrestricted reach, leading to extraordinary results and possible hardship to taxpayers.

[40] Mr Green developed this argument with great skill, but to my mind it faces an insuperable objection. If he is right, the whole elaborate definition in sub-s (8) could have been replaced by a simple reference to any capital or income of the property comprised in the chargeable settlement. Section 77(2)(a) and (b) already refer to property comprised in the settlement, before the reader ever gets to derived property. So the taxpayers' contention deprives the latter expression of any force. But Parliament must be taken to have intended the expression to add something to the effect of s 77, and it would occasion no great surprise if the addition were found to be a category of property which is settled property, and is derived from settled property comprised in the chargeable settlement, but is not itself still comprised in the chargeable settlement.

[41] Mr Green put forward various imaginary scenarios in which, on totally different facts, taxpayers might be faced with tax claims which might appear oppressive. He was understandably rather reluctant to spend long on analysing the sequence of events which actually occurred in these appeals. But he did (as I understand it) accept that the £770,000 borrowed by Mr and Mrs Trennery on



a the security of the settled Einkorn shares was initially 'derived property' in relation to those shares. However the £770,000 did (in his submission) cease to be derived property within hours or even minutes of the draw-down of the loan, when the money was (by the deed executed at step four and the simultaneous ledger entries in the solicitors' client account) transferred to the trustees of the second settlement. It was in consequence, at the dawning of the  
b 1995–1996 year of assessment, comprised in a settlement separate from the first settlement. (To state, as the respondents' printed case does, that it was an entirely separate settlement might be said to overlook the effect of the rule against perpetuities, as explained by this House in *Pilkington v IRC* [1962] 3 All ER 622, [1962] AC 612; the trust law analysis is that the second settlement served as a vehicle to receive and continue the act of bounty effected by the first  
c settlement, with the rule against perpetuities acting as a sort of umbilical cord between the two settlements; the fact remains, however, that it was a separate settlement for CGT purposes.) Mr and Mrs Trennery were then excluded from the first settlement, which at that stage comprised 8,000 Einkorn shares and £10, subject to the trustees' liability to service and repay the loan of £770,000.  
d That loan was secured on the shares, and Mr and Mrs Trennery, in their capacity as trustees, were entitled to be indemnified for the liability against the whole trust fund (the shares and £10).

[42] In my opinion the £770,000 started off as derived property (and was also, for a matter of hours or minutes, property comprised in the first settlement). It continued to be derived property after it was appointed out of  
e the first settlement. The effect of the taxpayers' argument would be to cut off the operation of the 'derived property' provision at the very moment when it started to have some work to do. The economic effect of the arrangements was to transfer about three-quarters of the value of the shares to the second settlement, but without any disposal of the shares for CGT purposes.  
f Mr Trennery was a beneficiary under the second settlement, and continued to be a beneficiary in 1995–1996. Both on the natural meaning of s 77(2) and (8) and in normal parlance, Mr Trennery was in 1995–1996 beneficially interested in property derived from (that is, representing proceeds of) the shares which remained in the first settlement. The only property in the second settlement which was not 'derived property' was the second nominal sum of £10 which  
g Mr Trennery settled on 4 April 1995.

[43] That construction seems to me well within Parliament's likely intention in enacting s 77 in its amended form. By 1995 it was well known that (under the rule then embodied in s 26 of the 1992 Act) secured borrowing could be used to produce economic results which were, at least in the short term, at  
h odds with the analysis of the transaction for CGT purposes. It was also well known, and had been since the decision of this House in *Roome v Edwards* (*Inspector of Taxes*) [1981] 1 All ER 736, [1982] AC 279, that special powers of appointment and advancement could be used to make settled property pass from one settlement to another, without any intervening period of absolute  
j ownership, and that such transfers might have important CGT consequences. In my opinion the transactions on which the taxpayers embarked fall squarely within the language, and the likely legislative intendment, of s 77 as amended.

[44] In the end the taxpayers' case is based, as it seems to me, not on the way in which the Revenue seek to apply the statutory provisions in these cases, but on the anomalous and oppressive effect which they might have in other

hypothetical circumstances far removed from those of the present case. Section 77's requirement that the chargeable settlement should, in the year of assessment in question, contain some property (what I have referred to above as P) to which the derived property can be linked, provides some restriction on its scope, but I would accept that it does not meet every possible hard case. One possible answer to the alleged anomaly and oppression is that in 2000 Parliament enacted the far more detailed code now found in Sch 4B to the 1992 Act. But a more complete answer was given by Lord Wilberforce (with whom Lord Scarman, Lord Roskill and Lord Brandon of Oakbrook agreed) in *Leedale (Inspector of Taxes) v Lewis* [1982] 3 All ER 808 at 816–817, [1982] 1 WLR 1319 at 1330:

'I would only refer to one other argument, that based on the alleged "hardship" of accepting the Crown's contention. I do not think that this is a relevant consideration at all. If there were two equally possible constructions of this subsection, it might be correct to choose that which is the more favourable to the taxpayer, on the basis that subjects can only be taxed by clear words. This principle cannot apply where there are decisive legal reasons for preferring one construction rather than another. Once this step has been taken, considerations of "hardship" do not enter into the discussion.'

Parliament has for very many years passed many enactments aimed at settlors who seek to use settlements to shelter assets from high rates of tax, and later to enjoy the benefit of the settled property themselves. The possibility of even a small benefit may have severely adverse consequences. That is well understood by those who advise settlors. As Lord Wilberforce added after the passage just quoted: 'Settlors, after 1965, make their settlements with knowledge of the legislation and of its consequences.'

[45] I wish to add a few comments (which can be regarded as an appendix, and not required reading) on the legislative history of s 77. This is a point noted by the Special Commissioners (who have great experience and learning in these matters), and Mr Green attached some (but not much) importance to it in his printed case and his oral submissions.

[46] The expression 'derived property' seems to have appeared first in a taxing statute in s 28 of the Finance Act 1946, in provisions designed to charge higher rates of income tax on some categories of income covenants and other settlements of property in which the settlor retained a beneficial interest. It was, I think, the third round of amending legislation aimed at curbing income covenants, and the proviso to s 28(1) responded to the decision of this House in *IRC v Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259. The section went through various consolidations, emerging (with later accretions) as ss 683–685 of the 1988 Act. Section 685(1) provided:

'For the purposes of section 683 and 684, the settlor shall not be deemed to have divested himself absolutely of any property if that property or any derived property is, or will or may become, in any circumstances whatsoever, payable to or applicable for the benefit of the settlor or, in the case of a settlement made after 6th April 1965, the wife or husband of the settlor.'

a Subsection (3) provided (apart from an immaterial amendment made by the Finance Act 1989):

‘In subsections (1) and (2) above “derived property”, in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or any income therefrom.’

b [47] The obvious similarity of wording suggests that this definition provided the model for the amended version of s 77 enacted in 1995. But it was at best an imperfect model, because the relevant definition of ‘settlement’ was quite different, and because the notion of the settlor having ‘divested himself absolutely of any property’ naturally focused on the particular property which c he had settled (whereas s 77 referred more generally to the property comprised in the settlement).

d [48] In 1995 Parliament decided to rationalise the ragged patchwork of provisions which had come to be included in Pt XV (Settlements) of the 1988 Act. Chapters I and II and part of Ch III (including ss 683–685) were repealed. Instead ss 660A–660G were enacted. Section 660A(1) and (2) provide as follows:

e ‘(1) Income arising under a settlement during the life of the settlor shall be treated for all purposes of the Income Tax Acts as the income of the settlor and not as the income of any other person unless the income arises from property in which the settlor has no interest.

f (2) Subject to the following provisions of this section, a settlor shall be regarded as having an interest in property if that property or any derived property is, or will or may become, payable to or applicable for the benefit of the settlor or his spouse in any circumstances whatsoever.’

g Section 660A(10) contains the now familiar definition of ‘derived property’. These amendments were made by the 1995 Act, which also amended s 77 of the 1992 Act. The amendments to s 77 (in form, though not in substance, the substitution of a whole new section) were made by s 74 of and Sch 17, Pt III, para 27 of the 1995 Act, in a part of the Schedule headed ‘Consequential amendments of other enactments’. Previously s 77 had not referred to derived property.

h [49] So the income tax provisions were in 1995 recast to ask the question (much as s 77 does) whether there is a settlement of property ‘in which the settlor has no interest’, and that question is explained in terms of ‘that property or any derived property’. But the model is still far from perfect because the meaning of settlement for income tax purposes (now in s 660G(1)) is still far wider, and much further from the traditional language of chancery lawyers, than the fairly traditional meaning given to the expression for CGT purposes. For income tax purposes the transfer from the first settlement to the second j settlement was a non-event; the £770,000 was derived from Mr Trennery’s original disposition and he did not cease to be the settlor of it (and would not have ceased to be the settlor even if some other individual had provided the second nominal sum, and had been named as settlor of the second settlement). So any apparent parallel between the income tax provisions and the CGT provisions may be misleading.

[50] Mr Green submitted that on the Revenue's argument Parliament did in 1995 make a fundamental change in s 77, and that it is remarkable to see it described as a consequential amendment. I see some force in that. But it is possible that the in-depth review which must have preceded the 1995 Act led to this point being identified as one on which a significant change in the CGT legislation was expedient. In any event the use of the label 'consequential amendments', even if rather inappropriate, cannot alter the construction of the amended s 77. With all respect to the Court of Appeal I consider that the construction which they adopted is clearly wrong. I would allow the appeal, set aside the order of the Court of Appeal, and restore the order of Peter Smith J. But (in accordance with the terms on which leave to appeal was granted) the appellants must pay the respondents' costs in this House. I would order the respondents to pay the costs in the Court of Appeal.

*Appeal allowed.*

Celia Fox Barrister.



a

# Office of Fair Trading v Lloyds TSB Bank plc and others

[2004] EWHC 2600 (Comm)

b

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

GLOSTER J

22–28 JULY, 12 NOVEMBER 2004

c

*Consumer credit – Agreement – Regulated consumer credit agreement – Restricted use credit agreement – Debtor-creditor-supplier agreement – Liability of creditor for breaches by supplier – Liability of creditor in foreign transactions – Consumer Credit Act 1974, ss 11(1)(b), 12(1)(b), 75(1), 187(1), (2), (3).*

d

The Office of Fair Trading issued declaratory proceedings for the determination of certain issues arising in relation to the construction of the Consumer Credit Act 1974. The defendants were sued as representatives of United Kingdom credit institutions licensed under the 1974 Act to carry on consumer credit business and who issued credit cards under regulated credit agreements with consumers. Credit card transactions commonly involved four parties: (i) the card issuer or creditor; (ii) the customer or debtor; (iii) the supplier or merchant who accepted credit cards in payment for goods or services supplied to the customer; and (iv) the merchant acquirer, who recruited suppliers to the scheme, paid them and obtained reimbursement through the card network clearing system. In a three-party transaction, the role of party (iv) would be carried out by the card issuer itself. The underlying issue was the application of s 75<sup>a</sup> of the 1974 Act to foreign transactions. Section 75(1) provided, inter alia, that if the debtor under a debtor-creditor-supplier agreement falling within, inter alia, s 12(b)<sup>b</sup> of the 1974 Act had, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he had a like claim against the creditor, who, with the supplier, would accordingly be jointly and severally liable to the debtor. The section granted to the creditor a statutory right of indemnity against the supplier and the creditor was entitled to have the supplier made a party to the proceedings. A debtor-creditor-supplier agreement falling within s 12(b) of the 1974 Act was a regulated consumer credit agreement being 'a restricted-use credit agreement which falls within s 11(1)(b)<sup>c</sup> and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier ...'. Section 11(1)(b) of the 1974 Act defined the relevant agreement as a regulated consumer credit agreement 'to finance a transaction between the debtor and a person (the "supplier") other than the creditor'. The words 'pre-existing arrangements' in s 12(b) were to be construed in accordance with s 187<sup>d</sup>, which provided in sub-s (1) that a consumer credit agreement 'shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of arrangements previously made between' inter alia, the creditor and the supplier. Subsection (2) dealt with 'future arrangements'. But

j

a Section 75, so far as material, is set out at [2], below

b Section 12, so far as material, is set out at [3], below

c Section 11, so far as material, is set out at [3], below

d Section 187, so far as material, is set out at [19], [36], below

s 187(3) provided that arrangements were to be disregarded for the purposes of sub-ss (1), (2) if (a) they were 'arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and (b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers in general'. The Office of Fair Trading sought declarations to the effect that (i) four-party transactions and (ii) foreign transactions were subject to the liability imposed by s 75(1) of the 1974 Act. The first and second defendants sought declarations to the effect that s 75 did not apply to four-party transactions, whether domestic or foreign, and all the defendants sought a declaration that s 75 did not apply to foreign transactions. The defendants therefore contended, inter alia, (i) that in a four-party transaction the transaction between the supplier and the customer was not a transaction that was financed by the regulated credit agreement between the customer and the card issuer in that the card issuer had no liability to pay the supplier, and the only person contractually liable to pay the supplier, once the card was accepted, was the merchant acquirer, so that it was the agreement between the supplier and the merchant acquirer that financed the transaction for the purposes of s 11(b); (ii) that in a four-party transaction the consumer credit agreement could not be said to have been entered into in accordance with arrangements previously made between a card issuer (the creditor) and a supplier; and (iii) that 'arrangements' in a four-party transaction should be disregarded under s 187(3)(a) because there were payments to the supplier by the creditor and under s 187(3)(b) because the creditor was holding himself out to make payments to suppliers generally.

**Held** – (1) A regulated credit agreement under which the creditor provided the debtor with a credit card which could be used by the debtor in payment of goods and services in transactions with suppliers of those goods and services able to accept the card (a regulated credit card agreement) fell into the definition of a restricted-use credit agreement in s 11(1)(b) of the 1974 Act whether the card payment system involved a three-party transaction or a four-party transaction. It was impossible to distinguish, in the real world, between a three-party and a four-party transaction. The obvious and simple purpose of the regulated credit agreement was to provide the customer with credit (ie financial accommodation) so that he could purchase goods or services from the supplier and 'to finance' had to be read in the context of its use and meant 'provide financial accommodation in respect of'. A card issuer clearly provided financial accommodation to its cardholder, in relation to his purchases from suppliers, because he was given time to pay for his purchases under the terms of the credit card agreement (see [16], [17], below).

(2) Where there was a regulated credit card agreement, there were 'arrangements between' the creditor and supplier for the purposes of s 12(b) of the 1974 Act in the circumstances of a four-party transaction. In the natural ordinary sense of the word, there were arrangements in place made between card issuers and suppliers, notwithstanding the absence of any direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. By virtue of the supplier and the card issuer being subject to the rules and settlement processes common to all participants in the card network, there was indeed an arrangement (albeit indirect) between them. Furthermore, there was no commercial or policy based reason for not applying s 75(1) of the 1974 Act to four-party transactions

a (see [24], [26], [27], [30], [33], [34], below); dicta of Willmer and Diplock LJ in *Re British Basic Slag Ltd's Agreements* [1963] 2 All ER 807 at 814, 819 applied.

(3) The relevant arrangements in four-party transactions were not to be disregarded for the purposes of s 187(1), (2) of the 1974 Act by virtue of s 187(3). A credit card issuer did not hold itself out as willing to make payments to suppliers generally, but only to those who had a subsisting agreement with a member of the network. Although large numbers of suppliers accepted credit cards, they remained within a limited class (see [38]–[40], below).

b (4) Section 75(1) did not apply to foreign contracts, where the contract between the debtor and the supplier of goods or services was made wholly outside the United Kingdom, was governed by a foreign law, and the goods were delivered or services supplied outside the United Kingdom; nor did it apply to contracts where the acts of offer and acceptance were done partly within the United Kingdom and partly overseas, and/or the goods were despatched outside the United Kingdom for delivery within the United Kingdom. There was no implication in the statute that the section had extra-territorial effect. The premise of s 75 was that the United Kingdom court had an enforceable and effective jurisdiction over the supply transaction and the supplier (see [44], [46]–[50], [59], below); *Jarrett v Barclays Bank plc*, *Jones v First National Bank plc*, *Peacock v First National Bank plc* [1997] 2 All ER 484 distinguished.

### Notes

e For the liability of a creditor for breaches by supplier, see 9(1) *Halsbury's Laws* (4th edn reissue) para 250.

For the Consumer Credit Act 1974, ss 11, 12, 75, 187 see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 27, 74, 146.

### Cases referred to in judgment

- f *AB & Co, Re* [1900] 1 QB 541, CA.  
*Amalia, The* (1863) 1 Moo PCCNS 471, 15 ER 778.  
*British Basic Slag Ltd's Agreements, Re* [1963] 2 All ER 807, [1963] 1 WLR 727, CA.  
*Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35, [2002] 1 All ER (Comm) 446.  
*Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133, [1983] 2 AC 130, [1983] 2 WLR 94, HL.  
*Clarke v Earl of Dunraven and Mount-Earl, The Satanita* [1897] AC 59, HL.  
*Fisher v Director General of Fair Trading* [1982] ICR 71, CA.  
*Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27, [1999] 3 WLR 113, HL.  
g *Grove v American Express Services Europe Ltd* (28 April 2003, unreported) Cty Ct.  
*Jarrett v Barclays Bank plc*, *Jones v First National Bank plc*, *Peacock v First National Bank plc* [1997] 2 All ER 484, [1999] QB 1, [1997] 3 WLR 654, CA.  
*Lister (RA) & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032, [1987] 1 WLR 1614.  
j *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.  
*Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] 1 All ER 545, [1981] AC 800, [1981] 2 WLR 279, HL.  
*Royal Institution of Chartered Surveyors' Application, Re* [1986] ICR 550, CA.  
*Sawers, Re, ex p Blain* (1879) 12 Ch D 522, [1874–80] All ER Rep 708, CA.  
*Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61, CA.

*Virgo Steamship Co SA v Skaarup Shipping Corp, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352. a

### Declaratory Proceedings

The Office of Fair Trading (the OFT) issued proceedings against Lloyds TSB Bank plc (the bank) and Tesco Personal Finance Ltd (TPF) for a declaration in determination of issues arising in relation to the construction of s 75 of the Consumer Credit Act 1974. American Express Services Europe Ltd (AESEL) was given permission to join the proceedings. The facts are set out in the judgment. b

*William Hibbert and Julia Smith* (instructed by the *Treasury Solicitor*) for the OFT. *Mark Hapgood QC* (instructed by *Lovells*) for the bank. c

*Ali Malek QC* and *Fred Philpott* (instructed by *S J Berwin*) for TPF.

*Mark Howard QC* and *Iain McDonald* (instructed by *CMS Cameron McKenna*) for AESEL.

*Cur adv vult*

12 November 2004. The following judgment was delivered. d

### GLOSTER J.

[1] This is an application by the Office of Fair Trading (the OFT) for the determination of certain issues arising in relation to the construction of s 75 of the Consumer Credit Act 1974 and, in particular, the section's application to overseas credit card transactions. The defendants are sued as representatives of all United Kingdom credit institutions who are licensed under the 1974 Act to carry on consumer credit business and who issue credit cards under regulated credit agreements with consumers. The first defendant, Lloyds TSB Bank plc (the bank) issues credit, as well as debit and charge, cards under the MasterCard and Visa schemes; the second defendant, Tesco Personal Finance Ltd (TPF), a joint venture company between the Royal Bank of Scotland plc (RBS) and Tesco plc (Tesco), likewise issues credit cards under the MasterCard and Visa schemes; the third defendant, American Express Services Europe Ltd (AESEL), a wholly-owned member of the American Express Company group (the Amex group), issues charge and credit cards on the American Express card payment network in the United Kingdom. e

[2] Section 75 of the 1974 Act provides for creditors to be jointly and severally liable to debtors (cardholders) for misrepresentations and breaches of contract by the supplier of goods and services financed by the credit provided by the creditor under a regulated agreement. The section is in the following terms: f

'(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor. g

(2) Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor. h



a (3) Subsection (1) does not apply to a claim—(a) under a non-commercial agreement, or (b) so far as the claim relates to a single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000.

(4) This section applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit or otherwise contravened any term of the agreement.

b (5) In an action brought against the creditor under subsection (1) he shall be entitled, in accordance with rules of court, to have the supplier made a party in the proceedings.'

[3] A debtor-creditor-supplier agreement falling within s 12(b) of the 1974 Act is defined in s 12, so far as material, as follows:

c 'A debtor-creditor-supplier agreement is a regulated consumer credit agreement being ... (b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier ...'

d (The OFT does not pursue any argument based on the contention that the card arrangements give rise to an unrestricted-use credit agreement under s 12(c).) Section 11(1)(b) of the 1974 Act defines a restricted-use credit agreement as a regulated consumer credit agreement 'to finance a transaction between the debtor and a person (the "supplier") other than the creditor'. Thus essentially, for  
e present purposes, in order to attract the connected lender liability imposed by s 75, the credit agreement must finance a transaction between the debtor and a supplier and be made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between the creditor and the supplier.

f [4] The application of the section to credit card arrangements has long been an area of dispute between credit card issuers and the industry regulator, the OFT, because of the nature of credit card operations. The defendants assert that the 1974 Act does not impose a liability in relation to them in relation to overseas credit card transactions. This is primarily on the basis that: (1) as submitted by the bank and by TPF (but not by AESEL), credit card issuers now operate through  
g complex international networks schemes such as Visa and MasterCard; under those schemes, it is submitted there cannot be said to be an arrangement between the card issuer/creditor and the supplier where the supplier's agreement to accept cards of a particular network is made not with the card issuer but with another member of the network; this is a common situation domestically and in overseas credit card transactions will often be the case; (2) as submitted by all  
h three defendants, the 1974 Act, properly construed, does not apply s 75 to a contract for goods and services that is made outside the United Kingdom, or has other foreign characteristics (a foreign transaction). (I refer in greater detail below to what the defendants contend are the constituent elements of a foreign transaction.)

j [5] Credit card issuers operate under the Visa, MasterCard and American Express international network schemes, of which they are members. This membership permits them to print the respective trademarks 'Visa', 'MasterCard' and 'American Express' on their cards issued to cardholders under their credit agreements. The networks have comprehensive rules governing the operation of the respective schemes. In particular the rules provide that suppliers are recruited only by a limited number of members of the networks, who are

given the status of 'merchant acquirers'. A supplier enters into a contract with a merchant acquirer, which contract obliges the supplier to accept all cards bearing a trademark of the relevant network as payment for goods or services supplied by them to such cardholders. In return, the merchant acquirer agrees to pay the supplier for any such transaction, less a discount. The merchant acquirer recoups his payment to the supplier from the card issuer through a settlement system organised by the network, together with a fee representing a proportion of the discount. The card issuer in turn is paid the supply price in full by the cardholder pursuant to the credit card agreement. A credit card transaction of this nature is referred to in the industry as a 'four-party transaction' with debtor, creditor, merchant acquirer and supplier involved. It is contrasted to the 'three-party transaction' where the card issuer also 'acquires' the merchant. There are approximately 100 Visa card issuers in the United Kingdom, and probably a similar number of MasterCard issuers in the United Kingdom, most of which do not acquire merchants. The detailed workings of the three schemes are extensively rehearsed in the evidence and it is not necessary for me to set them out in any greater detail at this stage. It suffices to say that in card payment systems there are commonly four parties, namely: (a) the card issuer (or creditor) who supplies the card to the customer and operates the customer's account from which payment is made; (b) the customer (or debtor) who makes payment using the card and is liable to pay the issuer; (c) the supplier or merchant (who is not a member of Visa or MasterCard or the Amex scheme or network) who exchanges goods or services for the customer's card details and consent to make the payment; and (d) the merchant acquirer, who recruits merchants/suppliers to the scheme, pays the merchant and obtains reimbursement from the card network clearing system. In a three-party transaction, there is no separate merchant acquirer as the card issuer selects and acquires the merchant. Consequently, the card issuer will reimburse the merchant directly for the particular transaction. In a four-party transaction, neither the card issuer nor its associate are the same person as the merchant acquirer. It has been accepted by card issuers that domestic three-party transactions involve arrangements between the creditor and the supplier.

[6] The bank and AESEL are both merchant acquirers and card issuers. The bank acquires merchants using the trading name 'Cardnet Merchant Services' or 'Cardnet'. Depending upon where in the world the transaction takes place, and with which supplier, many transactions between the bank's respective debtors and suppliers will not be with suppliers in relation to whom the bank (or its associates) are the merchant acquirers, although in some cases that will be the position. In other words, as with domestic transactions, some foreign transactions are three-party transactions and some four-party transactions. In the case of AESEL, an Amex company (within the definition of associate in s 184 of the 1974 Act) operates (with certain exceptions) as merchant acquirer in the United Kingdom. AESEL issues or licenses its credit cards over its own separate network. In the case of AESEL and the Amex scheme, however, a large majority of the merchant acquirers are group companies within the Amex group. AESEL's credit card transactions in the United Kingdom will usually be three-party transactions as mostly (but not always) it or its associates or licensees will issue and acquire merchants. It is therefore the case that the preponderance of Amex transactions, both domestic and foreign, are three-party, rather than four-party, transactions. Accordingly AESEL does not argue the applicability of s 75 to United Kingdom four-party transactions but only its applicability to overseas

a transactions. TPF issues credit cards but does not acquire merchants although it has associates within the definition of the 1974 Act which are merchant acquirers.

[7] The OFT seeks declarations to the effect that (i) four-party credit card transactions and (ii) foreign transactions are subject to the connected lender liability imposed by s 75(1). The bank and TPF seek a declaration to the effect that s 75 does not apply to four-party credit card transactions (whether foreign  
b transactions or United Kingdom transactions). All defendants seek a declaration in the following terms that the section does not apply to foreign transactions:

‘A declaration that s 75(1) of the Act does not apply where the contract between the debtor and the supplier of goods or services has the following characteristics: (1) the contract was made wholly outside the United  
c Kingdom; and (2) the contract was governed by a foreign law; and (3) the goods were delivered, or the services were supplied, outside the United Kingdom. Further, the defendants invite the court to rule that it makes no difference to the non-application of s 75(1) that characteristic (1) above differs in that the acts of offer and acceptance were done partly within the  
d United Kingdom and partly outside the United Kingdom (“characteristic (1A)”) and/or characteristic (3) above differs in that the goods were despatched outside the United Kingdom for delivery within the United Kingdom (“characteristic (3A)”). Further, the defendants invite the court to rule that s 75(1) does not apply where characteristics (2), and (3)  
e or (3A), are present, but not characteristics (1) or (1A); or any one of the characteristics (1), (1A), (2), (3) or (3A) are present.’

The formulation of characteristic (1A) adopts the language of sub-s 26(4)(b) of the Unfair Contract Terms Act 1977 (‘the acts constituting the offer and acceptance have been done in the territories of different States’). The various ways in which  
f foreign transactions are sought to be defined is apparent from the defendants’ proposed declarations.

[8] Thus the formal list of issues which the court is asked to determine (subject to the defendants’ amendment so as to raise the detailed sub-issues as to the definition of foreign transactions) is as follows. (1) Whether a regulated credit  
g agreement under which the creditor provides the debtor with a credit card which can be used by the debtor in payment of goods and services in transactions with suppliers of those goods and services able to accept the card (a regulated credit card agreement) falls into the definition of a restricted-use credit agreement in s 11(1)(b) of the 1974 Act. (2) This issue was not proceeded with. (3) Where  
h there is a regulated credit card agreement, whether there are arrangements between the creditor and the supplier, for the purposes of the definition of ‘debtor–creditor–supplier’ agreement in s 12(b) of the 1974 Act, in the circumstances set out in para 1 and/or para 2 of the appendix to the claim form and the schedule thereto (four-party transactions) and in particular under the current Visa and/or MasterCard rules. (4) If the answer to (3) is Yes, whether  
j such arrangements are to be disregarded for the purposes of sub-ss 187(1) and (2) of the 1974 Act by virtue of sub-s 187(3). (5) Whether s 75(1) of the 1974 Act applies so as to make a creditor under an agreement falling within s 12(b) or (c) and to which the 1974 Act applies potentially liable for a claim in respect of a transaction which is a foreign transaction (as variously defined in the defendants’ proposed declarations).

## BACKGROUND TO THE CURRENT DISPUTE

[9] It is perhaps helpful to describe the genesis of the current dispute. I gratefully adopt the following narrative from the appendix to TPF's skeleton argument. Section 75 was included in the 1974 Act following recommendations in the report of the Crowther Committee on Consumer Credit (Cmnd 4596) (March 1971) (the Crowther report). The government White Paper (*Reform of the Law on Consumer Credit* (Cmnd 5427) (1973)) substantially adopted the Crowther Committee's approach for a form of connected lender liability to be incorporated into United Kingdom consumer credit law. Section 75 came into force in 1977 but the subsequent change in payment systems and methods gave impetus to the dispute as to its application to credit card transactions. In 1989 Professor Jack's report *Banking Services: Law and Practice Report by the Review Committee* (Cm 622) found no logic in applying connected lender liability on the basis of a chosen means of payment. The Banking Ombudsman, in its 1989–1990 report, considered that s 75 was not intended to apply to claims involving a foreign element and was, in fact, rejecting claims brought before him on such basis. On the other hand, the Director General of Fair Trading (the DGFT) asserted that s 75(1) would apply to four-party and overseas transactions. In 1995, following a review of the applicability of s 75 to credit card transactions, the DGFT recommended that liability be limited to the amount charged to the card in respect of the transaction (the 1995 report). Following the 1995 report the Department of Trade and Industry (the DTI) undertook a consultation with various interested parties, including the banking industry, on the scope of s 75. Subsequent to the DGFT's recommendations in the 1995 report, card issuers agreed, for a specified period—until 31 December 1996—to meet s 75 claims on overseas transactions ex gratia on the basis that the law was as recommended by the DGFT in his 1995 report ie limited to the amount deducted on the credit card for the transaction. Card issuers also confirmed that they would meet claims in respect of four-party transactions, without admission of liability, on the same basis as claims made under three-party transactions. This voluntary agreement was made by the issuing banks in anticipation of changes to the law following the consultation. Following the 1995 report, the DTI released a press statement on 28 October 1996 which stated that the government believed that the law required no clarification and that the law should be maintained as it stood. Following the change of government in 1997, the DGFT was again requested to consider the nature of advice to be offered to government on the matter. At that time the issuing banks continued to treat (on a voluntary basis) domestic four-party transactions in the same way as three-party transactions with regard to s 75 claims; however, there was no industry standard in respect of overseas transactions (the date of the voluntary undertakings having expired).

[10] TPF, for example, applies a voluntary undertaking to domestic four-party transaction claims and considers overseas transaction claims on a case-by-case basis and without any admission of liability. Whilst it is common practice so to treat domestic four-party transactions, there is no industry agreement to do so. (Pending the outcome of these proceedings, TPF continues to reserve its right as to liability under s 75 in both overseas and domestic four-party transactions.)

[11] On 24 April 2001 a draft consumer credit directive was discussed at European level, which included a provision for connected lender liability. It was proposed by the Council of the European Communities that the draft directive would replace the current Council Directive (EEC) 87/102 (for the approximation of the laws, regulations and administrative provisions of the



a member states concerning consumer credit) (OJ 1987 L42 p 48) (the Consumer Credit Directive). The consultation process on the proposed directive with member states was launched immediately following approval at European level. The DTI was concerned that connected lender liability for cards was not included in the proposed directive.

b [12] In May and June 2001, the OFT wrote to TPF stating that it viewed TPF's policy of 'denying liability for four-party and overseas transactions' as a 'Community infringement' falling within the Stop Now Orders (EC Directive) Regulations 2001, SI 2001/1422. TPF in response objected to the appropriateness of the 2001 regulations to the current dispute. The OFT stated that it was considering issuing proceedings under the 2001 regulations (which came into force on 1 June 2001). Stop now orders (SNO) were designed to enable certain specified public bodies to obtain injunctive relief to restrain actual or threatened breaches of particular statutory provisions including consumer credit legislation. SNO proceedings applied in circumstances in which there was a Community infringement in which case an injunction could be granted under the 2001 regulations to stop the infringing action. TPF disputed the appropriateness of the SNO procedure; it considered that its interpretation of s 75(1) liability did not infringe Community law; that s 75 predated and 'gold-plated' the Consumer Credit Directive; and that even if the 1974 Act 'transposed' the directive despite being passed 13 years prior to the directive, TPF's interpretation of s 75 could not constitute a Community infringement as the directive legislated for lesser protection to the consumer which was added to by the 1974 Act. TPF submitted that the SNO procedure was not appropriate in such circumstances. On 21 February 2002, the OFT indicated in a letter to TPF that unless it received assurances that TPF would 'comply in full with section 75, on the basis of the OFT's interpretation regarding four-party and overseas transactions' then the DGFT would—

'seek an undertaking under section 14 of schedule to the SNO Regulations from TPF and may consider bringing proceedings with a view to the matter being resolved through court action.'

g Following this, correspondence was entered into between the bank/TPF and the OFT regarding the dispute.

h [13] In February 2003 the bank, following advice from Mr Hapgood QC, invited the OFT to consider instituting declaratory proceedings. TPF were informed by the OFT that it intended to do so and invited comments prior to issuing proceedings. Declaratory proceedings were issued by the OFT on 20 June 2003 out of the Queen's Bench Division of the High Court. On 25 September 2003, on the bank's application, the proceedings were transferred to the Commercial Court. At the initial case management conference on 5 December 2003, AESEL made a successful application to join the proceedings.

j [14] I should also state for the sake of completeness that elsewhere in Europe the liability of the issuer in the case of breach of contract or duty by the supplier has generally been limited to re-crediting the sum charged to the card, in line with the Consumer Credit Directive, rather than extending to consequential damages. Elsewhere in the world, the protection afforded to consumers may well be more limited.

## ISSUE (1)

[15] Despite the somewhat wider formulation of this first issue, as set out at [8], above, the real issue under this head, as argued before me, is whether four-party transactions fall within the s 11(1)(b) definition of restricted-use credit. The submission, as developed by Mr Ali Malek QC for TPF (and supported by Mr Mark Hapgood QC for the bank) is that, in a four-party transaction, the transaction between the supplier and the customer (ie the actual purchase of goods or services by the customer from the supplier) is not a transaction that is financed by the regulated credit agreement between the customer (the debtor) and the card issuer. Mr Malek submits, in effect, that because, under the provisions of the relevant schemes, in a four-party transaction the card issuer has no liability to pay the supplier, and the only person contractually liable to pay the supplier, once the card is accepted, is the merchant acquirer, it is the agreement between the supplier and the merchant acquirer, and not the regulated consumer credit agreement between that customer and the card issuer, that finances the transaction between the customer (the debtor) and the supplier for the purposes of s 11(1)(b). He submitted that the fact that the merchant acquirer may (or may not) receive funds via the card system emanating from the card issuer referable to the regulated consumer credit agreement and the transaction which the supplier has effected with the customer, does not mean that the regulated consumer credit agreement has financed that transaction. He further submitted that, whereas, under a three-party situation, the obligation to pay the supplier ('to finance') is on the card issuer/creditor, which is also the merchant acquirer to whom the supplier can properly contractually look for payment, in a four-party situation the supplier is indifferent as regards the card issuer or the regulated consumer credit agreement because he contractually looks to the merchant acquirer only. He relied upon example 16, in Sch 2 to the 1974 Act, which envisages an agreement whereby the credit card is issued 'for use in obtaining ... goods ... from suppliers ... who have agreed to honour credit-cards issued by' the creditor. In a three-party situation, the creditor will have entered into an agreement with suppliers for them to honour the credit cards issued by that card issuer. He submitted that there is no such agreement in a four-party situation where the supplier's agreement to honour the card will not be by reference to the credit cards issued by any specific creditor; the obligation will be to honour those cards described in the merchant acquirer agreement carrying the specified trademark. He likewise applied his argument to the word 'financed' in s 75 itself.

[16] Mr Mark Howard QC for AESEL (who supported the OFT on this issue) and Mr William Hibbert for the OFT argued, to the contrary, that the bank's and TPF's contentions on this issue were technical and that it was impossible to distinguish, in the real world, between a three-party transaction and a four-party transaction. The obvious and simple purpose of the regulated credit agreement is to provide the customer with credit (ie financial accommodation) so that he can purchase goods or services from the supplier. I accept these submissions. The phrase 'to finance' is not defined in s 189(1). 'Finance' has to be read in the context of its use in ss 11(1)(a) and 9(3), which do not involve the transfer of money by the creditor. Approaching the matter in a commonsense way, the phrase must mean 'provide financial accommodation in respect of' (see also the definition of credit in s 9(1)), rather than simply 'pay money'. A credit card issuer clearly provides financial accommodation to its cardholder, in relation to his purchases from suppliers, because he is given time to pay for his purchases under the terms of the credit card agreement.

a [17] Accordingly, I decide issue (1) in the affirmative and contrary to the contentions of the first and second defendants. As I have said, issue (2) is no longer live.

ISSUE (3)

b [18] The issue under this head is whether, where there is a regulated credit card agreement, there are arrangements between the creditor and the supplier, for the purposes of the definition of 'debtor-creditor-supplier' agreement in s 12(b) of the 1974 Act, in four-party transactions, and, in particular, under the current Visa and/or MasterCard rules. As I have said, the first and second defendants submit that, under those schemes, there cannot be said to be an arrangement between the card issuer/creditor and the supplier where the  
c supplier's agreement to accept the card of a particular network is made not with the card issuer but with another member of that network. It will be obvious from the brief description of the mechanics of the operation of credit card schemes that I have given above, that the determination of this issue adversely to the contentions of the OFT would have the effect that, irrespective of the position in  
d relation to foreign transactions, s 75 connected lender liability would not be invoked in relation to the large number of credit card transactions in the United Kingdom that are structured as four-party transactions.

[19] For present purposes, s 75 connected lender liability applies, if the agreement is a debtor-creditor-supplier agreement as defined by s 12(b); that is to say, is a regulated consumer credit agreement being a restricted-use credit  
e agreement which falls within s 11(1)(b) and 'is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier'. Section 189 provides that "'pre-existing arrangements" shall be construed in accordance with section 187'. By s 187(1):

f 'A consumer credit agreement shall be treated as entered into under pre-existing arrangements between a creditor and a supplier if it is entered into in accordance with, or in furtherance of, arrangements previously made between persons mentioned in subsection (4)(a), (b) or (c).'

Section 187(4) provides:

g 'The persons referred to in subsections (1) and (2) are—(a) the creditor and the supplier; (b) one of them and an associate of the other's; (c) an associate of one and an associate of the other's.'

'Associate' (so far as a body corporate is concerned) is defined in s 184 in the following terms:

h '(3) A body corporate is an associate of another body corporate—(a) if the same person is a controller of both, or a person is a controller of one and persons who are his associates, or he and persons who are his associates, are the controllers of the other; or (b) if a group of two or more persons is a controller of each company, and the groups either consist of the same  
j persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

(4) A body corporate is an associate of another person if that person is a controller of it or if that person and persons who are his associates together are controllers of it.'

[20] The arguments before me raised two points of construction in relation to the application of the section to four-party transactions. The first is whether a merchant acquirer is a person mentioned in s 187(4)(a), (b) or (c), namely whether it can be an 'associate' for the purposes of s 187(4), notwithstanding that it does not satisfy the defining criteria in s 184. The second, and critical, point is whether, even on the assumption that a merchant acquirer is not such a person, four-party transactions involve an arrangement made between the creditor and the supplier.

[21] Section 187(4) confines the persons referred to in sub-ss (1) and (2) to (a) the creditor and the supplier, (b) one of them and an associate of the other, or (c) an associate of one and an associate of the other. The list is tightly drawn. The striking feature of s 184 which defines 'associate' is its technicality and precision. A merchant acquirer in a four-party transaction is not a person mentioned in s 187(4). He is not the creditor, the supplier, or an associate of either of them. He is an independent person carrying on business separately from the creditor and the supplier. I accept the submission of the first and second defendants that the definition of 'associate' in s 184 is exhaustive, not inclusive. If Parliament had intended to give the courts scope for treating other persons as associates, the 1974 Act would have used the conventional technique of providing that 'An associate includes ...'. Accordingly, on the first point of construction, one cannot regard a merchant acquirer as a person falling within s 187(4) notwithstanding that it does not satisfy the defining criteria in s 184 of 'associate'.

[22] The crucial issue is thus whether, in a four-party transaction situation, the consumer credit agreement can be said to have been entered into in accordance with, or in furtherance of, arrangements previously made between a card issuer (the creditor) and a supplier. The first and second defendants' submissions on this issue were summarised by Mr Hapgood as follows. (1) The point of statutory construction under s 187 of the 1974 Act has to be determined by reference to: (a) the language of the 1974 Act, (b) the Crowther report, and (c) the record of proceedings in Parliament. (2) The basis on which the Crowther Committee recommended connected lender liability was its perception that a creditor who 'lists' a merchant is engaged in a joint venture with that merchant. This is the recruitment factor. The Crowther Committee was also influenced by the leverage factor. The same factors were relied on by the sponsors of the Bill in Parliament. (3) The Crowther Committee did not mention four-party transactions, and nor were they mentioned by the sponsors of the Bill. (4) The imposition of connected lender liability in four-party transactions cannot be justified by the recruitment factor or the leverage factors. Neither of these factors will typically be present in a four-party transaction. (5) Accordingly, Parliament's implementation of the Crowther Committee's recommendations in respect of connected lender liability in domestic three-party transactions evinces no intention at all with respect to such liability in four-party transactions, whether made in the United Kingdom or overseas. (6) The point of statutory construction has to be decided in accordance with the propositions stated by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] 1 All ER 545 at 564–565, [1981] AC 800 at 822. All the factors which he identifies as being relevant to the application of a statute to a new state of affairs weigh heavily against extending s 75 to four-party transactions. (7) The word 'arrangement' is not to be construed in isolation. It is part of the composite expression 'arrangements made between'. There is no arrangement between the creditor and the supplier and certainly no arrangement made between them.



a (8) In a four-party transaction under the MasterCard or Visa scheme, there is no arrangement made between the creditor and the supplier because: (a) there is no contract between them; (b) they are unlikely ever to have had any contact at all, whether directly or indirectly; (c) the creditor will often not even know of the existence of the supplier; (d) the creditor will not have recruited the supplier, so that the recruitment factor is completely absent; (e) the creditor has no leverage over the supplier, so that the leverage factor is also completely absent; and (f) the only situation permitted by s 187 in which an arrangement can be made between a creditor and a supplier otherwise than directly between them is where the parties act through associates, and the merchant acquirers who operate under the network schemes are not associates of the bank.

c [23] All parties made submissions at some considerable length as to what was said (and what was not said) in the Crowther report as an aid to the construction of s 187, and, in particular, as an indication of the mischief at which s 75 was aimed and of the circumstances in which, it was said, the report intended that connected lender liability should arise. I shall return to the report in due course. However, I first propose to construe the language of the relevant sections d without regard to the report. I should also say that, whilst I accept that the long title to the 1974 Act and authority make it clear that in construing its provisions one should bear in mind that its intention is to protect consumers (see *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35 at [21], [2002] 1 All ER (Comm) 446 at [21] per Dyson LJ), and that such intention might justify a purposive approach to the 1974 Act's construction, such intention does not per se e justify the conclusion that four-party transactions necessarily fall within the ambit of the relevant sections because that result would give maximum protection to consumers. At times Mr Hibbert's submissions on behalf of the OFT came precariously close to such a consulatory assertion.

f [24] There is no definition of the word 'arrangements' in s 189(1) of the 1974 Act. Nor do s 187(1) and (2) contain a definition of 'arrangements'. The second half of each subsection itself uses the word 'arrangements' as part of the explanation there set out. But, in my judgment, in its context it clearly betrays a deliberate intention on the part of the draftsman to use broad, loose language. It is to be contrasted with the far narrower word 'agreement'. In the words of Willmer LJ in *Re British Basic Slag Ltd's Agreements* [1963] 2 All ER 807 at 814, g [1963] 1 WLR 727 at 739 'everybody knows what is meant by an arrangement'. As he also said, where the word is not defined, the draftsman intends that the word should be understood and construed in its ordinary and popular sense.

h [25] I thus approach the matter by asking the simple practical question whether the terms on which the three networks operate involve arrangements made between the card issuer (the creditor) and the supplier. It is common ground that three-party transactions involve such arrangements. Does the intervention of the fourth party make a difference? As Mr Howard for AESEL submitted, the critical features of the networks are that the suppliers, by whomsoever they have been acquired, must honour all cards bearing the j relevant logo, when properly presented for payment. The suppliers may not themselves be members of the networks or directly party to the clearing house arrangements, but they clearly agree as part of their contract with their merchant acquirer to take part in the arrangements that involve honouring all cards on the relevant network. Likewise, what the card issuer is saying to the customer (the debtor) when the former issues the card to the latter, is, in effect, that there are arrangements in place whereby you can go into any store bearing the logo on the

card and use the card to buy goods or services; arrangements are in place whereby your supplier will be paid. Although it is common ground there is no direct contractual link between the supplier and the card issuer, it was common ground that there was probably a contractual link between all members of the network (ie the issuers and the merchant acquirers) since there are broad indemnities in place between all members of the network against loss, and that, even if that were not the position, there were clearly arrangements in place between all members. (It was also common ground that it was irrelevant to the issue whether the obligation on a card issuer to pay into the clearing house the credit amount, and the right of the merchant acquirer to receive the credit amount, involved a bilateral contract between the issuer and the merchant acquirer, or merely gave rise to a contract with the clearing house.)

[26] In my judgment, in the natural ordinary sense of the word, there are clearly arrangements in place made between the card issuers and the suppliers, notwithstanding the absence of any direct communication between them, or any direct contractual relationship, or even of knowledge on the part of the issuer of the identity of the particular supplier. The fact that there are a number of different arrangements, reflecting the various roles, contractual or otherwise, played by different participants in the network, does not mean that there is not an arrangement in place between the issuer and the supplier. I consider that it is unrealistic to look merely at the individual links in the chain; rather one should stand back and look at the whole network of arrangements that are involved in the operation of the schemes. If one does so, one can, in my judgment, properly conclude that, by virtue of the supplier and the issuer being subject to the rules and settlement processes common to all participants in the card network, there is indeed an arrangement (albeit indirect) between them.

[27] I am assisted in reaching this conclusion by the decision of the Court of Appeal in *Re British Basic Slag Ltd's Agreements*, notwithstanding that the word 'arrangement' there had to be construed in the different context of s 6(3) of the Restrictive Trade Practices Act 1956. The Court of Appeal proceeded upon the basis that there must be communication of the arrangement to each of the two or more persons between whom the arrangement was to have existed. However, the decision, in each of the judgments, depended upon the knowledge of the parties to the arrangement rather than the disputed question of direct communication between them (see [1963] 2 All ER 807 at 814, [1963] 1 WLR 727 at 740 per Willmer LJ, [1963] 2 All ER 807 at 816, [1963] 1 WLR 727 at 742-743 per Danckwerts LJ and [1963] 2 All ER 807 at 819, [1963] 1 WLR 727 at 747 per Diplock LJ, who said:

'it is sufficient to constitute an "arrangement" between A and B, if (i) A makes a representation as to his future conduct with the expectation and intention that such conduct on his part will operate as an inducement to B to act in a particular way; (ii) such representation is communicated to B, who has knowledge that A so expected and intended, and (iii) such representation or A's conduct in fulfilment of it operates as an inducement, whether among other inducements or not, to B to act in that particular way.'

There is no requirement as to how the information is communicated to B. All that is required is that B is aware of A's position. I accept Mr Hibbert's submission that the words are apt to describe a four-party transaction in the present case. There is an indirect communication of intent, all parties being aware of the operation of the scheme, which depends on each party performing

a their allotted role and thus giving rise to a common expectation. The case is not in my judgment to be distinguished on the grounds that ‘arrangement’ in the 1956 Act had to be one ‘under which restrictions are accepted by two or more parties’ (see s 6(1)). Although it was specifically on account of this qualification that the arrangement was interpreted as one involving mutuality, I consider that one can test whether there is indeed an arrangement made between a supplier and an issuer under the 1974 Act, by asking oneself whether they have respectively accepted mutual obligations dependent upon the other party’s expected performance under the network’s rules. As Diplock LJ said ([1963] 2 All ER 807 at 819, [1963] 1 WLR 727 at 746):

c ‘and since it must be an arrangement “under which restrictions are accepted by two or more parties”, it involves mutuality in that each party, assuming he is a reasonable and conscientious man, would regard himself as being in some degree under a duty whether moral or legal to conduct himself in a particular way or not to conduct himself in a particular way...’

d [28] There is clearly mutuality in this sense between credit card issuers and suppliers who agree to accept credit cards: the supplier is obliged to accept cards issued by the issuer and to obtain for the issuer the customer’s authorisation (by signature or personal identification number (PIN)) allowing the issuer to debit the debtor’s card. The issuer is obliged to pay the supplier’s merchant acquirer in respect of sales made by the supplier to the issuer’s cardholders. The issuer profits both directly from each transaction for which its card is accepted and indirectly from the reassurance given to the cardholder that the card is an acceptable means of payment. The supplier benefits in that he obtains custom that he might not otherwise obtain. If any party (supplier, merchant acquirer or issuer) were to refuse to perform its role, the system, in the sense of an ongoing business relationship between the parties, would cease to function, to the detriment of all.

g [29] A similar analogy may be drawn from the approach taken by the courts to clubs, whose membership can give rise to a contract based upon the rules of the club (see e.g. *Clarke v Earl of Dunraven and Mount-Earl*, *The Satanita* [1897] AC 59 and *Re Royal Institution of Chartered Surveyors’ Application* [1986] ICR 550; and, on the other side of the line, where there was held to be no mutual obligations as between individual licensees of the National Greyhound Racing Club Ltd, *Fisher v Director General of Fair Trading* [1982] ICR 71). In the present case, I do not need to go so far as to find there is a contract, since mere arrangements are enough. I am also supported in my conclusion by the fact that certain distinguished commentators on the 1974 Act support the position that ss 12(b) and 75(1) should apply to four-party transactions (see e.g. Goode *Consumer Credit Law and Practice* vol 1, paras IC [25.63](a), IC [33.148]; Guest and Lloyd *Encyclopaedia of Consumer Credit Law* vol 1, pp 2074/2, 2074/6; Brindle and Cox *Law of Bank Payments* (3rd edn, 2004) paras 4-066, 5-027 and 5-029).

j [30] It is also correct to say, as submitted by Mr Howard, that to exclude four-party transactions would lead to an anomalous and capricious result, since in my judgment there is no commercial or policy-based reason for not applying s 75(1) to such transactions. It was said by the first and second defendants that the leverage considerations referred to in the Crowther report so as to ensure that only reputable suppliers were recruited and that they conducted business properly, did not apply to a four-party transaction where the issuer was not the merchant acquirer, but I do not find such arguments convincing. The evidence

showed that the rules of the four-party card schemes control which suppliers may participate in the schemes by, for example, (i) stipulating that merchant acquirers must only put transaction details into interchange for suppliers with whom they have valid and subsisting merchant acquirer agreements; (ii) requiring merchant acquirers to screen suppliers before entering into agreements with them, in order to establish that the suppliers are creditworthy and carrying on bona fide businesses; (iii) requiring merchant acquirers to monitor suppliers to deter wrongful activity; (iv) requiring merchant acquirers to forward information to the network merchant databases where, for example, a supplier is suspected of fraud or where a supplier's ratio of transactions charged back by the card issuer exceeds established criteria. Likewise card-issuing creditors exert leverage over suppliers, through the networks, in that the networks reserve rights to insist that suppliers' merchant acquirer agreements are terminated and to exclude suppliers from entering into merchant acquirer agreements. Thus some sort of leverage is available, at least in domestic four-party transactions, but even if it were not, that would not affect my conclusion.

THE REPORT OF THE CROWTHER COMMITTEE AND THE APPROACH TO CONSTRUCTION

[31] It was common ground that it is permissible to have regard to the Crowther report to identify the purpose of s 75 and the mischief which s 75 was intended to meet (see *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 at 65, [1993] AC 593 at 635 per Lord Browne-Wilkinson). The Crowther report did not refer expressly to four-party transactions. The first and second defendants relied upon the report in support of an argument that today's credit card industry is so fundamentally different from the credit card industry which existed when the Crowther Committee reported in March 1971, and that the court is faced with a state of affairs which did not exist in 1974. From this starting point it was argued that, approaching the point of construction in accordance with the propositions stated by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] 1 All ER 545 at 564–565, [1981] AC 800 at 822, one could not extend s 75 to four-party transactions. Mr Hapgood summarised Lord Wilberforce's propositions as follows:

'9. Leaving aside cases of omission by inadvertence, this not being such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention.

10. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated.

11. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.

12. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed.

13. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question "What would Parliament have done in this current case—not being



a one in contemplation—if the facts had been before it?” attempt to supply the answer, if the answer is not to be found in the terms of the Act itself.’

[32] He went on to make the following submissions by reference to Lord Wilberforce’s propositions:

b ‘(1) Three-party and four-party transactions cannot fairly be said to fall within the same genus of facts. As is explained below, four-party transactions are structured in an entirely different way and involve a very different set of contractual relations. Most importantly, there is no contractual relation between the creditor and the supplier.

c (2) As will become apparent when the Crowther report and the proceedings in Parliament are considered, there is no “clear purpose” in the legislation which can only be fulfilled if s 75 is extended to cover four-party transactions. The clear purpose of the legislation has been, and will continue to be, fulfilled by the availability of connected lender liability in three-party transactions.

d (3) The 1974 Act is drafted in language, and by reference to concepts, which are technical and (supposedly) precise. The Act is intended to be a complete code. At the time, the Act was one of the most technical pieces of legislation ever to have been enacted. It does not permit a liberal construction.

e (4) The scale of potential liability for card issuers which results from treating s 75 as applying to four-party transactions is of a different dimension to the scale of potential liability which results from treating s 75 as limited to three-party domestic transactions—this being the liability which Parliament must have had in mind in 1974.

f (5) It is not permissible to approach the issues in the present litigation by asking what Parliament would have decided if the issues had been expressly addressed in 1974; this is clear from proposition (5).’

[33] I reject these submissions. It is clear that there has been substantial development in the mechanism of credit card operation within the United Kingdom in that the overwhelming majority of supply transactions financed by credit cards now involve four parties, whilst, at the time of the Crowther report, and for a good time after s 75 came into force in 1977, such transactions appeared to have involved only three parties. It is also clear that the number of cards and the number of outlets accepting cards, and the amount of credit afforded to customers, have increased enormously. Thus, the evidence shows that there are now about 1,300 types of credit card available to United Kingdom consumers compared to a single card (Barclaycard) in 1971, and that the total amount owed on credit cards in the United Kingdom today is in the order of £49bn compared with £3m in 1969 (equivalent to £32m today). However, while so-called ‘four-party transactions’ were not common at the time of the report as regards United Kingdom consumers, they did exist. In the United States, they were already standard. It is speculation whether the Crowther Committee knew about their existence. There are other significant increases in the various statistics. However, in my judgment, one cannot say that one is looking at a fresh state of affairs in the sense used by Lord Wilberforce. It was clearly anticipated in the Crowther report that the credit card industry would be likely to expand and develop. This is not a situation such as that which arose in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27 (same-sex partner held

to be 'a member of the original tenant's family' within para 3(1) of Sch 1 to the Rent Act 1977). If I am wrong on that, then, in my judgment, and contrary to Mr Hapgood's submission, three-party and four-party transactions can fairly be said to fall within the same genus of facts. I gain no assistance from the absence of any reference to four-party transactions in the report as to the mischief at which the 1974 Act was aimed, let alone as to its construction. In the circumstances it was understandable. I accept the submission of the OFT that, if four-party transactions were uncommon at the date of the drafting of the 1974 Act, the fact that the draftsman did not refer to them expressly does not warrant the inference that the statute, although intended to create a comprehensive code, was not meant to apply to them. I agree with Mr Howard's submission that the real issue is the construction of the wording of the 1974 Act itself, and whether it could be said that Parliament intended that s 75 liability could be avoided by interposing a merchant acquirer into the arrangements with the supplier. As to that, I have already concluded that it could not.

[34] Accordingly, in my judgment issue (3) is to be decided in the affirmative.

ISSUE (4)

[35] This issue raises the question (if the answer to (3) is Yes) whether the relevant arrangements are to be disregarded for the purposes of s 187(1) and (2) of the 1974 Act by virtue of s 187(3).

[36] Section 187(3) provides:

'Arrangements shall be disregarded for the purposes of subsection (1) or (2) if—(a) they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and (b) the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.'

[37] The point is very short. Even if, as the OFT contends, arrangements do exist in a four-party transaction, then the first and second defendants submit that such arrangements should be disregarded under the two limbs of s 187(3), because (a) as to sub-s (3)(a): on the OFT case there are payments to the supplier by the creditor; and (b) as to sub-s (3)(b): the creditor (card issuer) is holding himself out to make payments to suppliers generally.

[38] In my judgment, this argument is wrong for the reasons submitted by Mr Hibbert on behalf of the OFT. The credit card issuer does not hold itself out as willing to make payments to suppliers generally, but only to suppliers who have a subsisting agreement with a member of the network. Although large numbers of suppliers can accept credit cards, they remain within a limited class. This can be contrasted with the creditor's holding itself out as being willing to make payments contained in a cheque card, which can be made to any supplier—any person can accept a cheque supported by a cheque card.

[39] The meaning of 'generally' in this sense is confirmed by the fact that Parliament introduced by amendment s 187(3A). Notwithstanding the large number of suppliers with whom a debit card can be used, there was still a need to exempt electronic funds transfer at point of sale (EFTPOS) payment systems as banks wished to pick and choose which suppliers were allowed to accept the debit card. The point is made in *Guest and Lloyd* p 2170/1 (para 2–188); s 187(3) was inadequate to exempt agreements in this situation.

- a [40] Accordingly I decide issue (4) in the negative. The relevant arrangements are not to be disregarded for the purposes of s 187(1) and (2) of the 1974 Act by virtue of s 187(3).

ISSUE (5)

- b [41] The issue here is whether s 75(1) of the 1974 Act applies so as to make a card issuer potentially liable for a claim in respect of a transaction which is a foreign transaction (as variously defined by the defendants). The dispute between the claimant and credit card issuers over the extra-territorial application of s 75 has been ongoing for many years. There is no binding authority on the point. Many lenders have continued to follow the approach referred to in the evidence, namely to compensate borrowers on a voluntary basis to the extent of the amount of credit involved in the transaction. This addressed the concern of many lenders that s 75 is unlimited in scope and therefore potentially could give rise to large claims for consequential loss by the debtor in respect of breaches of contract, often way beyond the extent of the amount of credit involved in the transaction.
- c [42] It is relevant to remind oneself by way of introduction that the scheme imposed by s 75 has the following effect. (1) It is premised upon the debtor having a claim against the supplier 'in respect of a misrepresentation or breach of contract'. (2) In such a circumstance, the section imposes a 'like' liability on the creditor ie exposing him to a liability as if he were the supplier or requiring him to stand behind the supplier. Thus, the debtor enjoys a like claim against the creditor who is 'jointly and severally liable' with the supplier to the debtor.
- e (3) This statutorily imposed liability only applies to claims where the sterling cash price was above a floor (£100) and below a ceiling (£30,000). (4) As a quid pro quo for the imposition of this statutory liability upon the creditor, he is granted a statutory right of indemnity against the supplier and entitled to have
- f the supplier made a party to the proceedings.

- [43] The OFT seeks to argue that such matters are wholly irrelevant to the application of s 75. If this were right, it would mean that Parliament had purported to legislate to impose liability on creditors and suppliers notwithstanding the potentially very limited connection of the supply transaction to the United Kingdom. Indeed, on the OFT's case the nexus with the United Kingdom is merely provided by the fact that the payment for a supply is made by a credit card issued to a United Kingdom individual. On this basis s 75 would apply to any purchase from an overseas supplier in any far-flung corner of the world, however remote. The defendants submitted that the implications of holding that s 75 does apply to overseas transactions are startling and readily apparent. The evidence shows that, if such were the case, issuers carrying on business in the United Kingdom would become the insurers of some 29 million foreign suppliers. The total amount owed on credit cards in the United Kingdom alone is £49bn. The issuer itself will never have heard of the overwhelming majority of these foreign suppliers. As the availability of a remedy under s 75 becomes better known among an increasingly aware population of consumers, the issuer will be at risk of being inundated with claims whose merits the issuer will generally be incapable of assessing. They gave the example of the payment of hotel bills abroad which are commonly paid by credit card; if s 75 were extended to overseas transactions, the issuer would become the insurer (for no premium) of the performance of most of the hotels in the world; this, it was submitted, was far removed from the type of situation in which the Crowther
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Committee thought it appropriate to impose connected lender liability; there is no joint venture of any sort between the issuer and these hotels, and the issuer has no means of exerting pressure on them to honour their contracts with their guests or to pay damages for any breach of contract, other than (very indirectly) through the network rules. Moreover, the concerns of the card issuers are underlined by the huge growth in recent years of purchases by means of credit cards from foreign suppliers over the internet. If s 75 applies to such transactions, then card issuers will have to bear the liability not only for fraudulent internet transactions, but also for fraudulent foreign suppliers who misrepresent their goods or fail to deliver, with the card issuers in reality having very little influence over local foreign merchant acquirers, other than to attempt to insist upon commercial charge-back provisions where such liability is passed back down the line to the merchant acquirer.

[44] There is a debate in the evidence about the extent to which credit cards could be used abroad in 1974. It appears that a Barclaycard could be used in some foreign jurisdictions, but there is little evidence as to the extent of such use. I accept Mr Hapgood's submission that this evidence is irrelevant. The relevant point is that there is absolutely nothing in the Crowther report or the record of proceedings in Parliament to suggest that the members of the Crowther Committee or the sponsors of the Consumer Credit Bill ever applied their minds to the territorial scope of s 75. The context in which their report was produced was vastly different from the modern marketplace. It is plain when one examines their conclusions that they are entirely focused on domestic transactions. However, what is also clear from the report is that the Crowther Committee attached considerable importance to the fact that the creditor would, as part of their recommendations, have a right of indemnity from the supplier who was responsible for the breach of contract, that being, in effect, the reverse side of the coin to the Crowther Committee's view that it would be easier for the lender to put pressure on the supplier to deal with any customer complaint, or to indicate that financing facilities would be withdrawn if it was not (see para 6.6.29 of the report). The Crowther Committee went on to state (para 6.6.31):

'It is of course implicit in our recommendations that a lender who incurs a liability to the borrower in the circumstances we have described should have a right of indemnity from the dealer or supplier who caused the trouble. To avoid any doubt, this right of indemnity should be expressly stated in the enactment.'

In other words, the Crowther Committee took the view that the corollary of the imposition of a like liability on card issuers, to that of suppliers, was the entitlement of card issuers to an indemnity. That is reflected in s 75 of the 1974 Act itself. This, in my judgment, is an important feature to bear in mind when one comes to consider the construction of the section and its potential extra-territorial effect, to which I now turn. Subject to the point I have just made, it was effectively common ground that the process of construction involves ascertaining the intention of Parliament on the basis of: (i) the rules of statutory construction in relation to the extra-territorial application of English statutes; (ii) what is in the 1974 Act itself; and (iii) just as importantly, what is not in the Act.

[45] The general principle of statutory construction in relation to the extra-territorial application of English statutes is well known. As Lord Scarman said in *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133 at 139, [1983] 2 AC 130 at 144, 145:



a 'It is well-settled law that English legislation is primarily territorial: see *Re Sawers, ex p Blain* (1879) 12 Ch D 522 at 528, [1874–80] All ER Rep 708 at 711 per Brett LJ ... Put into the language of today, the general principle being there stated [in *Ex p Blain*] is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners, who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction.'

b I refer also to the rule as stated in *Bennion on Statutory Interpretation* (4th edn, 2002) p 275 (section 102):

c '(1) Although an enactment may be expressed in general terms, the area for which it is law must exclude territories over which Parliament lacks jurisdiction. It also excludes territories for which Parliament did not in that enactment intend to legislate.

d '(2) Parliament has ordinary jurisdiction to legislate for any of Her Majesty's dominions, except Her Majesty's independent dominions. In addition, Parliament has extraordinary jurisdiction to legislate for New Zealand. Parliament has no jurisdiction to legislate for any other territory.'

*Bennion* further states in section 130, headed 'Application to foreigners and foreign matters outside the territory' (p 315):

e 'Unless the contrary intention appears, and subject to any relevant rules of private international law, an enactment is taken not to apply to foreigners and foreign matters outside the territory to which it extends ...'

f This principle is clearly supported by the authorities (see, for example, *The Amalia* (1863) 1 Moo PCCNS 471, 15 ER 778 and *Re AB & Co* [1900] 1 QB 541 at 544, where Lindley MR stated:

g 'What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words then, of course, the Court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that, unless Parliament has conferred upon the Court that power in language which is unmistakable, the Court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments. Unless Parliament has used such plain terms as shew that they really intended us to do that, we ought not to do it.'

h [46] In my judgment, having considered the extensive arguments of the OFT on the one side, and the opposing arguments of the defendants on the other, s 75 cannot properly be construed as applying to foreign transactions. (I set out below what I regard as the necessary characteristics that qualify a transaction as a foreign transaction.) My reasons may be summarised as follows.

j [47] The issue of construction is whether the phrase 'any claim against the supplier' is limited to claims enforceable in a United Kingdom court. As I have stated above, in the absence of express enactment or clear implication, the rules of statutory construction are strongly against giving a United Kingdom statute extra-territorial effect and are also against subjecting foreigners to liability under English legislation in respect of acts committed abroad. The words 'any claim

against the supplier' are so wide that, in accordance with such rules, some limitation must be given to them, and to the scope of the claims covered, in the absence of express enactment or clear implication that the section extends extra-territorially. A good illustration of the application of the principle is *Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61 where it was held that the Workmen's Compensation Act 1906 did not apply to an accident happening abroad. Subject to exceptions provided in the 1906 Act, including in s 7, it was held that it did not apply to an accident beyond the territorial limits of the United Kingdom. Cozens-Hardy MR stated (at 64):

'What is the widow's claim here? She is claiming, not as a party to the contract, not as claiming any rights under a contract made by her or by any person through whom she claims, but she is simply claiming the performance by the defendants of a statutory duty, which statutory duty is said to be found in the Workmen's Compensation Act. Now that brings us face to face with this proposition. What is the ambit of the statute and what is the scope of its operation? It seems to me reasonably plain that this is a case to which the presumption which is referred to in Maxwell on the Interpretation of Statutes in the passage at p. 213 ... must apply: "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."'

Farwell LJ stated (at 65):

'The question is one purely of the construction of the statute. The words of s. 1, sub-s. 1, are so wide that some limitation must necessarily be affixed to them. The words are, "If in any employment personal injury by accident arising out of and in the course of the employment is caused to any workman," and so on. To my mind the words "any employment" there must be restricted to employment within the ambit of the United Kingdom or on the high seas as provided by s. 7.'

[48] There is no express provision in the 1974 Act that applies s 75 to claims that a debtor has against foreign suppliers or states that s 75 gives creditors a right to the statutory indemnity against such suppliers. I reject the argument that s 75(1) has no extra-territorial effect, on the basis that it merely provides a cause of action to a United Kingdom cardholder against a United Kingdom card issuer. Such an argument ignores the effect of the remainder of the section. By subjecting a foreign supplier to a statutory liability to indemnify a creditor carrying on business in the United Kingdom, s 75 would indeed be given an indirect extra-territorial effect. But for s 75, there would be no legal relation at all between the United Kingdom creditor and the foreign supplier. From the standpoint of the foreign supplier, England could only be seen as asserting a long arm and exorbitant jurisdiction. There is no express provision that justifies such a jurisdiction.

[49] Nor can I find any clear, or indeed any, implication that the section is so to apply. 'Extra-territoriality by necessary intendment' is discussed in *Bennion* (pp 320–322). It is stated (p 320):

'Although an Act may contain no express provisions rendering it operative in relation to foreigners outside the Act's territory, such operation may be

a implied. The implication must be strong enough to overcome the reverse implication that an Act is intended to apply only to persons and acts within its territory.'

b There is nothing in the 1974 Act to suggest or support such a necessary implication. The Act is plainly intended to protect United Kingdom consumers within a scheme of regulation which was designed for the United Kingdom market. There is no reference within the Crowther Committee's report to any intention to regulate transactions outside the United Kingdom. Moreover, although there have subsequently been EC directives on consumer credit (such as Council Directive (EEC) 87/102 for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit), c there was no European legislation, nor any proposal for such legislation, at the time of the Crowther Committee report or by the time the 1974 Act was drafted. One therefore cannot impute to the Act any extra-territorial dimension by reason of the existence of the emergent common market.

d [50] On the contrary, in my judgment, the implication is that the section does not so apply. The whole premise of s 75 is that the United Kingdom court has an enforceable and effective jurisdiction over the supply transaction and over the supplier. By s 75(2) the card issuer is given an indemnity against the supplier, which includes his costs of defending the cardholder's claim. He is also entitled, by s 75(5) and 'in accordance with rules of court' to have the supplier joined to the proceedings. In my judgment, this points clearly to the conclusion that the e 1974 Act envisages that the supplier must be amenable to the jurisdiction of the English court (otherwise the creditor would not be able to join him to such proceedings—necessarily English proceedings).

f [51] As Mr Hapgood submitted, in the context of claims for contribution under s 1 of the Civil Liability (Contribution) Act 1978, the courts of this jurisdiction have sought to minimise the extra-territorial effect of the 1978 Act by insisting that, if the respondent to the contribution claim is a foreigner, then the party claiming contribution must establish some procedural right recognisable under CPR Pt 6 which entitles the claimant to proceed against the respondent in this country (see *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty* (No 2) [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1622 per Hobhouse J). g There can be no question of extending s 75 to overseas transactions without imposing the same requirement. Mr Hapgood gave the worked example of a contract entered into by the debtor for cosmetic surgery in New York, governed by New York law, and containing a clause conferring exclusive jurisdiction on the courts of the state of New York, where the surgery, paid for by a credit card issued h by the bank, is unsuccessful, and the debtor returns to the United Kingdom and issues proceedings against the bank. Mr Hapgood demonstrated the real difficulties that would arise if s 75 were to be extended to overseas transactions in relation to (i) obtaining leave to serve out; (ii) non-appearance by the supplier; and (iii) enforcement of an English judgment in New York. I need not rehearse j them in detail, but these kinds of problems support my conclusion that, given the machinery of s 75, the rules of court, and the principles on which this jurisdiction recognises foreign judgments, demonstrate that there can be no implication that s 75 should extend to overseas transactions because any such notion is in practice unworkable, where that person is not amenable to the United Kingdom jurisdiction. It is unlikely that Parliament intended to legislate for something which was unlikely to be effective in practice.

[52] Another problem is that the legal relation between the debtor and a foreign supplier will almost always be governed by a foreign law of which the 1974 Act forms no part. If their relationship is contractual, the contract may well include a clause giving the courts of the supplier's country exclusive jurisdiction to settle any disputes arising out of or connected with the contract. In the context of contribution claims, this problem has been solved not by the courts, but by the 1978 Act itself. It expressly provides, in s 1(6), that it is immaterial whether any issue arising in an action by the person who suffered the damage against the party from whom contribution is sought would be determined (in accordance with rules of private international law) by reference to the law of a country outside England and Wales. The existence of this provision was invoked by Hirst J in *Virgo Steamship Co SA v Skaarup Shipping Corp, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352 in support of his conclusion that the 1978 Act is not limited in its scope to liabilities incurred in England and Wales. He remarked of s 1(6): 'This important provision, going well beyond anything contained in the [Law Reform (Married Women and Tortfeasors) Act 1935], is well worthy of the careful exposition it receives in the sub-section.' The absence of any equivalent provision in the 1974 Act, enacted only four years earlier, is an important indication, in my judgment, that s 75 was not intended to apply where the relationship between the debtor and the supplier is governed by foreign law.

[53] Both ss 9(2) and 16(5)(c) of the 1974 Act, coupled with the absence of corresponding provisions in s 75, point to an intention that s 75 does not extend to overseas transactions. Section 9(2) provides that where credit is provided otherwise than in sterling, it shall be treated for the purposes of the Act as provided in sterling of an equivalent amount. Thus, in dealing with the question of whether a credit agreement is within the Act at all, the impact of credit being given in a foreign currency (for example, a loan denominated in US dollars) is expressly addressed. By s 75(3)(b), connected lender liability under s 75 arises so far as the claim relates to any single item to which the supplier has attached a cash price of not less than £100 and not more than £30,000. The level of credit given to the cardholder is not the same either conceptually or in amount as the cash price attached by the supplier. Conceptually, the credit agreement, and the transactions financed by credit provided under the credit agreement, are two different things. As to amount, a credit card could have been used to pay for only part of the overall cash price of the cosmetic surgery. Yet s 75 does not provide that a cash price denominated in a foreign currency is to be treated as a cash price in the sterling equivalent. I accept the defendants' submission that the absence of any provision in s 75 for any sterling equivalent, or any mechanism by which this may be determined, is not simply a drafting oversight, or a matter which could be dealt with by necessary inference. The absence of any such equivalent provision to s 9(2) in relation to the amount of the supply transaction in s 75(3)(b) is a significant indicator that Parliament was only concerned with domestic transactions.

[54] I also accept Mr Hapgood's submission that some, albeit small, assistance can be derived from the point that if s 75 had been intended to apply to overseas transactions, one would have expected to find a corresponding provision to s 16(5) empowering the Secretary of State to exempt certain transactions, or transactions within specified jurisdictions, from the scope of connected lender liability. However, I do not regard this point as being of any great significance.

[55] Mr Hibbert on behalf of the OFT relied upon the decision of the Court of Appeal in *Jarrett v Barclays Bank plc, Jones v First National Bank plc, Peacock v First*



- a *National Bank plc* [1997] 2 All ER 484, [1999] QB 1 in support of his argument that s 75 applied to foreign transactions. In *Jarrett's* case, on a preliminary point of jurisdiction, the Court of Appeal held that although *Jarrett's* case involved a contract governed by Portuguese law, with a Portuguese company for a timeshare property in Portugal, in respect of which, as between the consumer and the supplier, the Portuguese courts had exclusive jurisdiction under art 16(1)
- b of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention) (as set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982), this was not an obstacle to a s 75(1) claim against the card issuer being brought in the United Kingdom courts, despite the fact that the underlying contract breached was for the transfer of an interest in immovable property located in another jurisdiction. The ratio was that the
- c proceedings were based on the debtor-creditor-supplier agreements rather than the timeshare agreements, that they did not have as their objects tenancies of immovable property and that accordingly art 16(1) did not apply. However, the point was not taken by the bank card issuers that s 75 did not apply in any event, because of the principle against the extra-territorial application of United
- d Kingdom legislation. In my judgment, the decision in *Jarrett's* case does not assist in my determination of issue (5). I was also referred to a decision of Judge Behar in *Grove v American Express Services Europe Ltd* (28 April 2003, unreported), who upheld the application of s 75 to foreign transactions. He did not have the benefit of the extensive argument which I have received and for the reasons stated in this judgment I do not, with respect, agree with the conclusion of the county court
- e judge in that case.

[56] The academic writers to which I was referred in the course of argument are divided over the application of s 75 to overseas transactions. I have in the event not derived much assistance from them, since, apart from expressing conflicting views, the level of analysis is not sufficiently deep. It is perhaps worth

f summarising a selection of the views.

(i) *Professor Sir Roy Goode*

In his *Consumer Credit Law* (1989) p 494 (para 16.61), Professor Goode considers that s 75 should apply to overseas transactions, but some of his reasoning could be said to support the defendants' approach:

- g 'The fact that the supply contract is governed by foreign law would not appear to affect the creditor's liability under s 75 of the Act, assuming that the credit agreement is itself within the Act and is not exempt ... Thus, a bank issuing a credit card under a regulated consumer credit agreement will be
- h liable under s 75 if the cardholder uses the card abroad to purchase goods or obtain services and the supplier commits a misrepresentation or breach of contract. This may seem hard; but it has to be remembered that liability is imposed on the creditor only as the result of the credit being extended pursuant to or in contemplation of arrangements between him and the supplier, and it is therefore for the creditor to exercise care in selecting overseas
- i suppliers with whom to conclude arrangements. Indeed, it can be argued that the consumer needs even greater protection in dealings with a foreign supplier than with a trader in his own country, for the problems of litigating abroad are formidable.' (My emphasis.)

The italicised words arguably support the defendants because what the OFT is seeking to achieve is to impose s 75 liability in relation to suppliers whom the

bank most certainly has not selected. Professor Goode also recognises that the extension of s 75 to overseas transaction would be 'hard' (on creditors). I also accept Mr Hapgood's submission that Professor Goode's concluding point is misplaced. If the problems of litigating abroad are formidable, why should the problem be borne by the bank rather than the debtor who voluntarily went abroad to a country of his choice and purchased goods or services from a local supplier there?

(ii) *Professor Guest*

In the *Encyclopaedia of Consumer Credit Law* by Guest and Lloyd, the editors do not express a concluded view at pp 2074–2076, but rather canvas the following competing arguments:

'There is no specific provision, as is found in s. 9(2), whereby for the purposes of s. 75(3)(b) a cash price in a foreign currency is to be treated as a cash price in sterling of an equivalent amount; and the reference to a claim against the supplier in respect of "a misrepresentation or breach of contract" suggests a claim in English or Scots law, and not a claim under some comparable or similarly characterised principle in a foreign law. Further, there is the "extraterritorial" principle of statutory interpretation whereby the courts are reluctant (where the statute does not so provide expressly) to give statutes extraterritorial effect. On the other hand, there is no good policy reason why a s. 75 claim should be confined to cases where the supply contract has no foreign connection. On the contrary, it is in just such cases where the consumer is most at risk and ill-equipped to bring a direct claim against the supplier. Moreover, so interpreting s. 75 only gives the section "extraterritorial" effect in the indirect sense that the creditor's liability is determined by foreign law. Finally, s. 16(5)(c) contemplates that the Act may apply to cases with an overseas connection and provides a mechanism for exempting credit agreements with such a connection.'

(iii) *Paget's Law of Banking*

The contributor to the consumer credit chapter in *Paget's Law of Banking* (12th edn, 2003) (Neil Levy of counsel) considers that s 75 does not extend to overseas transactions (see p 66 (para 2.68)):

'A question also arises whether connected lender liability would extend to a claim by the debtor in respect of a transaction made abroad with a foreign supplier and which may be subject to foreign law. Although the statutory wording seems wide enough to cover such a case, this would be tantamount to according the Act extra-territorial character. It is suggested that the application of s 75 ought not to be given that effect in the absence of words making it clear that this was Parliament's intention, and because it imposes an artificial liability without fault upon the creditor which would not otherwise arise. This adverse effect is mitigated by the creditor's right to join the supplier to proceedings to recover from him by virtue of the statutory indemnity, but these rights may not be capable of effective enforcement against a foreign supplier. In addition, the use of the terms "misrepresentation" and "breach of contract" may also be read as supporting the view that the only claims which Parliament had in contemplation as

a giving rise to connected lending liability were those under the law of England and Wales or under Scottish law.<sup>7</sup>

[57] In his written argument (paras 166–177), Mr Hibbert raised a point purportedly based on arts 28 and 29 EC in relation to the prohibition on trade between member states. He did not develop it in his oral argument to any extent, and I was not referred to the Treaty or any relevant authorities. However, in my judgment it does not assist him in any event. The arguments put forward by the defendants are based essentially on whether or not the supply contract is governed by a foreign law, and where it is made, not based on a distinction between United Kingdom nationals and other European Union nationals. Moreover there was no evidence whatsoever before me that the unavailability of a s 75 remedy would be liable to dissuade United Kingdom customers from purchasing goods or services from overseas European Union suppliers, or from going on holiday abroad. Accordingly, I reject this argument. I also reject the OFT's argument that consumers are in greater need of protection in relation to foreign transactions than domestic transactions, due to the difficulties inherent in litigation abroad, and hence that one should not limit the scope of s 75 liability to the domestic sphere. Quite apart from the inconsistency of such an analysis with the intention one can draw from the words used in the legislation, I accept Mr Howard's submission that it is also flawed in policy terms. As he said, credit cards are a global phenomenon. United Kingdom consumers already enjoy a greater degree of protection from their use domestically than holders of cards issued in other countries. If that protection were to be extended to use of credit cards anywhere in the world, United Kingdom consumers would be put at a massive advantage to holders of cards issued on the same networks in any other country.

[58] Finally, I accept the submission made on behalf of the defendants that it is unlikely that Parliament intended to place creditors in a position where they would be exposed to connected lender liability for overseas transactions, not only because they would be defending claims without direct knowledge of the facts (or the ability to obtain such knowledge) but also, without in many cases the actual supplier coming in to defend the claim.

g CONCLUSION ON ISSUE (5)

[59] Accordingly I hold that, on its true construction, s 75(1) does not apply to foreign contracts, where the contract between the debtor and the supplier of goods or services has the following characteristics: (1) the contract was made wholly outside the United Kingdom; and (2) the contract was governed by a foreign law; and (3) the goods were delivered, or the services were supplied, outside the United Kingdom. I rule that it makes no difference to the non-application of s 75(1) that: characteristic (1), above differs in that the acts of offer and acceptance were done partly within the United Kingdom and partly outside the United Kingdom (characteristic (1A)) and/or characteristic (3), above differs in that the goods were despatched outside the United Kingdom for delivery within the United Kingdom (characteristic (3A)). However, in the absence of further argument I am not prepared to rule one way or another whether, in any particular case, s 75(1) does not apply where: characteristics (2) and (3) or (3A), are present, but not characteristics (1) or (1A); or any one of the characteristics (1), (1A), (2), (3) or (3A) are present. It seems to me that, having decided the point of principle, it is not satisfactory to lay down a template for whether in any particular factual situation, a contract can indeed be characterised

as a foreign contract. It seems to me that it is preferable for the application of the principle to be left to be worked out by reference to the particular facts of any given case. a

[60] I shall hear argument as to the form of any order.

*Declarations accordingly.*

James Wilson    Barrister (NZ). b



**a Al Sabah and another v Grupo Torras SA  
and another**  
[2005] UKPC 1

**b** PRIVY COUNCIL

LORD HOFFMANN, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD  
25 OCTOBER 2004, 11 JANUARY 2005

**c** *Bankruptcy – Jurisdiction – Jurisdiction to act in aid of another British court – Statutory provision requiring every British court to act in aid of each other in bankruptcy matters – Whether provision having been repealed in its application outside United Kingdom by subsequent United Kingdom legislation – Scope of jurisdiction under provision – Bankruptcy Act 1914, s 122 – Insolvency Act 1986, s 426(5).*

**d** Section 122<sup>a</sup> of the Bankruptcy Act 1914, which requires every British court having jurisdiction in bankruptcy or insolvency to act in aid of and be auxiliary to each other in all matters of bankruptcy, has not been repealed, in its application outside the United Kingdom, by the Insolvency Act 1985. In the territories in which it remains in force, s 122 of the 1914 Act confers a jurisdiction which is essentially as wide as that conferred on United Kingdom courts by s 426(5)<sup>b</sup> of the Insolvency Act 1986. It therefore equates the receipt and acceptance of a letter of request with a hypothetical bankruptcy in the receiving territory. Accordingly, after identifying the matters specified in the request, the receiving court should ask itself what would be the relevant insolvency law applicable by it to comparable matters falling within its jurisdiction. The receiving court should then apply that law to the matters specified in the request, notwithstanding that on that hypothesis those are matters which would not, or might not, otherwise fall within its jurisdiction by reason of some foreign element (see [34], [37], [46], below).

**g** *Galbraith v Grimshaw and Baxter* [1908–10] All ER Rep 561 and *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621 considered.

## Notes

**h** For the powers of the United Kingdom Parliament to legislate for British overseas territories and for co-operation between courts exercising jurisdiction in relation to insolvency, see respectively 6 *Halsbury's Laws* (4th edn) (2003 reissue) para 821 and 7(4) *Halsbury's Laws* (4th edn) (2004 reissue) para 1029.

In its application to the United Kingdom, s 122 of the Bankruptcy Act 1914 has been repealed, with effect from 1 April 1986, by the Insolvency Act 1985, s 235(3), Sch 10, Pt IV.

**j** For the Insolvency Act 1986, s 426, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 1280.

<sup>a</sup> Section 122 is set out at [15], below

<sup>b</sup> Section 426, so far as material, is set out at [38], below

### Cases referred to in opinion

*Ayres, Re, ex p Evans* (1981) 34 ALR 582; *aff'd Ayres v Evans* (1981) 39 ALR 129, Aust FC.

*Bank of Credit and Commerce International SA (No 9), Re* [1994] 3 All ER 764.

*Bolton, Re* [1920] 2 IR 324.

*Callender, Sykes & Co v Colonial Secretary of Lagos and Davies* [1891] AC 460, PC.

*Dallhold Estates (UK) Pty Ltd, Re* [1992] BCLC 621.

*Debtor, Re a, ex p Viscount of the Royal Court of Jersey* [1980] 3 All ER 665, [1981] Ch 384, [1980] 3 WLR 758.

*Galbraith v Grimshaw and Baxter* [1910] AC 508, [1908–10] All ER Rep 561, HL.

*Hall v Woolf* (1908) 7 CLR 207, Aust HC.

*Hart, Re, ex p Green* [1912] 3 KB 6, [1911–13] All ER Rep Ext 1164, CA.

*Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497, CA.

*Osborn, Re*, [1931–32] B & CR 189.

*R v Jameson* [1896] 2 QB 425.

*Radich v Bank of New Zealand* (1993) 116 ALR 676, Aust Fed Ct.

*Tucker, Re* (1987–89) MLR 220, I of M Staff of Gov Div.

*Ukley v Ukley* [1977] VR 121, Vic SC (Full Ct).

### Appeal

The appellants, Barbara Alice Al Sabah and Mishal Roger Al Sabah, appealed with leave granted by Zacca P, Rowe and Taylor JJA on 5 December 2003 from their decision in the Court of Appeal of the Cayman Islands (Zacca P, Rowe and Taylor JJA) on 1 October 2003 dismissing their appeal from the decision of Henderson J on 8 November 2002 refusing to set aside the *ex parte* order of Smellie CJ on 15 March 2002, for which he gave reasons on 27 March 2002, acceding to a letter of request by the Grand Court of the Bahamas seeking assistance from the Grand Court of the Cayman Islands by (i) recognising in the jurisdiction of the Cayman Islands the appointment of the second respondent, Clifford Culmer, as trustee in bankruptcy of the property of Mohammed Al Sabah, a judgment debtor of the first respondent, Grupo Torras SA; (ii) granting to the trustee all general law powers and the statutory powers accorded to a trustee in bankruptcy in that jurisdiction and in particular the powers under s 107 of the Cayman Bankruptcy Law (1997 Revision); and (iii) granting him such other powers as the Grand Court of the Cayman Islands saw fit. The facts are set out in the judgment of the Board.

*Robin Dicker QC and Adrian Beltrami* (instructed by *Alan Taylor & Co* as agents for *Walkers*, Cayman Islands) for the appellants.

*Andrew Popplewell QC, Paul Wright and Graham Ritchie* (of the Cayman Islands Bar) (instructed by *Baker & McKenzie*) for the respondents.

*Cur adv vult*

The Board took time for consideration.

a 11 January 2005. The following judgment of the Board was delivered.

## LORD WALKER OF GESTINGTHORPE.

### BACKGROUND

b [1] The appellants Barbara Alice Al Sabah and Mishal Roger Al Sabah are the wife and adult son respectively of Sheikh Fahad Mohammed Al Sabah (the debtor). The debtor was formerly head of the Kuwait Investment Authority in London. It embarked on a huge programme of investment in Spain through a Spanish company named Grupo Torras SA (GT). With the help of co-conspirators the debtor defrauded GT on a very large scale. The misappropriations were effected by four separate fraudulent schemes between 1988 and 1990. After a long civil trial in London the debtor was found liable for very large damages (see *Grupo Torras SA v Al Sabah* [1999] CLC 885). There have subsequently been various proceedings in different parts of the world by which GT, and more recently the debtor's Bahamian trustee in bankruptcy, have sought to recover funds in order to satisfy the judgment. GT has so far recovered about \$US178m from the debtor or trusts established by him, but that is only a small part of the total indebtedness.

e [2] The debtor is now resident in the Bahamas. On 29 June 2001 he was adjudicated bankrupt under the Bahamian Bankruptcy Act 1870. The bankruptcy was deemed to have commenced on 6 February 2001. GT's proof of debt was for a sum of the order of \$US800m. On 30 July 2001 the first meeting of creditors was held and Mr Clifford Culmer, a partner in BDO Mann Judge of Nassau, was appointed as trustee in bankruptcy.

f [3] The debtor is the settlor in respect of two trusts governed by the law of the Cayman Islands. One is the Comfort Trust, which he established (under the name of The Chester Trust) under Bahamian law on 29 September 1992. On 30 December 1992 a corporate trustee resident in the Cayman Islands, Bank of Butterfield International (Cayman) Ltd, was appointed as trustee of the trust and on 12 February 1993 the trust's proper law was changed to that of the Cayman Islands, and its name was changed to its present name. The debtor is the principal beneficiary under this trust and the appellants are also beneficiaries. The other is the Eaglet Trust, established on 14 February 1992 and governed from its inception by Cayman law. The trustees are Pictet Trustee SA (a Swiss company) and Pictet Bank and Trust (Cayman) Ltd (a Cayman company). The appellant Mishal Al Sabah is the principal beneficiary under this trust.

g [4] The trustee in bankruptcy's case is that the two trusts own and control, through a network of companies, very valuable assets (the Comfort Trust alone is said to be worth over \$US27m) which enable the debtor, despite his bankruptcy, to enjoy a life of luxury. On 31 August 1995 GT commenced proceedings in the Cayman Islands (cause no 271 of 1995) against the trustee of the Comfort Trust and various companies owned by the trustee, pleading proprietary claims. The pleadings have been extensively amended and the proceedings are still on foot. GT has also obtained summary judgment from the Grand Court of the Cayman Islands in effect converting its English money judgment into a Cayman money judgment. These Cayman proceedings are of no more than background relevance to the claim by the Bahamian trustee in bankruptcy, which is of central importance in this appeal.

## THE LETTER OF REQUEST AND SUBSEQUENT PROCEEDINGS

[5] On 14 February 2002 the trustee in bankruptcy made an ex parte application to the Bahamian Grand Court for an order under s 122 of the Bankruptcy Act 1914 of the United Kingdom (or alternatively under the inherent jurisdiction) requesting aid from the Grand Court of the Cayman Islands. On 12 March 2002 Lyons J gave a short reasoned judgment (mainly concerned with s 122 of the Bankruptcy Act 1914) and made an ex parte order for a letter of request to be issued seeking assistance under three heads: (i) that Mr Culmer's appointment as trustee in bankruptcy of the property of the debtor should be recognised in the jurisdiction of the Cayman Islands; (ii) that the trustee should be granted 'all general law powers and the statutory powers accorded to a trustee in bankruptcy in [the jurisdiction of the Cayman Islands] and in particular ... the powers under s 107 of the [Cayman] Bankruptcy Law (1997 Revision)'; and (iii) that he should be granted such other powers as the Grand Court of the Cayman Islands thought fit.

[6] Section 107 of the Bankruptcy Law (1997 Revision) of the Cayman Islands provides that any voluntary settlement (an expression which is widely defined) of property is to be void against the trustee in bankruptcy if the settlor is made bankrupt (i) within two years after the date of the settlement or (ii) within ten years after the date of the settlement unless (in the latter case) the beneficiaries can prove that the settlor was, when he made the settlement, able to pay all his debts without the aid of the property comprised in the settlement (and that the settled property passed to the trustee on execution of the settlement). Although this enactment speaks of the settlement being 'void' it is common ground that this should be interpreted as 'voidable' in accordance with the decision of the English Court of Appeal in *Re Hart, ex p Green* [1912] 3 KB 6, [1911-13] All ER Rep Ext 1164. If the Cayman trusts are to be set aside under s 107, that can be achieved only by an order of a court of competent jurisdiction, prima facie the Grand Court of the Cayman Islands.

[7] The Bankruptcy Act 1987 of the Bahamas contains (in s 71) provisions similar to those of s 107 of the Cayman statute but they are not identical. In particular, the power conferred by s 71 of the Bahamian statute is exercisable only if the bankrupt settlor was (apparently at the time of the settlement) a trader (within the meaning of a rather old-fashioned statutory definition). Their Lordships heard no argument as to whether the debtor was at any time a trader within the meaning of the Bahamian statute and they express no view on the point. But it appears to have been one of the considerations which led the trustee in bankruptcy to seek a letter of request to the Cayman court. The other consideration may have been doubt as to whether the Cayman court would give effect to an order of the Bahamian court setting aside a trust governed by Cayman law. Their Lordships express no view on that point either; it was mentioned in the course of the hearing but was not fully argued, and is of no direct relevance to the outcome of this appeal (its only relevance is that if the doubt is well-founded, it shows that the Bahamian trustee in bankruptcy, like the Scottish trustee in bankruptcy in *Galbraith v Grimshaw and Baxter* [1910] AC 508 at 510, [1908-10] All ER Rep 561 at 562 may still 'find himself ... falling between two stools').

[8] The Bahamian court's letter of request came before the Grand Court of the Cayman Islands on 15 March 2002, when Smellie CJ considered it ex parte. He made an immediate order (followed by a written judgment delivered on



a 27 March 2002) acceding to the letter of request and (in particular) granting the Bahamian trustee in bankruptcy the powers conferred by s 107. The main points in his judgment can be summarised as follows: (i) that s 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands, and further or alternatively s 122 of the Bankruptcy Act 1914 of the United Kingdom, authorised the Grand Court to act on the letter of request; (ii) that the Grand Court should as a matter of discretion confer the s 107 powers, since any Cayman assets relevant to the bankruptcy were likely to be held in trust; and (iii) that the order could in any case be made under the court's inherent jurisdiction.

b [9] The matter then came before Henderson J inter partes on three days in September 2002. Henderson J also had before him an application to join the trustee in bankruptcy as a co-plaintiff in cause no 271 of 1995. He reserved judgment and handed down a written judgment on 8 November 2002. In relation to the letter of request Henderson J decided (i) that the Chief Justice had rightly exercised jurisdiction (although Henderson J took a rather different view as to the reasons); (ii) that the order should not be set aside on grounds of material non-disclosure (this is not an issue in the appeal to the Board); and (iii) that any further exercise of the court's discretion should be postponed until after a full consideration of the evidence.

c [10] The appellants appealed to the Court of Appeal of the Cayman Islands and the appeal came before that court (Zacca P and Rowe and Taylor JJA) in July 2003. On 1 October 2003 the Court of Appeal (in a reserved judgment of the court delivered by Taylor JA) dismissed the appeal. The appellants now appeal to Her Majesty in Council with final leave granted on 5 December 2003. The principal issues in the appeal are as follows: (i) Was the Court of Appeal correct in its view that the Grand Court had jurisdiction under s 156 of the Bankruptcy Law (1997 Revision)? (ii) If not, did the Grand Court have jurisdiction under s 122 of the Bankruptcy Act 1914 of the United Kingdom (on the basis that it was not repealed by the Insolvency Act 1985) or under its inherent jurisdiction? (iii) If the Grand Court had jurisdiction under any of these routes, did it have power to confer the s 107 powers on a Bahamian trustee in bankruptcy?

#### THE LEGISLATION

g [11] In considering these issues it is necessary to look closely at the terms and antecedents of a number of statutory provisions, including in particular s 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands and s 122 of the Bankruptcy Act 1914 of the United Kingdom. As the Court of Appeal recorded, it had had submissions covering enactments passed in the United Kingdom, Jamaica and the Cayman Islands over a period of more than 130 years, and the judgments at first instance and in the Court of Appeal reflect the care with which all the courts below have approached this difficult task. Their Lordships have also had the benefit of thorough research and admirable arguments from both sides; the depth of the research is particularly impressive in view of the severe damage and disruption which has unfortunately been suffered in the Cayman Islands as a result of the recent hurricane.

j [12] Before embarking on the detail of the legislation their Lordships think it desirable to set out some basic points about legislation in the imperial context. The earliest statute to which it is necessary to refer is the Bankruptcy Act 1869 of the United Kingdom. In the middle of the reign of Queen Victoria the British Empire was nearing its fullest geographical extent (although there was some later

expansion, especially in Africa) and the establishment of local legislatures (dating back to the 1850s in the case of most states of Australia, to the eighteenth century in the case of most of the provinces of Canada, and to the early seventeenth century in the case of Bermuda) marked the beginnings of the long progress towards independent status within the Commonwealth. The enactment of the Colonial Laws Validity Act 1865 ('an Act to remove doubts as to the validity of colonial laws') reaffirmed the superior power of the Westminster Parliament but made clear that colonial laws could depart from any non-statutory rules of common law or equity. The 1865 Act did not in terms refer to the enactment of laws with extraterritorial effect. But most colonial legislatures had powers (granted either under the Royal Prerogative, or by the Westminster Parliament) to make laws 'for the peace, order and good government' of the territory in question and this implied (but did not clearly define) some territorial restrictions. This gave rise to many difficulties both before and after the 1865 Act (see generally DP O'Connell 'The Doctrine of Colonial Extra-Territorial Legislative Incompetence' (1959) 75 LQR 318). The 1865 Act has of course ceased to apply to independent members of the Commonwealth, the first repeals having been effected by the Statute of Westminster 1931. The balance of law-making authority, as between the Crown and the Westminster Parliament, was regulated (in relation to settled colonies) by the British Settlements Act 1887 (see generally 6 *Halsbury's Laws* (4th edn) (2003 reissue) paras 821–823).

[13] During the nineteenth century the English court was fairly ready to hold that an Act of the Westminster Parliament, especially if concerned with general rules of law, was intended to apply throughout the Empire. So in *Callender, Sykes & Co v Colonial Secretary of Lagos and Davies* [1891] AC 460, the Board held (at a time when Nigeria had no bankruptcy law of its own) that the general vesting provisions of the Bankruptcy Act 1869 of the United Kingdom (and not merely provisions about reciprocal enforcement) applied in Nigeria. But the Westminster Parliament's supreme legislative competence has in practice been more and more constrained by two factors. One has been an increasingly strong constitutional convention (eventually given statutory force, in relation to the Commonwealth countries to which it applied, by the Statute of Westminster 1931) not to interfere, unasked, in the laws of Commonwealth countries which enjoyed representative government. The other has been the courts' long-standing practice, in construing statutes of the Westminster Parliament, of presuming that their intended territorial extent is limited to the United Kingdom, unless it is clear that a wider extent is intended: see for instance the observations of Lord Russell of Killowen CJ in *R v Jameson* [1896] 2 QB 425 at 430. This presumption is of long standing but (with increasingly precise drafting techniques) it appears to have become stronger over the years, and it has become common for an Act of the Westminster Parliament to contain power for all or part of its provisions to be extended to British territories by Order in Council. A detailed commentary on the current position as to the territorial extent of an Act of Parliament can be found in Bennion *Statutory Interpretation* (4th edn, 2002) p 275–305.

[14] At the time of the enactment of the United Kingdom Bankruptcy Act 1869 the Bahamas were a British colony acquired by settlement; Jamaica was a British colony acquired by conquest; and the Cayman Islands were a British colony acquired by settlement but governed (under the Cayman Islands Act 1863 of the Westminster Parliament) as a dependency of Jamaica. The Bahamas became fully independent in 1973; Jamaica became fully independent in 1962; and the Cayman

*a* Islands are still a British colony, now officially termed a British overseas territory. Before the 1863 Act the Cayman Islanders had magistrates and a parish meeting which exercised limited law-making powers. The effect of the 1863 Act was to confirm the existing arrangements so far as they went, but the islanders' institutions became subject to the jurisdiction of the Governor, legislature and Supreme Court of Jamaica. The law of Jamaica was in general to apply to the Cayman Islands. That state of dependency continued until 1959. It is of central importance to the first issue, that is the construction of s 156 of the Cayman Bankruptcy Law.

*b* [15] The Bankruptcy Act 1869 of the United Kingdom provided principally for bankruptcies in England. The Scottish law of bankruptcy developed on very different lines and had its own statutes enacted by the Westminster Parliament (see generally Professor McBryde's work on [Scottish] *Bankruptcy* (1959) pp 2–4). Ireland also had its own statutes enacted at Westminster. Nevertheless the 1869 Act had some extraterritorial effect, as already noted. In particular, ss 73–77 contained provisions which provided in different ways for mutual recognition and assistance in respect of bankruptcy proceedings in other parts of the United Kingdom and throughout the British Empire. Section 74 is the most important for present purposes. It was re-enacted (with a small change of language to which neither side attached importance) as s 118 of the Bankruptcy Act 1883 and again re-enacted (without any change) in s 122 of the Bankruptcy Act 1914. Section 122 is in the following terms:

*c* 'The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.'

*d* [16] The principal bankruptcy statute in force in the Bahamas is the Bankruptcy Act 1870. It did not contain any power comparable to s 74 of the United Kingdom Bankruptcy Act 1869 (the antecedent of s 122). But when he ordered the despatch of a letter of request, Lyons J was satisfied that s 122 applied in the Bahamas, having been specially mentioned in a Bahamian enactment (after the Bahamas became fully independent in 1973) entitled 'Acts of the United Kingdom Parliament applying in or affecting the Bahamas otherwise than by virtue of an enactment of the Legislature of the Bahamas.' The correctness of that conclusion is not an issue in this appeal.

*e* [17] The legislative history in Jamaica and the Cayman Islands is more complicated. The Jamaican Bankruptcy Law 1871 did contain, in s 64, provisions similar but by no means identical to those of s 74 of the Bankruptcy Act 1869. Section 64 was in the following terms:

*f* 'All the courts in bankruptcy, and the officers of such courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and may be carried into

effect accordingly: And an order of any court in bankruptcy seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.’ a

These provisions do not in terms have any extraterritorial effect. Bankruptcy law was administered in Jamaica by several district courts whose jurisdiction was based on the residence or place of business of the debtor, with an appeal to the Supreme Court (see ss 60 and 62 of the 1871 Act). The Grand Court of the Cayman Islands did not have any jurisdiction in bankruptcy until the enactment (as a Jamaican statute) of The Cayman Islands Administration of Justice Law 1894. Section 41 of that law provided as follows: b  
c

‘The Grand Court shall have and exercise all the jurisdiction and powers in Bankruptcy now vested in the Chief Court of Bankruptcy of Jamaica, save and except the jurisdiction now vested in the Supreme Court of Judicature of Jamaica as the Chief Court of Bankruptcy sitting as a Court of Appeal, but any such appeal shall lie to the full Court of the Supreme Court of Judicature of Jamaica, and all the Bankruptcy Laws and Rules now in force in Jamaica shall extend and apply to the Cayman Islands and to the said Grand Court.’ d

The reference to the Chief Court of Bankruptcy of Jamaica is explained by changes made by ss 3–11 of the Jamaican Bankruptcy Law 1880, which established the High Court of Justice as the Chief Court of Bankruptcy, and gave limited jurisdiction (where the estate of the debtor was worth less than £200) to the Resident Magistrates’ Courts, with an appeal (in either case) to the Court of Appeal. e

[18] So after 1894 s 64 of the Jamaican Bankruptcy Law 1871 (by then re-enacted as s 161 of the Jamaican Bankruptcy Law 1880) still made sense, with a very limited degree of extraterritorial effect as between the Grand Court of the Cayman Islands and the various Jamaican courts with original jurisdiction in bankruptcy (the Court of Appeal of Jamaica having jurisdiction to hear appeals from all of them). These statutory provisions remained in force unchanged throughout the first half of the twentieth century. The Cayman Islands were still a dependency of Jamaica at the inception of the short-lived British Caribbean Federation. But the Cayman Islands and Turks and Caicos Islands Act 1958 repealed the Cayman Islands Act 1863 and provided for the Cayman Islands to have a new constitution, granted by The Cayman Islands (Constitution) Order in Council 1959 (SI 1959/863). This provided for the Governor of Jamaica to be ex-officio the Governor of the Cayman Islands, with limited legislative powers conferred concurrently on the Governor with the advice and consent of the Cayman Legislative Assembly (on the one hand) and the legislature of Jamaica (on the other hand), with power being reserved to Her Majesty in Council to amend or vary the Order in Council. f  
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[19] The 1959 Order in Council was revoked by The Cayman Islands (Constitution) Order in Council 1962 (SI 1962/1646), which was intended to take effect on 6 August 1962, simultaneously with Jamaica’s attainment of full independence under the Jamaica Independence Act 1962. The 1962 Order in Council was inadvertently not laid before Parliament and was brought into force retrospectively by The Cayman Islands (Constitution) Order 1965 (SI 1965/1860). j



- a The present constitution was brought into force by The Cayman Islands (Constitution) Order 1972 (SI 1972/1101). Both the 1962 and the 1972 Constitutions conferred law-making power 'for the peace, order and good government of the Islands' on the Administrator (later the Governor) with the advice and consent of the Legislative Assembly, with power reserved to Her Majesty in Council.
- b [20] That completes the relevant constitutional history. But it is necessary to go back a little in time to the enactment of the Cayman Bankruptcy Law 1964. The general effect of the various constitutional instruments was to maintain existing laws in force in the Cayman Islands, subject to any necessary modifications. But with Jamaica's independence it was appropriate for the Cayman Islands to have their own body of statute law. That was the purpose of
- c the Revised Edition (Laws of the Cayman Islands) Law 1960 (a Cayman enactment). It provided (in s 3) for the Governor to appoint Commissioners to prepare a revised edition of the laws of the Cayman Islands and (s 8) a Table of the Acts and Laws in force on 31 December 1963. The Commissioners had power (s 4) to make a variety of formal or verbal changes (no doubt in the interests of
- d clarity, simplicity, uniformity and accuracy) but s 6 provided:

'(1) The powers conferred upon the Commissioners by s 4 of this Law shall not be taken to imply any power in them to make any alteration or amendment in the matter or substance of any Act or Law or part thereof.

e (2) In every case where any such alteration or amendment is, in the opinion of the Commissioners, desirable, the Commissioners shall draft a Bill setting forth such alterations and amendments and authorizing them to be made in the revised edition, and every such Bill shall, subject to the sanction of the Governor, be submitted to the Legislative Assembly and dealt with in the ordinary way.'

- f Several amendments to the Jamaican Bankruptcy Law 1880 were made by the enactment of The Statute Law Revision (Amendments) Law 1963 which was passed by the Cayman Legislative Assembly (apparently under s 6(2) of the 1960 Law) but no amendment of s 161 was made by those means. Such textual
- g alterations as were made must have been made under the limited powers conferred by s 4 of the 1960 Law.

- h [21] The Commissioners' labours did in due course produce three volumes of statutes entitled 'The Laws of the Cayman Islands 1963', with the Bankruptcy Law as ch 7. It is still in force, with some amendments not material to this appeal, as the Bankruptcy Law (1997 Revision). There has never been any change to s 156 which (with the side note 'Enforcement of Warrants and Orders of Courts') is in the following terms:

j 'All the Courts in bankruptcy and the officers of such Courts, shall act in aid of and be auxiliary to each other in all matters of bankruptcy and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court, and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well

as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.'

[22] It will be apparent that most of the language of the section, like that of s 161 of the Jamaican Bankruptcy Law 1880, is close to that of s 122 of the Bankruptcy Act 1914 of the United Kingdom. But whereas the United Kingdom statute applied to all British courts, the only extraterritorial operation of the Jamaican statute was very limited (and constitutionally unexceptionable), that is to the Cayman Islands as Jamaica's dependency. Under s 156 of the Cayman statute it is very hard to see what effect (extraterritorial or otherwise) could sensibly have been intended, since the Cayman Islands had only one court with bankruptcy jurisdiction, and its Governor and Legislative Assembly had (at best) very limited power to legislate with extraterritorial effect.

THE FIRST ISSUE: SECTION 156

[23] So their Lordships come to the first issue, the meaning of 'all the Courts in bankruptcy' at the beginning of s 156. It is, once the background has been explained, a short point of statutory construction. The Court of Appeal noted four possible interpretations: (i) all United Kingdom and British courts (the view of the Chief Justice); (ii) all bankruptcy courts worldwide (the view of Henderson J); (iii) all bankruptcy courts in the Cayman Islands (of which there was only one, so that the provision would have no present application at all); and (iv) Cayman and Jamaican bankruptcy courts (a view which neither side put forward in the Court of Appeal, and which the Court of Appeal regarded as untenable).

[24] The Court of Appeal preferred the view of the Chief Justice. The court was reluctant to find that s 156 had no coherent present meaning, and was directed simply to the possibility of there being more than one Cayman court with bankruptcy jurisdiction at some time in the future (a possibility which would in any event have called for primary legislation). The court attached little weight to the argument that the Governor and the Legislative Assembly had no general power of extraterritorial legislation by treating s 156 as a sort of declaratory repetition or re-enactment of s 122 of the Bankruptcy Act 1914 so as to provide a complete bankruptcy code for the Islands:

'We believe the proper view to be that a correct statement of prevailing law contained in an enactment will fall within the competence of the enacting body notwithstanding that such body does not itself have authority to make or change the law so stated—that such a practice is constitutionally unobjectionable, whether in state or provincial legislation, municipal by-laws, rules and regulations of administrative tribunals or other branches of government or by-laws or articles of a body corporate created under statutory authority.'

The court also relied (as did the respondents before the Board) on the contrast in language between 'Courts' in s 156 (and its Jamaican antecedents) and the singular 'Court' (defined as the Chief Court in Bankruptcy) in ss 157 and 158 (and their Jamaican antecedents).

[25] Their Lordships readily understand why the Court of Appeal was anxious to interpret s 156, if possible, in a way that gives it a sensible present effect. But for the legislative history as summarised above the Court of Appeal's interpretation might have been possible, although to treat s 156 simply as a declaratory repetition of the United Kingdom provision would involve some

a remoulding of the statutory language. The section would have to be read as conferring on the Grand Court authority to send letters of request to United Kingdom courts and other British courts, and as placing it under a duty to respond to letters of request from such courts, while leaving the powers and duties of the other courts to be conferred or imposed by other legislation enacted in the United Kingdom or elsewhere in the Commonwealth.

b [26] But in their Lordships' view the history of the Jamaican legislation, and the way in which it has been transposed into Cayman legislation, make such an interpretation impossible. When the transposition took place the state of Jamaican law was that for nearly a century s 64 of the Bankruptcy Law 1871, and then s 161 of the Bankruptcy Law 1880, had provided a system of co-operation in bankruptcy matters which made sense in the domestic context of Jamaica.

c Section 122 of the Bankruptcy Act 1914 and its antecedents provided for mutual assistance between the Jamaican courts and the British courts. It is inconceivable that the Commissioners appointed under The Revised Edition (Laws of the Cayman Islands) Law 1960 (who seem, from the contents of the Statute Law Revision (Amendments) Law 1963, to have been scrupulous about what might be

d regarded as amendments of substance) should have intended to make a significant change of substance without invoking the procedure in s 6(2) of the 1960 Law. This aspect of the matter does not seem to have been raised in the Court of Appeal, which seems to have thought that the amendment to s 161 was included in the 1963 amending statute.

e [27] Their Lordships must therefore conclude that the Commissioners cannot have understood the effect of this part of the Jamaican legislation. Had they done so they would have realised that there was no way in which it needed to be, or could sensibly be, transposed into a legal system under which there was only one bankruptcy court. Section 156 has no practical present effect in the Cayman Islands. Therefore the appellants succeed on the first issue.

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#### THE SECOND ISSUE: REPEAL OF SECTION 122

[28] This issue is also an issue of statutory construction, the relevant statute being the Insolvency Act 1985 of the United Kingdom. The question is whether that Act repealed s 122 in its entirety, and across the whole range of its extent, or

g repealed it in relation to the United Kingdom but left it in force in relation to the Channel Islands, the Isle of Man, and all other parts of Her Majesty's Dominions (including fully independent Commonwealth countries) in which it was still in force. Although this too is in the end a short point of construction it is by no means an easy one. Counsel on both sides put forward some elaborate arguments

h representing the fruits of painstaking research. But the only sure conclusions that their Lordships can draw are that the drafting techniques of successive generations of parliamentary counsel have not been wholly uniform, and the reasons for variations in their techniques are often obscure.

[29] The relevant provisions of the 1985 Act are as follows:

i (i) s 213 provided for mutual assistance between courts within different parts of the United Kingdom, and between its courts and those of a 'relevant country or territory'. It was the predecessor of s 426 of the Insolvency Act 1986, which is discussed below as part of the third issue.

(ii) s 235(3):

'The enactments mentioned in Schedule 10 to this Act are hereby repealed to the extent specified in the third column of that Schedule.'

(iii) s 236(2):

'This Act shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes and for different provisions.'

(iv) s 236(3) provided that certain provisions of the Act do not extend to Scotland. Subsection (4) provided that with certain exceptions (including s 235 and the relevant parts of Sch 10, Pt IV) the Act does not extend to Northern Ireland.

(v) s 236(5):

'Her Majesty may, by Order in Council, direct that such of the provisions of this Act as are specified in the Order shall extend to any of the Channel Islands or any colony with such modifications as may be so specified.'

(vi) Sch 10, Pt III (Bankruptcy Repeals) included the following:

'4 & 5 Geo. 5 c. 59.	The Bankruptcy Act 1914.	The whole Act, except sections 121 to 123.'
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(vii) Sch 10, Pt IV (Other Repeals) included the following:

'4 & 5 Geo. 5 c. 59	The Bankruptcy Act 1914.	Sections 121 to 123.'
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[30] The Secretary of State made two relevant Commencement Orders on 6 February 1986 and 10 November 1986 respectively. The Insolvency Act 1985 (Commencement No 2) Order 1986 (SI 1986/185) provided for the coming into force on 1 April 1986 of most of the provisions of s 213 and of Sch 10 'except insofar as it relates to courts in the United Kingdom acting in aid of and being auxiliary to British courts elsewhere'. The Insolvency Act 1985 (Commencement No 5) Order 1986 (SI 1986/1924) provided for the coming into force on 29 December 1986 (with a very few immaterial exceptions) of all the remaining provisions of the 1985 Act.

[31] No Order in Council was made under s 236(5) extending any provision of the Insolvency Act 1985 to the Cayman Islands, nor has any such Order ever been made under s 442 of the Insolvency Act 1986 (which replaced s 236(5)). In particular, there has been no such extension of the repeal of s 122. The respondents rely on this simple point as their key argument. The appellants say that no extension of the repeal was necessary, since s 122 was repealed outright by the Insolvency Act 1985 itself. They contend that the presumption against extraterritorial operation of a United Kingdom statute does not apply (at any rate with the same force) to a repeal. They point to other statutes (especially Statute Law Revision Acts and Statute Law (Repeals) Acts ranging from 1867 to 1995) in which clear words of exception were used (for instance, in s 2(3) of the Statute Law (Repeals) Act 1995, '... this Act does not repeal any enactment so far as the enactment forms part of the law of a country outside the United



a Kingdom; but Her Majesty may by Order in Council provide that the repeal by this Act of any enactment specified in the Order shall on a date so specified extend to any of the Channel Islands or any colony'). They point to the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409), by which s 426 of the Insolvency Act 1986 was extended to Guernsey. This Order in Council did not include any express repeal of s 122. Similarly, Jersey and the Isle of Man b have enacted their own provisions for mutual assistance (in art 48 of the Bankruptcy (Desastre) (Jersey) Law 1990 and s 1 of the Manx Bankruptcy Act 1988 respectively) without any express repeal of s 122.

[32] The Court of Appeal did not find it necessary to reach a definite conclusion on this point, although it appears to have been inclined towards the view that s 122 had not been repealed in relation to the Cayman Islands. This inclination seems to c have been based partly on the decision of the Full Court of the Supreme Court of Victoria in *Ukley v Ukley* [1977] VR 121, which (at 124–125) attached great weight to the power to extend the relevant statute (the Evidence (Proceedings in other Jurisdictions) Act 1975) by Order in Council (although not to Victoria) and (at 131) concluded, after a full discussion of the authorities, that there is 'no sufficient reason d for distinguishing between a statute which repeals an earlier statute and one which amends it'. Mr Dicker QC (for the appellants) sought to distinguish this case because Victoria, unlike the Cayman Islands, had full self-government at the time when the 1975 Act was passed. Mr Popplewell QC (for the respondents) was right in commenting that the position of the Cayman Islands is really an a fortiori case.

e [33] It is surprising that there should be any room for doubt as to whether an important provision of primary legislation has or has not been fully repealed by a modern statute which appears to have been drafted skilfully and with close attention to detail. It is particularly noteworthy that in s 236(4) the draftsman has painstakingly excepted certain repeals (all affecting Ireland) from the general provision that the Act does not extend to Northern Ireland.

f [34] After carefully considering all the competing arguments their Lordships have come to the conclusion that the Insolvency Act 1985 did not repeal s 122 in its application outside the United Kingdom. Section 236(4) (the provision about Irish repeals) and s 236(5) (the power for Her Majesty by Order in Council to extend any of the provisions of the Act to certain territories outside g the United Kingdom) strongly support the natural reading of s 235(3) and Sch 10. The only possible drafting defect was that parliamentary counsel omitted (presumably as unnecessary) precautionary formulae (such as that used in the 1995 Act mentioned in [31], above) which have been used from time to time, both before and since the 1985 Act, by other parliamentary counsel. That carries little weight as against the matters just mentioned. Nor can much h weight be attached to the fact that there may have been an oversight (or a deliberate reliance on implied repeal) in subsequent instruments affecting the Channel Islands and the Isle of Man. Therefore the respondents succeed on the second issue.

j [35] The respondents relied in the alternative, on the second issue, on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by s 107 of its Bankruptcy Law in circumstances not falling within the terms of that section.

The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope (see Dicey and Morris *The Conflict of Laws* (13th edn, 2000) Vol 2, pp 1181–82 (paras 31-053–31-056), 1183–86 (paras 31-059–31-069) and the inherent jurisdiction of the Grand Court cannot be wider.

THE THIRD ISSUE: SECTION 107

[36] The conclusion that s 122 of the Bankruptcy Act 1914 remains in force in the Cayman Islands leads to the third issue, that is the nature and width of the jurisdiction that it confers on the Grand Court. In particular, does it authorise the Grand Court to exercise in favour of the Bahamian trustee in bankruptcy a special statutory power which might not be available to him (because of the 'trader' requirement) if the trusts in question were governed by Bahamian law and the trustees were resident in the Bahamas and facing proceedings in the Bahamian court?

[37] Mr Popplewell has urged the Board to give an affirmative answer to that question. He has pointed to the alternatives spelled out in the latter part of s 122:

'... such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.'

He has submitted that this equates the receipt and acceptance of a letter of request with a hypothetical bankruptcy in the receiving territory, with consequences described as follows by Chadwick J in *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621 at 626, a case on s 426 of the Insolvency Act 1986:

'The scheme of sub-s (5) appears to me to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by the domestic court to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request, notwithstanding that on this hypothesis, those are matters which would not, or might not, otherwise fall within its jurisdiction by reason of some foreign element.'

Rattee J agreed with that passage in *Re Bank of Credit and Commerce International SA (No 9)* [1994] 3 All ER 764 at 782–783, and both decisions were referred to with approval by the Court of Appeal in *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 at 511–515.

[38] To this Mr Dicker replied that these are all recent authorities on s 426 of the Insolvency Act 1986, which is in different and wider terms than s 122, and that the Court of Appeal was in error in treating them as having any relevance to s 122. It is therefore appropriate to set out the relevant provisions of s 426:

(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to

a which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.'

b Subsection (10) contains a wide definition of 'insolvency law'. Subsection (11) defines 'relevant country or territory' as any of the Channel Islands, the Isle of Man, and any country or territory which the Secretary of State designates by statutory instrument.

c [39] Mr Dicker submitted that s 122 (like its statutory predecessors, but unlike s 426) conferred an essentially auxiliary jurisdiction, which granted new remedies but did not create new rights. The High Court of Australia said as much (in relation to s 118 of the Bankruptcy Act 1883 of the United Kingdom) in *Hall v Woolf* (1908) 7 CLR 207 at 212. Moreover in *Galbraith v Grimshaw and Baxter* [1910] AC 508 at 511–512, [1908–10] All ER Rep 561 at 563, Lord Macnaghten said:

d 'It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the absence of special enactment the Scottish Court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration.'

e [40] *Galbraith v Grimshaw* was primarily concerned with s 117 of the Bankruptcy Act 1883. What the House of Lords actually decided was that where a Scottish sequestration (that is, bankruptcy) occurred about a fortnight after an English garnishee order nisi, the judgment creditor prevailed over the trustee in bankruptcy, although the result would have been different if both the attachment and the bankruptcy had occurred in the same jurisdiction (whether England or Scotland). The attachment in England had not been completed, but the fact that it had started meant that the garnished debt was no longer 'free assets' of the bankrupt. But in referring to the court's auxiliary function Lord Macnaghten must have had in mind s 118.

f [41] The general tenor of his opinion is adverse to the notion of a hypothetical bankruptcy in the receiving territory, as the operation of s 426 has been described in the recent authorities already mentioned. In *The Law of Insolvency* (3rd edn, 2002) p 773 (para 29-050) Professor Ian Fletcher has criticised *Galbraith v Grimshaw* as a 'somewhat unsophisticated, if not disingenuous, decision, which purports to disallow any possibility that the rules of law in force in one jurisdiction may enjoy effect elsewhere by virtue of rules of private international law in force in the other countries concerned', and he suggests that it is overdue for reconsideration. The decision has also been described as 'unfortunate' in *Anton Private International Law* (2nd edn, 1990), p734.

[42] Section 122 was given a cautious interpretation by Farwell J in *Re Osborn* [1931–32] B & CR 189, a case in which an Isle of Man trustee in bankruptcy was seeking the assistance of the English court in relation to the bankrupt's immovable property in England. *Re Osborn* is one of very few reported English cases on the operation of s 122. It has since been cited in many overseas cases in relation to the degree of discretion which the receiving court has in applying the apparently mandatory terms of s 122 (or comparable overseas enactments). Another of the rare English cases on s 122 is *Re a Debtor, ex p Viscount of the Royal Court of Jersey* [1980] 3 All ER 665, [1981] Ch 384, in which Goulding J (after noting the striking differences between insolvency laws in England and Jersey ([1980] 3 All ER 665 at 674, [1981] Ch 384 at 399)) said ([1980] 3 All ER 665 at 675, [1981] Ch 384 at 400):

‘The word “bankruptcy” in s 122, if indeed it refers at all to *process* of bankruptcy, must, in my judgment, be construed in a wide sense, for the section is designed to produce co-operation between courts acting under different systems of law, and it would be much restricted if extended only to jurisdictions that reproduce all the main features of English procedure. Dodd J took much the same view of a similar provision in the Bankruptcy (Ireland) Amendment Act 1872: see *In re Bolton* [1920] 2 IR 324, 327.’

[43] In addition to *Hall v Woolf* and *Ukley v Ukley* their Lordships were referred to a number of other Australian authorities, the most important of which are *Re Ayres, ex p Evans* (1981) 34 ALR 582 and on appeal *Ayres v Evans* (1981) 39 ALR 129; and *Radich v Bank of New Zealand* (1993) 116 ALR 676. These cases are of limited assistance since they are concerned with s 29 of the Bankruptcy Act 1966 of the Commonwealth of Australia, which although similar in its general scope to both s 122 and s 426, is not in identical terms to either. The key provisions of s 29 are in sub-ss (2) and (3):

‘(2) In all matters of bankruptcy, the Court:

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

(3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.’

In *Ayres*'s case the Federal Court of Australia was largely concerned with the aspect of indirect enforcement of the revenue laws of a foreign country (the New Zealand Inland Revenue Department was a major creditor of the bankrupt). There are passing references to the judgments in *Hall v Woolf* and *Galbraith v Grimshaw* but the main issue was as to the mandatory nature of the court's response to a letter of request.

[44] *Radich*'s case was concerned with whether a debtor, already bankrupt in New Zealand, should be made subject to a further sequestration order in Australia. It was held on appeal that the Australian Court had erred in exercising its discretion to bring about a second bankruptcy. The Federal Court



a was critical of *Hall v Woolf*, Einfeld J ((1993) 116 ALR 676 at 683) saying that it had produced a 'virtual nonsense' and Drummond J ((1993) 116 ALR 676 at 692) referring to 'unsatisfactory aspects of the reasoning' in it. But all three justices regarded it as a decision on unusual facts (involving a change of domicile in the course of the bankruptcy). Drummond J said of s 29(3) ((1993) 116 ALR 676 at 695):

b 'The jurisdiction the Australian court has under s 29(3) is a wide one ...  
c The Australian court is not limited in providing assistance to a foreign court to cases in which the Australian and the foreign court have powers that mirror each other. If there is a "matter of bankruptcy" within s 29(3) before the foreign court, the Australian court, in response to a request for aid, can exercise any of the powers it has under the Bankruptcy Act 1966 if that same matter had arisen in Australia, being powers the exercise of which will provide assistance to the foreign court in the circumstances of the particular case...'

d So here the Federal Court saw s 29(3) as importing a hypothetical bankruptcy in the receiving state.

e [45] Their Lordships see some force in the criticisms which have been made of *Hall v Woolf* and *Galbraith v Grimshaw*. The distinction between 'rights' and 'remedies' is not, in the context of auxiliary jurisdiction in bankruptcy, marked by a bright line (though their Lordships cannot accept Mr Popplewell's submission that even the debtor himself, before his bankruptcy, had some inchoate right to have his own trusts set aside). Section 122 is expressed in terms of exercising jurisdiction; s 29(3) is expressed in terms of exercising powers; s 426(5) is expressed in terms of applying insolvency law. That is not in their Lordships' view a sound basis for concluding that s 426 has conferred different and wider powers on the court which receives a letter of request. The  
f Court of Appeal in *Hughes v Hannover Ruckversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 at 515 did not take that view. Moreover there is nothing in The Cork Committee (*Report of the Review Committee on Insolvency Law and Practice* (Cmd 8558 (1982)) to suggest that s 426 was intended to make a large extension in the court's auxiliary jurisdiction in bankruptcy otherwise than in a geographical sense (that is, by extending its scope to any 'relevant country or territory'): see  
g Ch 49, especially pp 430–431 (paras 1909–1913).

h [46] For these reasons their Lordships conclude, despite Mr Dicker's skilful submissions in support of the appeal, that the jurisdiction conferred by s 122 is, in the Cayman Islands and the other territories in which it remains in force, essentially as wide as that conferred by s 426. Therefore the respondents succeed on the third issue.

j [47] In reaching this conclusion their Lordships have not overlooked the express provision in s 426(5) requiring the court to have regard to the rules of private international law. If asked to exercise its powers under s 426 the English court may find it necessary to consider whether the requesting court has properly exercised jurisdiction over a debtor with no obvious connection with its territory, and it might also, in some circumstances, have to take account of the general principle against enforcement of the public laws of another country. But that was true of s 122 also: see the judgment of the Isle of Man Staff of Government Division in *Re Tucker* (1987–89) MLR 220. Considerations of private international law may be material in subsequent proceedings which the

Bahamian trustee in bankruptcy takes in the Grand Court. But their Lordships have no reason to suspect that there will be any real doubt about the debtor's sufficient connection with the Bahamas, where he is permanently resident. Moreover the larger of the trusts in question, the Comfort Trust, was originally governed by Bahamian law, and the switch to the Cayman Islands seems to have taken place when the English proceedings against the debtor were already imminent. Their Lordships have no criticism of the observations made by the Court of Appeal as to the Grand Court's eventual exercise of discretion in this matter.

[48] Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Pamela Hardisty Barrister (NZ).

# Raffile v Government of the United States of America

[2004] EWHC 2913 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

ROSE LJ AND PITCHFORD J

2 DECEMBER 2004

*Extradition – Extradition hearing – Appropriate judge fixing date for extradition hearing – Extradition hearing beginning on or before date fixed – Whether judge having power to adjourn hearing – Whether refusal to adjourn reviewable by way of judicial review – Extradition Act 2003, ss 76, 103.*

The appellant was arrested in the United Kingdom and the respondent government sought his extradition to America in relation to violation of sentence and larceny. A date was set for the extradition hearing under the Extradition Act 2003. As the appellant had a history of mental ill-health, his solicitor requested prior authority from the Legal Services Commission to instruct a psychiatrist, but not having received it the week before the hearing date wrote to the court and the Crown Prosecution Service notifying them that an application would be made to adjourn. The court apparently did not receive the letter. At the extradition hearing the district judge (as the appropriate judge under the 2003 Act) refused the application to adjourn for the preparation of a psychiatric report on the basis that notice not having been given in advance he was obliged to commence the hearing in accordance with s 76(4)<sup>a</sup> of the 2003 Act which provided that if before the date fixed by the appropriate judge on which the extradition hearing was to begin a party to the proceedings applied to the judge for a later date to be fixed, and the judge believed it to be in the interests of justice to do so, he could fix a later date. Under s 76(5) if the extradition hearing did not begin on or before the date fixed, and the person arrested applied to the judge to be discharged, the judge had to order his discharge. The district judge then embarked on the relevant statutory steps under the 2003 Act. He was required under s 87<sup>b</sup> to decide whether the appellant's extradition would be compatible with his human rights and at that point counsel for the appellant renewed his application to adjourn for a psychiatric report and the district judge then considered that application and refused it. Counsel then applied to address him on the passage of time, a matter which related to decisions the district judge had already made during the hearing in relation to the relevant sections of the 2003 Act, each of which was dependent upon a decision previously made. The district judge held that counsel could not do so, since he had already made his decision on that issue in the absence of submissions made at the appropriate time. His decisions resulted in the matter being sent to the Secretary of State for the Home

<sup>a</sup> Section 76, so far as material, provides: '(4) If before the date fixed ... a party to the proceedings applies to the judge for a later date to be fixed and the judge believes it to be in the interests of justice to do so, he may fix a later date ... (5) If the extradition hearing does not begin on or before the date fixed under this section and the person applies to the judge to be discharged, the judge must order his discharge.'

<sup>b</sup> Section 87, so far as material, provides: '... the judge ... must decide whether the person's extradition would be compatible with the Convention rights ...'

Department for the Secretary of State's decision on whether the appellant was to be extradited. The appellant appealed under s 103<sup>c</sup> of the 2003 Act which provided for an appeal to the High Court against the relevant decision on a question of law or fact. Section 104<sup>d</sup> provided that on an appeal under s 103 the court could allow or dismiss the appeal or direct the judge to decide again a question which he had decided at the extradition hearing. The appellant also applied for permission to apply for judicial review of the district judge's decision not to adjourn on the basis of procedural unfairness.

**Held** – (1) On the true construction of s 76 of the 2003 Act, there was no bar to the appropriate judge opening the extradition hearing, completing such parts of the initial stages of the hearing (if any) as were possible before an issue arose with which it was not possible to deal without unfairness and then adjourning the hearing part heard. Section 76(5) did not state that the hearing had to be completed on or before the date fixed, but that it had to begin on or before that date. Accordingly, in the instant case, the district judge had had a discretion to adjourn. However, on the renewed application for adjournment in relation to s 87 he had considered the application on its merits. He had then given full reasons for declining to adjourn and his decision could not reasonably be described as procedural unfairness (see [17], [22], [23], below).

(2) If, as a result of misunderstanding or neglect counsel had failed to advance submissions as to the passage of time at the appropriate time in the staged process through the relevant sections of the 2003 Act, those submissions should have been heard, and if necessary, the district judge's previous decisions in that process reopened for that purpose. Not to have done so was capable of resulting in procedural unfairness and at worst injustice. However, it could not be asserted that any delay was being occasioned by the dilatoriness of the United States, nor was there anything oppressive in requiring the appellant to undergo his sentence and trial notwithstanding his moderate depressive illness (see [33]–[35], below).

(3) The court's power in an appeal under s 103 was wide enough to encompass the refusal to adjourn in the factual circumstances of the instant case and the consequences of that refusal. Nevertheless there might be circumstances which were not embraced by ss 103 and 104 and did require the consideration of the exercise of prerogative powers. Accordingly an application for judicial review was unnecessary and permission would be refused. The appeal under s 103 would be dismissed (see [35], [36], below).

## Notes

For the Extradition Act 2003, ss 76, 103, see 17 *Halsbury's Statutes* (4th edn) (Current Statutes Service) 75, 92.

## Cases referred to in judgments

*Kakis v Govt of the Republic of Cyprus* [1978] 2 All ER 634, [1978] 1 WLR 779, HL.

- c Section 103, so far as material, provides: '(1) If the judge sends a case to the Secretary of State ... for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision ... (4) An appeal under this section may be brought on a question of law or fact ...'
- d Section 104, so far as material, provides: '(1) On an appeal under section 103 the High Court may—(a) allow the appeal; (b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing; (c) dismiss the appeal'



- a *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, [2004] 3 WLR 23.
- R (on the application of Warren) v Secretary of State for the Home Dept* [2003] EWHC 1177 (Admin), [2003] All ER (D) 115 (Jun).

### Appeal and application

- b Christopher Raffile appealed under s 103 of the Extradition Act 2003 from the decision of District Judge Pratt, at the Bow Street Magistrates' Court on 9 August 2004, under s 87(3) of the 2003 Act to send his case to the Secretary of State for the Home Department to await a decision whether he was to be extradited to the United States of America, as sought by the respondent government.
- c The appellant also applied for permission to apply for judicial review of the district judge's decision not to adjourn the extradition hearing. The facts are set out in the judgment of Pitchford J.

- d *Oscar Del Fabbro* (instructed by *Martin Murray & Associates*, Reading) for the appellant.
- Adina Ezekiel* (instructed by the *Crown Prosecution Service*) for the respondent.

**PITCHFORD J** (delivering the first judgment at the invitation of Rose LJ).

- e [1] On 9 August 2004 at Bow Street Magistrates' Court, District Judge Pratt, the appropriate judge for the purposes of the Extradition Act 2003, informed the appellant of his decision under s 87(3) of the 2003 Act to send his case to the Secretary of State for the Home Department to await a decision whether he was to be extradited to the United States of America.

- f [2] The appellant pursues his statutory right of appeal under s 103 against that decision. This appeal has been listed together with the appellant's application for leave to apply for judicial review of the district judge's decision on 9 August 2004 not to adjourn the extradition hearing. It is contended that the refusal amounted to procedural unfairness, which is either fatal to the decision or which is an event which should cause this court to direct a further decision from the district judge under our powers in s 104 of the 2003 Act.

- g [3] The factual background is as follows. On 9 July 1998 the appellant was arrested in Connecticut in the United States for offences of sexual assault. He was then 21. On 4 November of the same year, he pleaded guilty to an offence of sexual assault. He was, on 8 January 1999, sentenced to eight years' imprisonment, the execution of that sentence being suspended after a period of nine months spent in custody, with a further period of ten years' probation to follow after his release.

- h [4] On 7 October 1999 the appellant was released from prison and the period of probation commenced. On 8 October 1999 he signed an agreement entitled 'intensive sex offender conditions' to complete his sentence under the direction of his probation officer. The agreement included a condition that he would not be in the presence of minors, nor would he have contact in any form, direct or indirect, personally, by telephone, letter, or through anyone else, with children under the age of 16 without the prior approval of his probation officer. He is alleged to be in breach of the order by reason of contact with an under-age girl identified as 'A'. It is alleged that A was a girl upon whom he had committed sexual offences before his conviction in November 1998.

[5] On 5 November 1999 the New Haven Superior Court signed a warrant for the arrest of the appellant, charging him with violation of his probation. On 8 November he was arrested in respect of that warrant. The following day he was granted bail. On 9 November 1999 the New Haven Superior Court signed a warrant for the appellant's arrest, charging him with sexual offences against A, and he was arrested the same day. On 11 November, he was released on conditional bail.

[6] On 31 May 2000 the appellant was due to appear at the New Haven Superior Court in respect of the violation of probation and girl A allegations. He failed to appear. On the same day, Judge Fasano, at that court, received a letter from the appellant in which he expressed his intention 'to travel half way around the world to establish a new home and identity as I am not strong enough to go back to jail'.

[7] On 6 June 2000 Judge Fasano issued two warrants for the arrest of the appellant in respect of the matters for which the appellant had failed to appear. He was also charged with two offences of failing to appear. On 16 October 2000 Judge Patrick Clifford of the Middlesex County Superior Court signed a warrant for the arrest of the appellant, charging him with a further offence of larceny. Inquiries had revealed that on 30 May the appellant had stolen takings at a store in which he was working.

[8] On 30 April 2004 the appellant was arrested at the David Lloyd Leisure Centre in Reading in the United Kingdom. The appellant's arrest led to the extradition hearing on 9 August 2004. The central points in this appeal concern the procedure adopted by the district judge and its impact upon the fairness of the hearing. The appellant has a history of mental ill-health. In the past he is said to have attempted suicide and has more recently threatened suicide.

[9] We have been provided with a witness statement from the appellant's solicitor, Mr Sotiris Yiakoumi, the copy of which appears in the court's bundles unsigned. Mr Yiakoumi says that the appellant was produced at Bow Street Magistrates' Court on 26 July 2004 and the hearing was set for 9 August. On 23 July a request was made for prior authority from the Legal Services Commission to instruct a consultant psychiatrist. Authority was not given until 12 August 2004, three days after the hearing, and a consultant was instructed on 13 September. He provided a written report dated 16 September and we have that report at p 158 of the judicial review bundle.

[10] Mr Yiakoumi spoke to the office at Bow Street Magistrates' Court on 3 August 2004 to express his concerns that he would not be in possession of important material on the day fixed for the hearing. He was advised to write to the court. That day he wrote a letter which, if his office protocol was performing properly, should have arrived by facsimile the same day and the original by the course of document exchange. That letter read:

'We write to inform you that counsel will be applying to adjourn the hearing on the above mentioned date, so that our client can be assessed by a psychiatrist. Our client has instructed us that he has been treated by psychiatrists in the United States of America and it is counsel's opinion that the instruction of a psychiatrist is essential in these proceedings in order to provide the foundation for cogent and realistic submissions before the judge.'

[11] In the third paragraph of his letter, he wrote:

a 'Should you have any queries regarding the above matter please do not hesitate to contact either Sotiris Yiakoumi or Simon Grant of this office.'

b [12] No reply was received from the court, although a reply was received from the Crown Prosecution Service at Ludgate Hill, to whom the letter had been copied. On 9 August, before the extradition hearing commenced, counsel for the appellant made an application for an adjournment. The district judge refused that application and he gave his reasons in writing as follows:

c 'Prior to the commencement of the hearing, I was asked by the defence to adjourn the proceedings for the preparation of a psychiatric report in connection with Mr Raffile's human rights. Notice of the application to adjourn not having been given in advance of the hearing, I was obliged to commence the hearing in accordance with s 76(4).'

d [13] Mr Del Fabbro, for the appellant, criticises this decision for three reasons. First, notice of an application had been given by letter of 3 August. Section 76 contained no guidance as to the form in which an application should be made, and, in the circumstances, the onus was upon the court to respond to it. Second, and in any event, the district judge enjoyed a jurisdiction to adjourn, independent of s 76 of the 2003 Act, either under the common law, or under s 77(1), which reads:

e 'In England and Wales, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial of an information against the person whose extradition is requested.'

f [14] Section 10 of the Magistrates' Courts Act 1980 empowers a magistrates' court, at any time, whether before or after beginning to try an information, to adjourn the trial. Third, Mr Del Fabbro submits that the application should have been granted on its merits.

g [15] Miss Ezekiel, who appears for the respondent and appeared at the extradition hearing, recalls that the letter of 3 August was drawn to the district judge's attention. It is not, however, clear whether or not the district judge accepted that the court had been notified. The words used by the district judge in his written reasons, 'notice of the application to adjourn not having been given in advance of the hearing', suggest that he was not so satisfied. As to the issue whether, notwithstanding the terms of s 76, the district judge enjoyed a discretion to adjourn, the answer can only, in my view, be found in an interpretation of the section. That part of Pt 2 of the 2003 Act which applies to category 2 territories, as defined by the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334, is expressed in terms which are mandatory. The consequences which follow failure to take the steps required are spelled out. Section 71, which permits the issue of an arrest warrant, will only apply under sub-s (1) if the correct documents have been sent to the appropriate judge by the Secretary of State.

j [16] By s 74(6), if an arrested person is not brought before the appropriate judge as soon as reasonably practicable, the judge must, on an application by the arrested person, order him to be discharged. If within the time limited the Secretary of State fails to send the request of the requesting party, the Secretary of State's certificate under s 70 and a copy of the relevant Order in Council, the judge must by s 74(10) order the arrested person's discharge. By s 76(5), if the

arrested person's extradition hearing does not begin on or before the date fixed under the section, and the person applies for the judge to be discharged, the judge must order his discharge.

[17] The district judge appears, on the face of his reasons, to have construed this section as providing no discretion in the matter. In my view, he did have a discretion. Section 76(5) does not say that the hearing must be completed on or before the date fixed, but that it must begin on or before that date. There would, upon the ordinary meaning of the words used in s 76, have been no bar to the district judge opening the hearing, completing such parts of the initial stages of the hearing (if any) as were possible before an issue arose with which it was not possible to deal without unfairness to the appellant, and then adjourning the hearing part heard. Such a course would indeed amount to the application of s 10 of the 1980 Act (as nearly as may be) to the proceedings before the appropriate judge. Having reached this conclusion, I consider that, if the district judge did refuse jurisdiction to exercise such a discretion, he fell into error.

[18] In the light of that finding, it seems to me to be unnecessary to embark upon an exploration of the common law power, if any, identified in the nineteenth century.

[19] The district judge proceeded to embark on the statutory steps he was required to take. No criticism is made of the district judge's decisions under s 78 of the 2003 Act which concern the initial stages of the hearing. He then embarked, as he was required by s 78(7), on a consideration of s 79; that is, whether there was a statutory bar to extradition by reason of: (a) the rule against double jeopardy as defined by s 80; (b) extraneous considerations as defined by s 81; (c) the passage of time as defined by s 82; or (d) hostage-taking considerations as defined by s 83. No submission having been made to him on behalf of the appellant under s 79, the district judge proceeded, as he was required by s 79(4) and (5), to examine whether the appellant was accused of an extradition offence, but not alleged to be unlawfully at large, or whether he was alleged to be unlawfully at large following conviction. Section 84 applied to the former and s 85 to the latter. Both applied to the appellant, but since under s 84(7) the requesting state was the United States of America, the district judge was not required to make a decision whether the evidence established a *prima facie* case. Under s 85 he found that the appellant was convicted in his presence.

[20] Finally, as required by both ss 84 and 85, he proceeded to s 87, which required him to decide whether the appellant's extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998. I should express my gratitude for the analysis of the 2003 Act, so far attempted, to the skeleton argument of Miss Ezekiel which makes clear the procedure which the district judge was required to follow and the steps that he took in performance.

[21] At this point, and for the first time, counsel for the appellant addressed the district judge on the merits of this—the last stage. The district judge was informed that it would be submitted that, by reason of the appellant's mental condition, a return to the United States would infringe his Convention rights under arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The application for an adjournment was renewed to enable the appellant to obtain expert psychiatric evidence. I think the district judge's reasons for refusing the application and deciding the merits in favour of the United States should be referred to in full:



a It is submitted on behalf of Mr Raffile that under [s 87(1)] I must decide  
whether his extradition to the United States would be compatible with the  
Convention rights within the meaning of the Human Rights Act 1998 and, in  
particular: (i) Art 2—the right to life. (ii) Art 3—inhumane and degrading  
b treatment. The submission is based upon Mr Raffile’s psychiatric state which  
is noted in the United States papers and the suggestion that he has been in  
five psychiatric hospitals in the United States. It is submitted that I should  
adjourn, indeed, must adjourn for a psychiatric report dealing with his  
background and current psychiatric state. The application to adjourn is  
opposed by the government. On 8 January 1999, Mr Raffile was sentenced to  
eight years imprisonment which was suspended after nine months. The  
papers clearly state that he was on “suicide watch” which indicates a caring  
c state rather than one likely to be involved in inhumane or degrading  
treatment. Mr Raffile was released from prison on 7 October 1999 when  
probation commenced. One of the conditions of his release was “to submit  
to such psychological treatment as may be deemed appropriate”. Mr Raffile  
was arrested in November 1999 as a result of violation of probation and of  
d the charges against “Girl A”. Mr Raffile was due to appear in court in the  
United States on 31 May 2000 but failed to appear, having advised the judge  
in writing that he would not be there. Mr Raffile was arrested in the United  
Kingdom on 30 April 2004 and he has remained in custody since then. He has  
been on “suicide watch” since then. It is clear throughout that the authorities  
e both here and in the United States have been mindful of a possible tendency  
to suicide on Mr Raffile’s part. There has been no suggestion that during  
almost five years of unlawful liberty Mr Raffile has needed to see or seek any  
psychiatric treatment. I do not believe that s 87(1) requires me in every case  
to adjourn a case for further evidence. On the material before me, I am not  
f persuaded that Mr Raffile’s human rights as outlined will be in any way  
violated by extradition. Accordingly, I refuse the application to adjourn and  
I, therefore, proceed under s 87(3) of the Act.’

[22] It seems to me that this manifestly was a consideration of the application  
to adjourn on its merits, and it may well be that the district judge was consciously  
doing exactly what he knew he was permitted to do by Pt 2 of the 2003 Act,  
g notwithstanding the terms of s 76(4). Furthermore, he gave full reasons for  
declining to adjourn. The essence of his decision was that any mental illness from  
which the appellant was suffering, and in particular his tendency to suicide, was  
something of which the United States prosecutor was well aware and to which  
the court at trial was bound to have regard. To return the appellant could not  
h therefore risk breach of the appellant’s Convention rights.

[23] The documents submitted in support of the application demonstrated  
that, while serving his nine-month period in custody, the appellant was on suicide  
watch. While it seems to me that the district judge’s decision not to adjourn was  
within the proper margins of his discretion and cannot reasonably be described as  
procedural unfairness, I do not wish to suggest that it is a decision which I, for my  
j part, would have made in the district judge’s position.

[24] Section 104(1) of the 2003 Act describes the powers of this court on appeal  
under s 103, which may be upon a question of law or fact. The court may either  
(a) allow the appeal; or (b) direct the district judge to decide again the question  
decided at the hearing; or (c) dismiss the appeal. By sub-s (2), the court may allow  
the appeal only if either (sub-s(3)) the judge ought to have decided a question

differently, and had he done so he would have been required to order discharge, or (sub-s(4)) an issue was raised for the first time or evidence is for the first time available which was not available at the hearing and the issue or evidence would have resulted in the judge deciding a question differently, and had he so decided, he would have been required to order the person's discharge; otherwise, this court must dismiss the appeal.

[25] We now have the advantage of reading the evidence which the appellant sought to adduce at the extradition hearing. It is a psychiatric report dated 16 September 2004 from Dr Partovi-Tabar, a consultant psychiatrist of the Cardinal Clinic in Windsor. Dr Partovi-Tabar saw the appellant at HM Prison Brixton on 15 September, and a number of documents supplied by the appellant's solicitor, including weekly reports from the appellant's supervising medical practitioner at Silver Hill Hospital, New Canaan, Connecticut, Dr Ellyn Shander, during his stay at that hospital in the month of August 1994. The report is, in my view, carefully and objectively phrased.

[26] Dr Partovi-Tabar records the appellant's admission to Silver Hill Hospital at the age of 18, having attempted suicide, suffering a severe depressive illness for which he was prescribed a substantial dose of tricyclic antidepressant medication. His teenage behaviour was marked by impulsive and unpredictable behaviour. He was then judged to be a high risk for self-harm and suicide. The origins of his illness and disturbance may be attributable to his dysfunctional upbringing.

[27] However, following his release from hospital, in or about September 1994, the appellant continued with his prescribed medicine for a period of only one month. Since that time, as he told Dr Partovi-Tabar, he has not been in contact with medical or psychiatric services, either in the United States or in the United Kingdom. He has, on the contrary, been working, been self-reliant and has now acquired a small family.

[28] By the time he was seen by Dr Partovi-Tabar, however, the appellant had been in custody for nearly five months. He found the appellant to be suffering a moderate depressive illness, with some psychotic features. He appeared to be determined to attempt suicide if he were ordered to be extradited to the United States. In Dr Partovi-Tabar's opinion, should the court decide on extradition, a thorough risk assessment and risk management would be of paramount necessity. The contents of this report demonstrate that, when refusing an adjournment, the district judge had well in mind the relevant features of the illness contended by counsel on the appellant's behalf. Had the district judge been in possession of this report, I have no doubt that he would have reached exactly the same conclusion, namely that no risk to the appellant's art 2 and art 3 rights would attend a return to the United States.

[29] Mr Del Fabbro now argues that a return to the United States would risk also a breach of an art 8 right to physical integrity of art 3 proportions or verging upon it. Miss Ezekiel, in response to this submission, has drawn the attention of the court to a decision of the House of Lords in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323, and in particular, the speech of Lord Bingham of Cornhill (at [24]) in which he said this:

'While the Strasbourg jurisprudence does not preclude reliance on articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to art 3, it is necessary to show strong grounds for believing

a that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment ...

b [30] Mr Del Fabbro's argument presupposes a return to a jurisdiction which does not acknowledge or apply an obligation to preserve life and physical integrity for a man in the appellant's position. We are not here, in my view, in the realms of such a case. In so far as return may amount to interference with any family life the appellant has acquired in the United Kingdom, return would nevertheless be a proportionate response given the obligations which this country has to return those accused of serious crime and fugitives from justice in the requesting state.

c [31] In my judgment, neither the new evidence nor the gloss on the submissions made, should move this court to allow the appeal under s 104(1)(a) and sub-s (4) of the 2003 Act on these grounds.

d [32] Mr Del Fabbro raises a new issue before us, namely the prospect of a fair trial within the meaning of art 6 of the convention. He submitted that, by reason of what he described as sensational publicity at and since the time of his appearance on fresh charges of sexual assault upon A, the appellant cannot expect a fair trial in his home country. This is, in my view, a matter for consideration not by the district judge, but by the court in New Haven, Connecticut. The necessary qualification for extradition is a fair trial. That is an obligation manifestly accepted by the United States. How a fair trial is to be achieved is for consideration by the court of trial.

e [33] In the course of submissions, Mr Del Fabbro conceded that there was nothing which could have been drawn to the district judge's attention which signified any risk that the court at trial would not attend fairly to these issues. He had nothing to place before us which demonstrated the presence of such a risk. The essence of Mr Del Fabbro's complaint was simply that the district judge did not consider the issue as he should. The submissions made to us do not reach the minimum cogency required to persuade me that we should direct a re-hearing of the issue, let alone allow the appeal under s 104. Having made his decision under s 87, the district judge was then faced for the first time with an application from counsel to address him on other matters—specifically, the passage of time. The district judge held that he could not do so since he had already made his decision on that issue in the absence of submissions made at the appropriate time. The procedure in which he was engaged was a staged progress through the relevant sections, each of which was dependent upon a decision previously made. He could not be expected to reopen those decisions at such a late stage of the hearing. In fact, passage of time under s 79(1)(c) was three steps back in the procedure. Two of those steps involved decisions made under ss 84 and 85 which were uncontested; while, on the other hand, s 79, to which the district judge's attention was being redirected, created statutory bars to extradition. If it was the case that, as a result of misunderstanding or neglect, counsel had failed to advance submissions at the appropriate time, it is my view that those submissions should have been heard and, if necessary, the district judge's previous decisions reopened for that purpose. Not to do so was capable of resulting in procedural unfairness, and, at worst, injustice. This conclusion is, I believe, demonstrated by the Secretary of State's reluctance to reopen issues which were properly before the district judge for decision. I therefore turn to the question whether any unfairness or injustice has in fact resulted from delay. Section 82 of the 2003 Act provides:

j

'A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).'

[34] It cannot be asserted that any delay in this case is being occasioned by the dilatoriness of the United States, rather than the actions of the appellant himself in fleeing the jurisdiction to escape prosecution: see *Kakis v Govt of the Republic of Cyprus* [1978] 2 All ER 634, [1978] 1 WLR 779, in particular the speech of Lord Diplock ([1978] 2 All ER 634 at 638, [1978] 1 WLR 779 at 782–783). I would reject the submission on this ground also.

[35] Mr Del Fabbro invites us now to consider an issue under s 91 of the 2003 Act, which provides as follows:

(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.

(2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.

(3) The judge must—(a) order the person's discharge, or (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied.'

The evidence upon which we are invited to decide this issue is the psychiatric report to which I have already made reference. Nowhere in that report is it suggested that the appellant is not fit to stand trial. The only risk identified is the risk of suicide which antedated the appellant's flight from the United States and was plainly effectively managed while the appellant was serving his sentence in the United States. Mr Del Fabbro's submissions on this matter were somewhat confusing. I understood him to submit that the appellant was not concerned about his safety in the United States, rather he was more concerned about his safety in the United Kingdom if this court were to order extradition. However, we had earlier been told that the appellant is currently under close supervision in prison. Miss Ezekiel, for the United States, has drawn our attention to a decision of this court, differently constituted, in *R (on the application of Warren) v Secretary of State for the Home Dept* [2003] EWHC 1177 (Admin), [2003] All ER (D) 115 (Jun), under the Extradition Act 1989 in which it was the Secretary of State's order for return which was being reviewed. The court held that, provided the Secretary of State was satisfied that the state to which the applicant was to be returned adopted proper procedures which are fair to an accused for the determination of the issues of fitness for trial, the appropriate forum for such a decision was the court of trial. The risk of any deterioration in mental health remained a matter for decision for the United States, provided the Secretary of State was satisfied of the fairness of the decision-making process. Having compared the evidence available to the court in *Warren* with the report of Dr Partovi-Tabar, it does not seem to me that this appellant's condition reaches the minimum seriousness required to engage considerations of fitness to stand trial. I can find nothing oppressive in requiring the appellant to undergo his sentence and his trial, notwithstanding his moderate depressive illness. Somewhat late in the day, Mr Del Fabbro raised for our consideration an issue as to whether the Secretary of State's order for extradition was procedurally valid. This, it seems to me, is not a matter which this court can deal with today. We were invited by Mr Del Fabbro



a to consider dealing with the matter today, either by directing the district judge to  
amend the charges of which he had notified the Secretary of State, or by allowing  
the appeal to that extent and amending them ourselves. Miss Ezekiel submits that  
we should make no order since it will be the argument of the Secretary of State,  
as she understands it, that he has the power to amend the charges for himself.  
b There remains the procedural question whether it was necessary to issue  
concurrently an application for judicial review, together with the appeal under  
s 103. The subject of the application for judicial review was procedural unfairness  
at the hearing. An appeal under s 103 may be brought on an issue of law or fact.  
The court has power in an appropriate case to direct a re-hearing of any question  
decided at the hearing. In my view, that power is wide enough to embrace the  
refusal to adjourn in the factual circumstances of this appeal and its  
c consequences, in common with Collins J who considered the leave application on  
the papers and concluded, that an application for judicial review was  
unnecessary. There may, however, in other cases be circumstances which are not  
embraced by the terms of ss 103 and 104 and do require the consideration of the  
exercise of prerogative powers. For the reasons I have given, I would refuse leave  
d to apply for judicial review. I would dismiss the appeal, but I would give liberty  
to apply to the government of the United States should there be any outstanding  
issue with regard to the amendment of the charges which the court should hear.  
I should note for the purposes of any court which does hear such an application  
under the liberty to apply, that it is acknowledged by Mr Del Fabbro on behalf of  
the appellant that it is a matter which is technical only.

e ROSE LJ.

[36] I agree and add only that any such application, as my Lord has indicated,  
must be made within 14 days. The appeal is accordingly dismissed.

*Appeal dismissed. Application for permission to apply for judicial review refused.*

Dilys Tausz Barrister.

# Capewell v Customs and Excise Commissioners and another

## Note

[2004] EWCA Civ 1628

COURT OF APPEAL, CIVIL DIVISION

LAWS, LONGMORE AND CARNWATH LJ

26 OCTOBER, 2 DECEMBER 2004

*Receiver – Appointed by court – Restraint order – Appointment of receiver to take possession of realisable property – Guidelines – Criminal Justice Act 1988, Pt VI.*

In its judgment of the court on this appeal against an order refusing to discharge a receiver appointed under Pt VI of the Criminal Justice Act 1988, the Court of Appeal commended, as a useful checklist for those concerned in future cases under the 1988 Act and similar jurisdictions, the guidelines set out in an appendix to the judgment:

### 'APPENDIX—COUNSELS' SUGGESTED GUIDELINES FOR APPOINTMENT OF RECEIVERS

#### *Application by the prosecutor*

1. Within the witness statement in support of the application to appoint a management receiver, the prosecutor should set out the reasons the prosecutor seeks the appointment of a receiver; and what purpose the prosecutor believes the receivership will serve.
2. The witness statement in support of the application should also give an indication of the type of work that it is envisaged the receiver may need to undertake, based on the facts known to the prosecutor at the time of the appointment.
3. The witness statement should specifically draw to the court's attention the proposition that the assets over which the receiver is appointed will be used to pay the costs, disbursements and other expenses of the receivership (even if the defendant is acquitted or the receivership is subsequently discharged).
4. The letter of acceptance of appointment from the receiver, which must be exhibited to the applicant's witness statement, should contain the time charging rates of the staff the receiver anticipates he may need to deploy.
5. In appropriate cases, where it is possible, and this will not be in every case, the receiver should give in his letter of acceptance an estimate as to how much the receivership is likely to cost.
6. The prosecutor's witness statement in support of the application should inform the court of the nature of the assets and their approximate value (if known), and the income the assets might produce (if known).
7. If the prosecutor or receiver is unable to comply with any of the above requirements the prosecutor should explain the reasons for the failure in the prosecutor's application to the court, and the matter will be left at the discretion of the court.

*Upon appointment*

a 8. Upon the appointment of a receiver, the judge should consider whether it is appropriate, in all the circumstances, to reserve any future applications to himself, with a view to minimising costs.

b 9. Upon the appointment of a receiver, the judge should consider whether it is appropriate, in all the circumstances, to set a return date, balancing the need for such a hearing with the interests of the defendant, who ultimately will bear the costs of such a hearing.

c 10. The receiver should inform the parties by written report as soon as reasonably practicable, if it appears to him that any initial costs estimate will be exceeded, or receivership costs are increasing, or are likely to increase to a disproportionate level. Such a report should also be filed with the court. In such circumstances the parties and the receiver shall be at liberty to seek directions from the court.

*Reporting requirements*

d 11. Unless the court directs otherwise, the receiver should report 28 days after his appointment and quarterly thereafter.

12. Unless the court directs otherwise, the report should be served on the prosecutor and the defendant and filed with the court.

e 13. Every report should set out: the costs incurred to date; the work done; the projected costs until the next report; a summary of how those costs attach to the matters that led to the appointment or to the matters that may have arisen; and, where appropriate, an estimated final outcome statement.

14. Every report should contain a statement that the receiver believes that his costs are reasonable and proportionate in all the circumstances.

f 15. If the receiver is unable to fulfil any of the above reporting requirements, he should give, as soon as reasonably practicable, an explanation, by way of written report to be filed at court and served on the parties, of why this is the case, and those parties shall be at liberty to seek directions from the court.

*Lawyers and other agents*

g 16. The parties should always be told that lawyers or other agents have been instructed unless it is not practicable or in the interests of justice to do so (for example, to make an urgent without notice application to secure assets).

h 17. If lawyers or other agents are instructed the receiver should ask for monthly bills or fee-notes. The receiver should endeavour to keep a close control on such fees and satisfy himself that the costs being incurred are reasonable and proportionate in all the circumstances.

j 18. The receiver should notify the parties as soon as reasonably practicable, if it appears to him that any lawyers' or other agents' costs are rising to a disproportionate level, and those parties shall be at liberty to apply to the court for directions.

*General*

19. Nothing in these guidelines should be read as supplanting the appropriate rules of court, particularly CPR Pt 69, and the relevant statutory provisions.

20. Judges appointing receivers should always bear in mind that the costs of the receivership may fall on an innocent man. They should also bear in

mind that the interests of justice dictate that receiverships are a necessary and essential tool of the criminal justice process for preserving and managing assets to satisfy confiscation orders if the defendant is convicted.

21. Management receivership orders should be indorsed with the appropriate penal notice. It will be a term of most orders that defendants should co-operate with and comply with, as soon as possible and forthwith, directions and requests of the receiver, so as to enable the receiver to efficiently and cost-effectively carry out the duties, functions and obligations of his office. It is therefore in the defendant's interest to avoid, as far as possible, the need for the receiver to return to court for further orders or directions, the cost of which ultimately fall on the defendant's estate.'

The full text of the judgment in this case, in which *Andrew Mitchell QC* and *Abigail Barber* (instructed by *Olliers*, Manchester) acted for the appellant, Mr Robert Capewell, and *Mark Sutherland Williams* (instructed by the *Solicitor for the Customs and Excise*) acted for the Customs and Excise Commissioners and (instructed by *Tarlo Lyons*) for Mr Nigel Sinclair, the receiver, can be found on our daily online service at [2004] All ER (D) 29 (Dec).

Kate O'Hanlon Barrister.



a **Moy v Pettman Smith (a firm) and another**  
(Perry, Pt 20 defendant)

[2005] UKHL 7

b HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, BARONESS HALE OF RICHMOND, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

15, 16 NOVEMBER 2004, 3 FEBRUARY 2005

c *Counsel – Negligence – Advice at door of court – Whether counsel negligent for giving insufficiently detailed advice to client on settlement offer at door of court when substance of advice not negligent.*

The claimant brought proceedings for medical negligence against a health authority. Although it admitted liability, the authority contended that its negligence had not caused the claimant any loss or damage. At a pre-trial review held a few months before the anticipated trial date, a district judge gave leave for each party to rely on the evidence of a medical expert whose report was to be disclosed by a specified date. The order further provided that evidence not so disclosed would be inadmissible without the leave of court. By the time that the deadline expired, the solicitors had not yet obtained the medical report. They therefore issued an application for leave to adduce further medical evidence. Six weeks later, the solicitors received a surgeon's report which stated that the claimant's condition would, in the long-term, make it difficult for him to manage in his current job. The claimant's counsel, an experienced medical negligence practitioner, appreciated that the value of the claim would have to be revised in the light of the report, and advised that an application to vacate the trial date should be made in addition to the application to adduce further evidence. Both applications were dismissed by the deputy district judge, and her decision was upheld on appeal by the circuit judge. After the appeal, the authority increased to £150,000 a payment into court which it had previously made. The claimant, who had been advised by counsel that the 'floor' of his claim was £200,000, did not accept the payment in, and the case proceeded to trial. At the door of court, the authority informed counsel that its offer was open until the judge entered court. However, counsel told the claimant that she was hopeful that the judge would admit the surgeon's evidence, and advised him that he would be better to proceed with the action. That advice was based on the view, which counsel did not spell out to the claimant, that there was a slightly better than even chance that the judge would give leave to adduce the evidence contained in the surgeon's report, and that the claimant would have the security of a claim in negligence against the solicitors if the application were unsuccessful and the sum awarded did not reflect the claim for continuing disability and future loss. Counsel also bore in mind the possibility of the claimant accepting the authority's offer and suing the solicitors for the value of the balance of the claim, but she regarded that option as the course of last resort, and did not discuss it with the claimant. When the preliminary discussion took place in court, it became apparent that the application to adduce the surgeon's evidence was unlikely to succeed. There was a short adjournment during which the authority stated that it was willing to settle at £120,000, less the costs incurred from the date of the initial payment into court.

Taking the view that the measure of damages was likely to be lower than the sum offered if the trial proceeded on the limited evidence which the court was willing to receive, counsel advised the claimant to accept the reduced offer. The claimant did so, and subsequently brought proceedings for negligence against the solicitors. Counsel was later joined on the ground that she had been negligent in not advising the claimant to accept the offer of £150,000. The judge gave judgment against the solicitors for £210,000, but held that counsel had not been negligent. The solicitors appealed against that part of the judgment dismissing the proceedings against counsel. The majority of the Court of Appeal refused to interfere with the judge's finding that counsel had not been negligent in her assessment of the prospects of success of the application to adduce the surgeon's evidence, but went on to hold that she had been negligent in failing to give the claimant sufficiently detailed advice, and that she was therefore liable for a proportion of the damages payable to the claimant. On counsel's appeal to the House of Lords, their Lordships considered whether that approach was correct.

**Held** – Although it was not possible to lay down a hard and fast rule, for circumstances would vary infinitely, the court would be slow to hold advocates to blame, in cases such as the instant one, if they concentrated on giving clear and readily understood advice to their clients about the course of action they recommended. The public interest did not require advocates to be held immune from suit for the consequences of their negligence, but it did require that the application of the principle should not stifle advocates' independence of mind and action in the manner in which they conducted litigation and advised their clients. That also accorded with common justice in a case such as the instant one. The difficulties faced by an advocate who was advising on acceptance or rejection of a settlement were manifold, and the pressures, especially if the advice had to be given at the door of court, could be heavy. In such circumstances, it would be surprising if every such piece of advice were reasoned with as much comprehensive precision as might have been applied in hindsight by an appellate tribunal which had had the benefit of extensive argument and leisurely reflection. It would not be in the interests of clients if advocates were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or in advising litigants about the course to be taken. It would be unfortunate if advocates felt that they had to hedge their opinions about with qualifications, or abdicated their responsibility for decisions relating to the conduct of litigation and were reluctant to give clients the advice that they required in their own best interests. Nor would it be a productive discharge of the duty to give clients proper advice for advocates to give them a catalogue of every factor which might affect the course of action to be adopted. In the instant case, counsel's advice to proceed with the action, rather than accept the offer of £150,000, was not negligent. It fell within the range of that to be expected of reasonably competent counsel of her seniority and purported experience. That being so, it was difficult to accept that she had been negligent in failing to spell out the considerations which had led her to give that advice. It had not been incumbent upon her to spell out all her reasoning. It followed that she had not been in breach of her duty of care to the claimant in respect of the advice given. Accordingly, the appeal would be allowed (see [1], [2], [19]–[23], [27], [28], [59]–[63], [65], [66], [70], [71], below).

Per curiam. Section 1(5)<sup>a</sup> of the Civil Liability (Contribution) Act 1978 does not bar a defendant, against whom judgment has been given, from appealing against

- a the dismissal of proceedings against a co-defendant (see [2], [13], [24], [67]–[69], below); *Hanson v Wearmouth Coal Co Ltd and Sunderland Gas Co* [1939] 3 All ER 47 approved.

### Notes

- b For barristers' negligence, see Supp to 3(1) *Halsbury's Laws* (4th edn reissue) paras 528–530.  
For the Civil Liability (Contribution) Act 1978, s 1, see 13 *Halsbury's Statutes* (4th edn) (2004 reissue) 733.

### Cases referred to in opinions

- c *Ali (Saif) v Sydney Mitchell & Co (a firm)* [1978] 3 All ER 1033, [1980] AC 198, [1978] 3 WLR 849, HL.  
*Arthur JS Hall (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon) (a firm), Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673, [2002] 1 AC 615, [2000] 3 WLR 543, HL.  
*Barton v William Low & Co Ltd* 1968 SLT (Notes) 27, OH.  
d *Beedie v Norrie* 1966 SC 207, OH.  
*Buchan v Thomson* 1976 SLT 42, Ct of Sess.  
*Chester v Afshar* [2004] UKHL 41, [2004] 4 All ER 587, [2004] 3 WLR 927.  
*Hanson v Wearmouth Coal Co Ltd and Sunderland Gas Co* [1939] 3 All ER 47, CA.  
*Karpenko v Paroian, Courey, Cohen & Houston* (1980) 117 DLR (3d) 383, Ont HC.  
*Lownes v Babcock Power Ltd* [1998] PIQR P253, CA.  
e *Macleay v Macdonald* 1928 SC 776, Ct of Sess.  
*Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871, [1985] 2 WLR 480, HL.

### Cases referred to in list of authorities

- f *Asphalt and Public Works Ltd v Indemnity Guarantee Trust Ltd (Campbell and ors, third parties)* [1968] 3 All ER 509, [1969] 1 QB 465, [1968] 3 WLR 968, CA.  
*B v B (wasted costs order)* [2001] 3 FCR 724.  
*Barclays Bank v Tom* [1923] 1 KB 221, [1922] All ER Rep 279, CA.  
*Beachley Property Ltd v Edgar* [1997] PNLR 197, CA.  
*BICC Ltd v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621, [2002] Lloyd's Rep PN 526.  
g *Bryanston Finance Ltd v De Vries* [1975] 2 All ER 609, [1975] QB 703, [1975] 2 WLR 718, CA.  
*Dooley v Parker* [2002] EWCA Civ 1188, [2002] All ER (D) 112 (Jul).  
*Dunnett v Railtrack plc* [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434.  
h *Halsey v Milton Keynes General NHS Trust, Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002.  
*Hopgood v Willan* [1938] 2 All ER 196, CA.  
*Insurance Exchange of Australasia v Dooley* (2000) 50 NSWLR 222, NSW SC (CA).  
j *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53, Aus HC.  
*Jameson v Central Electricity Generating Board (Babcock Energy, third party)* [1999] 1 All ER 193, [2000] 1 AC 455, [1999] 2 WLR 141, HL.  
*Kwan v Hung* (4 April 1985, unreported), Hong Kong CA.  
*Lepak Ltd v Harris* [1997] PNLR 239, CA.

*Millwall, The* [1905] P 155, [1904–7] All ER Rep Ext 1387, CA.

*Mortgage Corp Ltd v Shandoe* [1997] PNL R 263, CA.

*Purnell v Great Western Railway Co and Harris* (1876) 1 QBD 636, CA.

*Secretary of State for the Home Office, Re, ex p Begum* [1995] COD 176.

*Shirley v Caswell* [2000] Lloyd's Rep PN 955, CA.

*Sparks v Van Den Ham* [2003] WASCA 143, W Aus SC.

*Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020, [2002] CPLR 97.

*Webb v Barclays Bank plc and Portsmouth Hospitals NHS Trust* [2001] EWCA Civ 1141, [2002] PIQR P61.

*Wimpey (George) & Co Ltd v British Overseas Airways Corp* [1954] 3 All ER 661, [1955] AC 169, [1954] 3 WLR 932, HL.

## Appeal

Jacqueline Perry, the second defendant and Pt 20 defendant, appealed with permission of the Appeal Committee of the House of Lords given on 8 July 2003 from the order of the Court of Appeal (Brooke, Latham LJ and Hart J) on 25 March 2003 ([2003] EWCA Civ 466, [2003] PNL R 606) giving effect to, and amending, its decision of 19 June 2002 ([2002] EWCA Civ 875, [2002] PNL R 961) allowing an appeal by the first defendant and Pt 20 claimant, Pettman Smith, a firm of solicitors, from that part of the decision of Judge Geddes, sitting as a judge of the High Court on 4 July 2001, dismissing (i) proceedings for negligence brought against Ms Perry by the claimant, David Leslie Moy, and (ii) Pt 20 proceedings brought against Ms Perry by the solicitors. The latter did not appeal from that part of the order of Judge Geddes giving judgment to the claimant in the sum of £210,000 in his proceedings for negligence against them. The claimant took no part in the proceedings before the Court of Appeal or the House of Lords. The facts are set out in the opinion of Lord Carswell.

*Sir Sydney Kentridge QC and John Norman* (instructed by *Withers*) for Ms Perry.

*Bernard Livesey QC and Jamie Smith* (instructed by *Barlow Lyde & Gilbert*) for the solicitors.

Their Lordships took time for consideration.

3 February 2005. The following opinions were delivered.

## LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell. For the reasons they give, with which I agree, I would allow this appeal.

## LORD HOPE OF CRAIGHEAD.

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. I agree with it and for the reasons that he has given I too would allow the appeal. I should like to add these comments.

## COMPETENCY OF THE APPEAL

[3] Section 1(5) of the Civil Liability (Contribution) Act 1978 refers to a judgment in any part of the United Kingdom. The phrase 'in any part of the United Kingdom' did not appear in cl 3(7) of the draft Civil Liability Contribution



- a Bill which was annexed to the Law Commission's report, *Law of Contract: Report on Contribution* (Law Com No 79) (9 March 1977). The Law Commission concentrated on the position in England and Wales. It recommended that, for the purposes of contribution proceedings in this jurisdiction, neither party should be allowed to challenge a finding of non-liability made in favour of the other in an action brought against the other by the plaintiff, provided that the finding was made after a trial on the merits (see para 81(g)). It did not discuss the possibility that the finding which was not to be challenged was one that had been obtained from a court in another part of the United Kingdom. But reference is made (para 65, footnote 89) to another matter drawn to its attention by a working party of the Scottish Law Commission which was not unrelated to this issue. This indicates that, in accordance with normal practice and as was to be expected, the two Law Commissions were in touch with each other during the preparation of this report.

- [4] We do not know what led to the change of wording which led to the formula that now appears in s 1(5) of the 1978 Act. But the intention appears to have been to remove the possibility of any doubt on this point by providing expressly that no distinction was to be drawn for its purposes between judgments obtained under any of the United Kingdom's legal systems. The way in which this was done indicates that it was assumed that there were no material differences between these legal systems as to the stage at which it would be right to regard a finding after trial as conclusive in favour of the person from whom the contribution was sought. It may be helpful therefore, as a footnote to what Lord Carswell has said, to look briefly at the circumstances in which a judgment which has been pronounced in Scotland will be regarded in that jurisdiction as having determined the issue in that person's favour.

- [5] Section 1(5) of the 1978 Act does not form part of the Scottish legislation that regulates proceedings for contribution between joint wrongdoers. This is to be found in s 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. That subsection was modelled on s 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935, which formerly applied to England and Wales but was repealed by s 9(2) of and Sch 2 to the 1978 Act. Section 3(1) of the 1940 Act enables the court to determine the proportions in which two or more parties are found jointly and severally liable in damages or expenses are to be liable inter se to contribute to that award. It remains in force in the form in which it was originally enacted.

- [6] Section 3(2) of the 1940 Act deals with the situation where a party who has been found liable wishes to recover from another party who, if sued, might also have been found liable. It provides:

- h 'Where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just.'

- j The words 'who, if sued, might also have been held liable' preclude the raising of proceedings against a party who has already been sued and found not to be liable.

[7] Chapter 26 of the Rules of the Court of Session 1994, SI 1994/1443, which is headed 'Third Party Procedure', enables questions arising out of claims by a defender against a third party for contribution, relief or indemnity and liability to be disposed of in the same action as that in which the defender is himself being

sued: see *Beedie v Norrie* 1966 SC 207 at 210 per Lord President Clyde. It is the counterpart of CPR Pt 20. Chapter 26 is a re-enactment of a rule which was first introduced as r 85 of the Rules of the Court of Session 1965. Where a third party is brought into the action in this way the pursuer has the option of amending his pleadings so as to adopt the case which the defender has made against the third party or of leaving it to the defender to make that case. The decision as to which course to adopt will usually depend on the pursuer's prospects of success in establishing that the defender is liable at least in part for the loss for which he seeks damages.

[8] Whether or not the pursuer does adopt the defender's case, the third party is regarded as being a party to the pursuer's action. This is because the purpose of the third party notice procedure is to make good the defender's claim that the third party is liable with the defender to the pursuer in the subject matter of that action: see *Buchan v Thomson* 1976 SLT 42 at 45 per Lord Fraser.

[9] In *Barton v William Low & Co Ltd* 1968 SLT (Notes) 27, the question was raised as to whether it was competent for a party who had been brought into the action under the third party procedure to challenge the relevancy of averments which the pursuer, who made no case against the third party, was seeking to incorporate in her pleadings as part of her case against the defenders. Lord Stott said (at 28):

'The third parties have been convened into the process by the defenders, and the pursuer makes no case against them. The defenders, however, have set out in their pleadings what is, in effect, a right of relief against the third parties. The third parties have therefore a clear interest in the success or failure of the pursuer's case against the defenders, and one of the objects of third party procedure, as I see it, is to enable the third parties to be heard on any matter in which they have a relevant interest in relation to the case between pursuer and defender. The question of whether the pursuer has made a competent or relevant case against the defenders is such a matter, and in my opinion the third parties are entitled to take a plea to the relevancy of the pursuer's pleadings and to be heard upon that plea.'

[10] There is one further point. An interlocutor which has been pronounced in the Outer House of the Court of Session does not become a final interlocutor until the expiry of the reclaiming days—that is to say, the number of days prescribed by r 38.3 of the Rules of the Court of Session within which a reclaiming motion may be marked to bring that interlocutor under review in the Inner House: see s 28 of the Court of Session Act 1988. When an interlocutor is reclaimed against, the effect from the time the reclaiming motion is marked is to suspend, or stay, all execution on the decree which has been pronounced in the Outer House until the reclaiming motion has been determined: see r 38.8; *Maclean v Macdonald* 1928 SC 776 at 782–783 per Lord Anderson.

[11] Where the pursuer, having amended his pleadings so as to make a case against the third party, is wholly unsuccessful against the defender and wholly successful against the third party, the third party may appeal against the decision that the defender is not liable by reclaiming against that interlocutor. His position is unaffected by the pursuer's decision as to whether or not he should appeal. The third party's interest in reversing the decision that the defender is not liable to the pursuer is regarded in itself as giving him a sufficient interest to enable him to take the matter to appeal in that action.

a [12] There are, of course, differences of procedure between the two jurisdictions as to the way these matters are to be dealt with. But a judgment given in any action in which the third party procedure has been used in the Court of Session in Scotland will not be a final judgment which determines the issue between the parties in that jurisdiction until the days for reclaiming against it have expired or until any competent appeal against that judgment has been disposed of, irrespective of the party by whom the appeal was brought. If it is not a final judgment in that jurisdiction, it must follow that it is not to be regarded as a final judgment in England and Wales for the purposes of s 1(5) of the 1978 Act.

c [13] I consider, for these reasons, that the challenge which has been made to the competency of the appeal in this case would not have succeeded if the judgment which was said to be conclusive was a Scottish judgment that had been reclaimed against and was still under appeal. This supports Lord Carswell's conclusion, with which I respectfully agree, that the solicitor's right of appeal was not barred in this case.

d THE BARRISTER'S NEGLIGENCE

e [14] A claimant who is seeking an award of damages needs to know two things when the defendant pays a sum into court before trial. The first is whether he is likely to obtain more than that sum if he leaves it to the judge to assess damages. The second is that he will be liable in costs from the date when the sum was paid in if he fails to obtain more than that sum from the trial judge. Every reasonably competent barrister knows that the claimant needs to be given this advice if he is to make an informed judgment as to whether he should accept the sum that has been paid in. But the situation with which Ms Perry was faced at the door of the court on 6 April 1998 was unusual. The matters on which advice was needed were complicated by the difficulty that had arisen about introducing the necessary evidence.

f [15] The case against Ms Perry has narrowed since the original allegations against her were made. The only breach of duty that is now alleged is that she failed to give proper advice to Mr Moy on 6 April 1998 on his prospects of beating the offer of £150,000 with costs which, as she had been told, was still open but would be withdrawn as soon as the judge came into court. It is not now being suggested that Ms Perry failed to advise him what he could expect to be awarded if all the necessary evidence as to causation and prognosis was before the trial judge, or that he had not been warned about his liability in costs if he failed to beat the payment in. The breach of duty relates to the problem which had arisen about introducing the necessary evidence.

g [16] This problem was, of course, not of Ms Perry's making. Nevertheless it was her duty to assess the prospects of persuading the judge to admit the evidence and then to advise Mr Moy about those prospects. Her evidence was that her assessment was that the prospects were 50:50, adding that they were 'probably slightly higher in favour of the matter going on, or the evidence being allowed in'. She accepts that she did not frame her advice to Mr Moy in these terms. She said that she told him that she was hopeful that the evidence would be allowed in. Mr Moy accepted in cross-examination that it was explained to him that he could still have the £150,000 if he wanted it. He also accepted that Ms Perry told him that she thought that he would do better if the case were to go on, but that it was a matter for him whether the offer should be accepted.

[17] The judge, Judge Geddes, asked himself whether this advice lay outside the range of possible advice which counsel of her seniority and purported experience could be expected to give, and concluded that it was not. The judges in the Court of Appeal ([2002] EWCA Civ 875, [2002] PNLR 961) accepted that Ms Perry's assessment of the prospects of persuading the trial judge to admit the necessary evidence was not negligent. The question then, as Latham LJ put it (at [42]), was: 'did the advice that she gave and the way that she gave it, measure up to the standard required of reasonably competent counsel?' a  
b

[18] In *Arthur JS Hall (a firm) v Simons*, *Barratt v Ansell (t/a Woolf Seddon) (a firm)*, *Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673 at 736, [2002] 1 AC 615 at 737 Lord Hobhouse of Woodborough said that one of the protections of the advocate was that the standard of care to be applied in any negligence action was the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time-constraining circumstances. In the same case ([2000] 3 All ER 673 at 725, [2002] 1 AC 615 at 726) I said that the measure of the advocate's duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged, and that it could not be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence. c  
d

[19] Where a claim is brought for professional negligence the court will usually expect to be provided with some evidence to enable it to assess whether the relevant standard of care has been departed from. No such evidence was adduced in this case. Judges, recalling how things were when they were in practice, no doubt feel confident that they can do this for themselves without evidence. But judges need to be careful lest the decision in the case depends on the standard they would set for themselves. If this were to happen, it would vary from judge to judge and become arbitrary. Considerable weight should therefore be given to the decision of the judge at first instance who heard all the evidence. In this case the judges in the Court of Appeal were right to defer to the judge's decision that Ms Perry was not negligent in her assessment. But in my opinion they did not give sufficient reasons for departing from his decision to reject the argument that she was negligent as to the way in which she advised Mr Moy in the light of that assessment. e  
f

[20] The question whether her advice was negligent has to be judged in the light of the choices that were available in the light of that assessment. It was clear from previous discussions with him that Mr Moy was dissatisfied with the £150,000 that was on offer. His own view was that his claim was worth about £200,000. Ms Perry was entitled to take this fact into account when she was considering whether she should advise him to accept the offer. As against the risk of losing the benefit of the offer, there was the prospect of recovering substantially more than that if the judge decided to admit the necessary evidence. There was an obvious advantage in achieving a full recovery in that action rather than having to fall back on an action against the solicitors to make up the shortfall. g  
h

[21] How then was the advice to be conveyed to Mr Moy? She did not tell him that her assessment of the chances of getting the evidence in was 50:50. That, for Latham and Brooke LJJ ([2002] PNLR 961 at [43], [53] respectively), was the only proper advice that she could have given him. So the advice she gave him was wrong and it was negligently wrong. But the question whether the advice was wrong and negligently wrong has to be tested in the light of the facts that were j



a known when the advice was given. It is difficult to see why the advice can be said to have been negligently wrong if the assessment on which it was based was not negligent. Moreover it is the substance of the advice, not the precise wording used to convey it, that needs to be examined in order to judge whether it was negligent. The significance of Ms Perry's failure to tell Mr Moy that the prospects of getting the evidence in were 50:50 has to be measured against what she did tell him, which was that she was hopeful that the judge would admit the evidence.

b [22] I am reluctant to differ from the views expressed by the judges in the Court of Appeal. But it does seem to me, with great respect, that they judged her actions too harshly when account is taken of all the circumstances. Their decision might have been supportable if it had been based on some reliable evidence to the effect that the advice which she gave was of a kind which no barrister of her standing and experience would have given in the circumstances. But, for reasons c that are not difficult to understand, there was no such evidence. In my opinion the decision of the trial judge ought not to have been departed from in these circumstances.

d **BARONESS HALE OF RICHMOND.**

[23] My Lords, my noble and learned friend Lord Carswell has written the leading opinion in this case. I agree with it, and also with the opinion of my noble and learned friend Lord Hope of Craighead. What follow are merely footnotes to what they have said.

e **THE CIVIL LIABILITY (CONTRIBUTION) ACT 1978**

f [24] The position in England and Wales differs slightly from that in Scotland, in that a notice of appeal does not operate as an automatic stay on the judgment of the court at first instance: see CPR 52.7. Indeed, the usual practice is that an unsuccessful defendant must satisfy the judgment under appeal unless the parties agree otherwise or he is granted a stay. Permission to appeal may be made g conditional on some or all of the judgment sums being paid. But a stay will be granted if there is good reason to do so, for example if there is reason to doubt that the money will be recoverable if the appeal is allowed. This does not, however, undermine the conclusion reached by Lord Carswell on the interpretation of s 1(5) of the 1978 Act. Indeed, it strengthens it, in that the position cannot be different depending upon whether this would or would not be h an appropriate case in which to grant a stay of execution. Thus, it should make no difference if (contrary to the facts of this case) the unsuccessful defendant wished to appeal the decision, not only as against the successful Pt 20 defendant, but also as against the claimant, and consequently were able to obtain a stay of execution. Section 1(5) cannot apply while the judgment in question is still liable to be set aside on appeal.

**THE NEGLIGENCE CLAIM**

j [25] This House, in *Arthur JS Hall (a firm) v Simons*, *Barratt v Ansell (t/a Woolf Seddon) (a firm)*, *Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673, [2002] 1 AC 615, abolished the advocate's remaining immunity from claims for negligence because their Lordships could see no good reason why advocates should be treated any differently from other professional persons. They should be in no better, but also no worse, position than others. Lord Hobhouse of Woodborough put that position in this way ([2000] 3 All ER 673 at 736, [2002] 1 AC 615 at 737):

'The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made.'

[26] In claims against members of other professions, the court will have expert evidence on whether their conduct has fallen short of this standard. In cases against advocates, however, the court assumes that it can rely upon its own knowledge and experience of advocacy to make that judgment. This brings, as Lord Hope has pointed out, an obvious risk that a judge will ask himself what he would have done in the particular circumstances of the case. But that is not the test. The doctor giving expert evidence in a medical negligence claim is not asked what he himself would have done, but what a reasonable doctor might have done.

[27] Ms Perry had two decisions to take at the door of the court: what advice to give her client and how full an explanation to give him. Neither the judge nor the majority of the Court of Appeal ([2002] EWCA Civ 875, [2002] PNLR 961) thought that her advice to reject the offer was negligent. It is hard to see how it can have been so. It was a judgment which turned out badly in the short term but was just as likely in the long term to lead to the client getting everything to which he was entitled. In her view the claim was worth much more than the offer. If the application to admit further medical evidence was granted, the claimant would get what the claim was worth from the health authority, which was properly liable for it; this was much better for him than trying to make up the shortfall from the lawyers whose negligence had led to the current dilemma. There was, in April 1998, a reasonable prospect of persuading the judge that justice required that the evidence be admitted. Had Ms Perry advised the claimant to take the offer and sue the solicitors, the solicitors could have mounted a respectable argument that she should have given him exactly the advice that she did. Unless and until an application to admit the further evidence was made to the trial judge, it could not be said that the claimant had been unable to obtain his full entitlement from the health authority.

[28] How much of this thinking did she have to explain to the client? It took the law of medical negligence some time to work out the principles governing what the patient is entitled to be told before deciding whether or not to agree to intrusive medical treatment: see *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871. These principles are now relatively well understood. In *Chester v Afshar* [2004] UKHL 41, [2004] 4 All ER 587, [2004] 3 WLR 927, for example, the doctor agreed that he should have explained the particular risk to the patient. We have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given. As Lord Hope has pointed out, there is a minimum which any client considering whether to accept a payment into court must know, but that advice had already been given. The situation at the court door was different. We have been shown no evidence or authority to support the view that no reasonable barrister would have given her advice in the way that Ms Perry did in this case. It may well be that such principles will develop in future. But there is still a respectable body of professional opinion that the client pays for the advocate's opinion not her

a doubts. I agree that the Court of Appeal should not have disturbed the judgment of the trial judge in this case.

**LORD CARSWELL.**

b [29] My Lords, the claimant in this action David Leslie Moy could not be blamed if he felt that he had been poorly served by the medical and legal professions. On 13 September 1992, then aged 27 years, he sustained fractures of the left leg when playing football. The surgical treatment of the injury in Maidstone Hospital was negligently carried out, leaving him with continuing pain and disability. Despite remedial surgery in 1995, he has been left with a degree of disability and has sustained and will sustain loss of earnings. He c commenced a claim for damages against the hospital authority, and it is not in dispute that as time went on it became clear that he was entitled to substantial damages, in excess of £200,000. As the result of a chapter of accidents, which I shall recount, when his action came to trial he was left in a position in which he was advised to settle at a very considerable undervalue.

d [30] He issued proceedings against the solicitors who had acted for him in his claim against the hospital authority, the respondent firm Pettman Smith (the solicitors), and in July 2001 the High Court gave judgment in his favour against the solicitors for the sum of £210,000. The appellant Ms Jacqueline Perry, the barrister who had appeared for Mr Moy in his medical negligence claim, was joined as a Pt 20 defendant and subsequently as a co-defendant to Mr Moy's claim e against the solicitors. Ms Perry, who was called to the Bar in 1975, is experienced in personal injury and medical negligence litigation. It is alleged against her in the present action that she had been negligent in giving the claimant advice relating to the conduct of his claim. The judge held that she was not negligent and made the award of damages solely against the solicitors. They paid Mr Moy the f damages due to him, but appealed to the Court of Appeal ([2002] EWCA Civ 875, [2002] PNL R 961), who held that Ms Perry was partly to blame for the claimant's loss and should bear a proportion of the damages paid to him. Ms Perry appealed to your Lordships' House against the decision of the Court of Appeal. Your Lordships accordingly have to consider the question whether she was negligent in the discharge of her duty of care to her client, the claimant. As a result of these g convoluted proceedings the claimant did eventually recover the damages due to him, but only after years of delay and, no doubt, much anxiety and distress.

h [31] The facts have been fully and carefully set out in the judgments of the trial judge and the Court of Appeal, but it is necessary to rehearse in a little detail the course of events leading up to the giving of the advice which was held to be negligent. The fractures of the tibia and fibula sustained by the claimant in the accident in September 1992 were originally treated by manipulation, but as this was not successful a surgeon in the hospital performed an operation in October 1992, involving rotation and internal fixation of the bones by means of a metal plate. This operation was negligently carried out, as was subsequently admitted j by the hospital authority, leaving the claimant with an unacceptable degree of rotational error. In March 1995 a remedial operation was carried out by Mr (later Professor) M Saleh, a consultant orthopaedic surgeon, which improved his condition materially and appeared at first to have effected a nearly complete recovery. Mr Saleh concluded a report to the solicitors dated 9 July 1996 by stating:

'I doubt that he will require significant further physiotherapy in-put and, overall, I believe he will make a 90 to 95% functional recovery with no serious sequelae anticipated in the short, medium or long term. I do not, at this stage, anticipate any need for further surgery and functional improvement may be expected to continue over a period of 18 months.'

[32] The solicitors had meanwhile commenced proceedings on Mr Moy's behalf in July 1994, claiming damages for negligence against the hospital authority. The authority initially denied liability, but in March 1995 it admitted liability and submitted to interlocutory judgment in favour of the claimant. It did, however, maintain the plea made in its defence served on 18 August 1994 that the defendant's negligence did not cause or contribute to any injury, loss or damage sustained by the claimant and that such continuing disability as he might have was the natural consequence of the fractures which he had sustained.

[33] The claimant did not make as good a recovery as had been hoped, and by late 1996 he was having increasing pain and difficulty. Another surgeon Mr King was instructed in January 1997 on Ms Perry's advice to deal with this, but he was not prepared to attribute the claimant's increasing pain and difficulty to the negligent surgery. Notwithstanding this adverse opinion, the solicitors consented to an order made on 13 February 1997, whereby they were to furnish a schedule of special damages within 28 days and the parties were to be limited to one medical expert per side and were to exchange medical reports within three months. In April 1997 the time for serving the schedule was extended by consent to 8 May and for exchange of medical reports to 8 July 1997. No medical report was served by 8 July, but the solicitors had explained their difficulties over medical advice to the district judge and expected to be able to obtain an extension of time.

[34] On 18 July 1997 (the last date permitted by an 'unless' order made on 20 June 1997) the solicitors served a schedule of damages, in which substantial future loss was claimed, amounting to £169,408 at 16 years' purchase of a continuing loss of £10,588 per annum. There was also a claim for £25,000 for handicap in the labour market. The grand total of the past and future loss specified in this document amounted to £276,457.27, but no medical opinion had yet been obtained to support the claimant's continuing disability and the schedule was based on the claimant's own evidence about his difficulties at work. The defendant authority served a counter-schedule on 19 December 1997, in which the question of causation of the loss was squarely raised, the thesis being that irrespective of the surgeon's negligence the claimant would have incurred much of the loss and damage claimed. The total accepted in this schedule was £55,067.72.

[35] In July 1997 Ms Perry advised the solicitors to obtain Professor Saleh's opinion on the causation of his pain and disability and on the prognosis and asked them to arrange a conference with him. The solicitors wrote several letters to Professor Saleh, but regrettably he failed to reply and equally regrettably the solicitors failed to pursue the matter with him.

[36] A pre-trial review was held by a district judge on 27 November 1997, at which it was ordered that each party should have leave to rely upon the evidence of 'a medical expert', whose report was to be disclosed by 9 January 1998, and 'in default no evidence not so disclosed shall be admissible save with leave of the court'. It was then expected that the date of trial would be in February 1998.



a [37] Although they had not obtained the further medical evidence which was vital for supporting the future loss claim, the solicitors did not seek an extension of time, but continued to write to Professor Saleh, while they also made unsuccessful attempts to contact him by telephone. On 8 January 1998 Professor Saleh at last replied to the solicitors, stating that he would have to examine the claimant again before he could give an opinion on his medical situation. An appointment was made for 22 January 1998.

b [38] On 9 January 1998 the solicitors issued a notice of application for leave to adduce further medical and other evidence before trial. Professor Saleh duly examined the claimant on 22 January 1998, and his report, although bearing that date, was sent to the solicitors under cover of a letter dated 12 February, which apparently was received on or about 20 February 1998. In his report Professor Saleh set out his opinion and prognosis:

d 'Mr Moy sustained a fracture of the lower left tibia which required corrective osteotomy. He is working full time in a demanding physical occupation and remains physically limited as a result of the problems with his left lower leg and ankle. There is some evidence of instability of the ankle and degenerative change within the foot. If Mr Moy continues in the building trade in his present work I believe that he will continue to be symptomatic on a daily basis. It is possible that a further corrective osteotomy to redress the residual deformity might improve things marginally. However I believe that he has residual problems at the level of the ankle and foot which will always limit his overall function. Overall therefore I do not believe surgery is indicated and believe that, were he to change to a lighter job, for example a quantity surveyor, it seems likely that he would continue to work up to retirement age. It was interesting to note that, on a recent holiday, he was asymptomatic. If, however, Mr Moy continues to work in his present occupation I believe that, in the short-term, he will cope as he does currently. In the medium term he will take further time off work and, in the long-term, I believe he will have difficulty managing. I believe that suitable retraining would be the most appropriate route for Mr Moy to take in order to preserve his current health status.'

g In his covering letter Professor Saleh said roundly: 'If he decides to carry on in his current capacity I believe that his symptoms will get worse.'

[39] Ms Perry appreciated that the value of the case would have to be revised in the light of this report and advised that in addition to the application for leave to adduce further evidence an application should be made to adjourn the trial, which was now listed for 6 April 1998.

h [40] On 24 February 1998 the health authority made a payment of £120,000 into court.

i [41] The applications, which were vigorously opposed by the health authority, were heard on 26 February 1998 by Deputy District Judge Stary. She dismissed both applications and confirmed that the trial date was to stand at 6 April 1998. The deputy district judge was very critical, not to say censorious, concerning the preparation of the case and the obtaining of medical evidence. As the trial judge, Judge Geddes, subsequently pointed out, however:

'The deputy district judge appears to have misunderstood the facts in a number of important respects. In particular she seems to have thought Mr Moy's problems were apparent in July 1996 and that "this was not picked

up as a point of serious implication until 18 months later". She further found that "there really is not any serious change in the plaintiff's medical condition [since Professor Saleh's report of July 1996]".'

The thrust of the deputy district judge's decision was that the delay was the fault of the claimant and his solicitors and that leave should therefore not be given for the further evidence to be adduced, nor should the trial date be vacated. The last portion of the note of her reasons reads as follows:

'It would seem that the plaintiff's solicitors are looking for a reason to use the plaintiff's days off work as a lever to show a change in the plaintiff's medical condition with a view to starting all over again the medical evidence which had been restricted by District Judge Wigfield. I am very concerned about this. I am not satisfied that there has been so significant a change from last year to now or over the last six months as to justify the plaintiff saying to me that they want to abandon the trial date in April and start all over again. I am not going to accede to the plaintiff's application.'

Ms Perry pointed out, perhaps with more force than diplomacy, that the ruling meant that she would have to call Professor Saleh to give evidence but instruct him not to give evidence about the claimant's condition and prognosis, but the judge was unmoved and made the order dismissing the applications to adduce further medical evidence and vacate the trial date.

[42] It must no doubt be frustrating for district judges who have charge of case management of actions before trial to be faced constantly with delays which result from inefficiency, incompetence or downright neglect on the part of the practitioners whose duty it is to prepare them. One is left with the very clear impression, however, that Deputy District Judge Stary either was over-influenced by the defects on the part of the solicitors in preparing the case and by the imperative of efficiency in managing a stream of actions for trial, or else she failed to appreciate how considerable an effect on the value of the claim the new medical evidence would have. She did not at any stage go into the question of the degree of prejudice which would be sustained by the health authority, which could readily be met by an order for costs. She either failed to carry out any balancing exercise or misunderstood the profound effect of the medical evidence which the claimant wished to adduce. Whatever the reason, the result of her decision was a drastic reduction in the amount which the claimant was likely to recover at trial, which the claimant and his advisers may justifiably have regarded as a serious injustice.

[43] An appeal was brought to the Central London County Court, but on 6 March 1998 the appeal was dismissed by Judge Preville QC. No note is available of his reasons, but Judge Geddes recorded that Ms Perry said that the decision 'was largely based not on the merits but on a particular recent authority'. The authority was not named, but it appears from the judgment of the Court of Appeal in the present case that it may have been *Lownes v Babcock Power Ltd* [1998] PIQR P253, decided on 11 February 1998. In that case the Court of Appeal upheld decisions refusing an extension of time to deliver a schedule of damages, which had very considerable adverse consequences for the plaintiff. It should be borne in mind, however, that the delay in that case and the gross nature of the solicitors' dereliction of duty substantially exceeded those in the present case. The letter of 10 March 1998 from the solicitors to the claimant sets out in rather more detail the criticisms which the judge made both of Professor Saleh and the solicitors. It

a does not appear from any source to what extent, if at all, the judge took account of the degree of injustice which would be suffered by the claimant if the further evidence from Professor Saleh were not adduced or of the extent of any prejudice which might be caused to the health authority.

b [44] On 12 March 1998 the health authority increased its payment into court to £150,000. By a letter of the same date its solicitors stated that provided the offer was accepted by 4 pm on 19 March it would waive its right to enforce the order for costs made at the appeal on 6 March, leaving each party to bear its own costs of that appeal.

c [45] Ms Perry advised the claimant in conference on 23 March 1998. She explained the difficulties of obtaining leave to have Professor Saleh's third report admitted in evidence. She advised that the figure propounded on behalf of the claimant for the value of the claim was about £300,000, while the 'floor' of the claim was £200,000 net. It was her advice that the payment into court of £150,000 should not be accepted, advice which the claimant accepted. The solicitors offered by letter of 26 March to accept £200,000 net of deductions, but the offer was rejected.

d [46] On 1 April 1998 the solicitors for the health authority wrote saying that Professor Saleh's earlier reports were agreed and that they would object to his being called to give oral evidence. Ms Perry directed, however, that Professor Saleh be asked to attend court so that he would be available to give evidence.

e [47] On 3 April 1998 Ms Perry received the health authority's skeleton argument, which now made it quite clear that the question of causation of the claimant's residual pain and disability and his claim for consequential future loss were in issue. As Judge Geddes stated at para 57 of his judgment, Ms Perry had been lulled by the counter-schedule of damages into a false belief that causation was no longer a significant issue in relation to the claimant's residual pain (cf Latham LJ's judgment in the Court of Appeal ([2002] PNLR 961 at [28])). It was therefore going to be necessary to obtain leave to adduce evidence to close this gap, as well as to establish the existence of the claimant's continuing pain and disability.

f [48] At the door of the court on 6 April 1998 Ms Perry was told by counsel for the health authority that the offer of £150,000 was still open for acceptance before the judge came into court, the authority being willing to waive payment of the costs of the hearings of 26 February and 6 March. Ms Perry discussed the matter further with the claimant and advised him that he would be better to proceed with the action. She was conscious that she still faced the hurdle of obtaining the judge's leave to adduce the medical evidence contained in Professor Saleh's third report, but took the view, based on her professional experience, that there was a better than 50:50 chance of succeeding in doing so. She reckoned that if she was not successful in the application and the claimant was awarded a sum which did not reflect the claim for continuing disability and future loss, he would have the security of a cause of action against the solicitors for negligence in preparation of the case. He would also have that prospect open to him if he took the offer of £150,000, but she was of opinion that to rely on it contained difficulties and risks and was bound to involve long delays and much stress and worry for the claimant and his wife, so that it should be a course of last resort. It is not necessary for present purposes to explore the problems which would have been inherent in resorting to a negligence claim against the solicitors, but one obvious risk was that the solicitors would then have pleaded that the claimant should not have agreed to take the offer, but should have proceeded with the action, an issue

whose resolution could have been a rather uncertain matter. Ms Perry accordingly concluded that it was in the claimant's best interests to press on with the application. She advised him that in her judgment he should beat the payment into court, though she told him that he could take the offer and avoid the risks if he so decided. The claimant decided to proceed and the parties went into court.

[49] What appears clearly from the evidence given by Ms Perry in the present action is that although she bore in mind the possibility of his accepting the offer and claiming the balance of the value of the claim from the solicitors in a negligence action, she did not discuss this possibility with the claimant. She stated in evidence that the time to advise the client of this was if the action went wrong, ie if he was prevented from recovering the true value of his claim. This was the point on which the decision of the Court of Appeal turned.

[50] When the preliminary discussion took place in court it became apparent after some little time that Ms Perry was unlikely to succeed in her application to adduce the further evidence of Professor Saleh. The judge rose for a time to read the papers, during which time discussion took place between counsel. The health authority was no longer willing to pay the sum previously offered of £150,000, but would only go to £120,000, less the costs incurred from the date of payment into court of that sum of £120,000. The shortfall involved in accepting this payment was considerable, subsequently estimated at £69,000, being the difference between the sum of £150,000 and the net sum eventually received by the claimant from the health authority. The immediate difficulty facing him and his counsel was that if he went ahead on the limited evidence which the court was willing to receive, the measure of damages would probably have been below £100,000, so leaving the claimant with an even lower net sum after payment of the heavy trial costs which would fall on him. Ms Perry accordingly advised the claimant that he would have to take the best terms available and that he should accept the reduced offer. The claimant did so and the case against the health authority was settled on these terms.

[51] The claimant commenced the present proceedings on 19 April 1999, and the action came on for trial before Judge Geddes, sitting as a High Court judge, who gave a written judgment on 4 July 2001. After reviewing the evidence in detail he held (at para 61) that the solicitors had been guilty of negligence in the conduct of the claim. This finding has not been the subject of challenge on appeal. He then considered the position of Ms Perry in paras 63–65 of his judgment:

'63. It was further argued that Ms Perry was negligent in not advising Mr Moy to accept the health authority's offer before trial of £150,000 and that had it not been for that negligence Mr Moy's losses would have been considerably less.

64. In deciding that issue I have to try and put myself into the position of Ms Perry at the time, and decide whether her advice fell outside the range of possible advice which reasonably competent counsel of her seniority and purported expertise could be expected to make. In my judgment it did not. Although others might have taken a different view of the likelihood of the success of her application, I do not think that it was wholly unrealistic for her to believe that the trial judge might have some sympathy for the plight in which Mr Moy had been placed by the failure of his legal advisers, and give leave for further evidence to be served (including that of causation) while



a adjourning the trial for this to be done. In reaching that conclusion I do not  
overlook the fact that there had been two previous unsuccessful applications  
to adduce further evidence and to adjourn the trial for that purpose.  
However it seems to me that the court on those occasions had not properly  
b adjudicated on the merits and that there was therefore some ground for  
believing that the trial judge might come to a different conclusion. I accept  
Ms Perry's evidence that she had known courts to take an indulgent view in  
such circumstances, at least before the reforms to the Civil Procedure Rules.  
\*No prejudice to the health authority would apparently have been caused by  
such an adjournment apart from costs, and they would no doubt have been  
ordered to be paid by the claimant or his solicitors.

c 65. The advantages of success would have been considerable. Although  
Ms Perry could only take an educated guess at the value of the claim in the  
absence of the necessary evidence, there was no dispute that that value  
would almost certainly have exceeded £200,000 and that therefore  
settlement at the sum suggested would have resulted in a considerable loss  
d to Mr Moy. The alternative was for Mr Moy to accept the sum on offer and  
then to sue his solicitors for the shortfall. Ms Perry considered that such a  
course should in the interests of her client be avoided if at all possible. On  
the other hand Ms Perry was aware that failure would not necessarily be fatal  
as Mr Moy would still be able to sue his legal advisers, albeit in those  
e circumstances for a greater sum, as he has done by bringing this action.  
Support for the view that Ms Perry appeared to those present at the time to  
have a reasonable chance of success in her application is provided by the fact  
that the health authority were prepared to continue with their offer of  
£150,000 (which exceeded the value of the claimant's claim as it stood  
without the missing evidence) but reduced this to £120,000 when it was clear  
that the application was going to be unsuccessful.'

f [52] The solicitors appealed to the Court of Appeal against that part of the  
judge's order by which he dismissed the claimant's claim against Ms Perry and  
the Pt 20 claim against her. By a respondent's notice reliance was placed upon  
s 1(5) of the Civil Liability (Contribution) Act 1978 as barring the claim against  
Ms Perry.

g [53] The Court of Appeal ([2002] PNLR 961) (Brooke, Latham LJ and Hart J)  
allowed the solicitors' appeal and held Ms Perry to have been negligent and liable  
for a proportion of the agreed damages payable to the claimant. The leading  
judgment was given by Latham LJ, who dismissed the argument based on the  
1978 Act briefly, on grounds to which I shall return.

h [54] He examined the facts of the case in some detail and approved the test  
applied by the judge, whether or not Ms Perry's assessment fell outside the range  
which reasonably competent counsel of her seniority and purported experience  
could be expected to have made. He concluded (at [41]), after considering  
previous cases on extensions of time, that although Ms Perry's assessment of the  
chances of having Professor Saleh's further evidence 'could be charitably  
i described as sanguine', it was difficult for the Court of Appeal to say that the  
judge was wrong in holding that the assessment was not negligent.

[55] Having so held, however, Latham LJ went on to hold that Ms Perry had  
been negligent in failing to give the claimant more detailed advice, related in  
particular to the prospects of getting in the essential further evidence. He said (at  
[43]) that when the offer of £150,000 was made, the claimant—

'was entitled to a proper assessment of the prospects of obtaining more  
were the trial to proceed. The only proper advice that [Ms Perry] could have  
given in the light of her own assessment of the chances of persuading the  
court to give leave to adduce further evidence was that the chances were  
50/50. He was not given that advice.'

On this ground he held that Ms Perry had been in breach of her duty to the  
claimant, and followed up this conclusion by inferring that if he had been advised  
that the chances of getting in the evidence were 50:50 he would have decided to  
take the offer of £150,000.

[56] Brooke LJ agreed with the reasons and conclusion of Latham LJ and  
added a discussion of several decided cases on failure to observe the rules in the  
CPR and to comply with 'unless' orders. He specifically agreed (at [65]) with  
Latham LJ that it would be wrong to interfere with the judge's finding as to the  
quality of Ms Perry's assessment of the likelihood of being allowed to adduce the  
evidence at the trial. He nevertheless went on to say (at [67]), in a passage which  
is difficult to reconcile with his conclusion on liability:

'It would be a disaster to the conduct of litigation in this country if an effect  
of the decision of the House of Lords in [the *Arthur JS Hall* case] is that  
advocates believe that they have to hedge their opinions about with "ifs" and  
"buts" in order to avoid an adverse finding of professional negligence. They  
are being paid to express their opinion, and if they assess their clients'  
prospects as 25 per cent, or 50-50, or "strong", then that advice will usually  
suffice unless they are expressly invited to explain it. However, if they have  
fallen below the standard of care reasonably to be expected of them when  
formulating their opinion, whether their negligence relates to questions of  
fact or questions of law (including procedural law), they will now be as  
vulnerable to a finding of professional negligence as any other professional  
man or woman.'

[57] Hart J concurred in the result, but on the basis that he considered that the  
advice not to accept the offer of £150,000 was wrong and negligent.

[58] Sir Sydney Kentridge QC for Ms Perry argued that the approach of the  
Court of Appeal was incorrect. If her assessment of the risk was not negligent, he  
submitted that it is difficult to understand how the advice based on it could be  
negligent. Both Latham LJ (at [42]) and Brooke LJ (at [67]) recognised that a  
client is entitled to have advice clearly stated rather than a dissertation on the  
respective advantages and disadvantages of different decisions. Latham LJ had  
also concluded (at [42]) that it was—

'preferable, if at all possible, to obtain full compensation from the Health  
Authority rather than to accept a lesser sum, on the basis that an action for  
negligence against [the solicitors] might make up the shortfall.'

These factors logically led to the conclusion that since Ms Perry had correctly  
formed her assessment of the chances and given the claimant advice, based on  
that assessment, how to proceed, it could not be said that she was negligent in  
giving that advice. Moreover, Sir Sydney challenged the inference drawn by the  
Court of Appeal that the claimant would have decided to accept the £150,000 if  
more fully advised of the problems involved in getting the evidence in and the  
prospects of doing so. He drew attention to the statement at para 42 of the  
skeleton argument in the Court of Appeal of counsel for the solicitors that 'there

a is no dispute that the claimant would have taken any advice given to him as to accepting the payment into court’.

[59] In my opinion there is considerable force in the arguments advanced on behalf of Ms Perry. Your Lordships have held in *Arthur JS Hall (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon) (a firm), Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673, [2002] 1 AC 615 that the public interest does not require advocates to be held immune from suit for the consequences of their negligence. But that interest does require that the application of the principle should not stifle advocates’ independence of mind and action in the manner in which they conduct litigation and advise their clients. That also accords with common justice in a case such as the present. Latham LJ cited an apt passage from the speech of Lord Salmon in *Saif Ali v Sydney Mitchell & Co (a firm)* [1978] 3 All ER 1033 at 1051, [1980] AC 198 at 231:

d ‘Lawyers are often faced with finely balanced problems. Diametrically opposed views may [be] and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.’

The same thought has been expressed in the Ontario High Court by Anderson J in *Karpenko v Parioian, Courey, Cohen & Houston* (1980) 117 DLR (3d) 383 at 397–398 in a passage which mutatis mutandis is material to the present issues:

e ‘What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error ... that negligence would be found.’

h [60] As Latham LJ acknowledged, the difficulties faced by an advocate who is advising on acceptance or rejection of a settlement are manifold and the pressures, especially if the advice has to be given at the door of the court, can be heavy. In such circumstances it would be surprising if every such piece of advice were reasoned with as much comprehensive precision as may be applied in hindsight by an appellate tribunal which has had the benefit of extensive argument and leisurely reflection. Since the decision in the *Arthur JS Hall* case advocates have been liable to their clients for negligence in the same way as other professional persons. It would not be in the interests of those clients if they were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising litigants about the

course to be taken. I would indorse the view expressed by Brooke LJ in the Court of Appeal, to which I have already referred, that it would be unfortunate if they felt that they had to hedge their opinions about with qualifications. It would be equally unfortunate if another effect of the same syndrome were to be an abdication of responsibility for decisions relating to the conduct of litigation and a reluctance to give clients the advice which they require in their own best interests. Nor do I consider that to give clients a catalogue of every factor which might affect the course of action to be adopted, on the lines of that suggested in argument by Mr Livesey QC for the solicitors, would be a productive discharge of advocates' duty to give them proper advice.

[61] Ms Perry was faced on the morning of trial on 6 April 1998 with a very difficult situation, not of her own making or that of the claimant. The decisions of the deputy district judge and circuit judge appear to have been largely driven by listing necessities and the need for enforcing a greater degree of efficiency and promptness on the part of practitioners. In the process the imperative of doing justice to the parties was subordinated, and Ms Perry may not unreasonably have felt that the trial judge would pay rather more regard to that imperative and be receptive to her application to be allowed to adduce the vital further evidence of Professor Saleh. The majority of the Court of Appeal recognised this in declining to interfere with Judge Geddes' assessment that Ms Perry was not to be held negligent in making her assessment of the prospects of success in the application. It must in my opinion follow by clear implication that, although they did not spell it out, they must also have accepted Judge Geddes' further finding that her decision to advise the claimant to proceed with the action rather than accept the offer of £150,000 was not negligent.

[62] I would for my part agree with Judge Geddes on both points. They cannot really be decided in isolation from each other, as the whole process was one of deciding whether or not to advise acceptance of the offer. The assessment of the prospects of success of the application was the key factor in reaching a conclusion, for if the claimant could be assured of that his course was obvious and the choice was easy. When the prospects of succeeding in the application had been determined—bearing in mind always that at this point Ms Perry still did not know how the trial judge would react to the application—she then had to pay regard to other possibilities and uncertainties. She was aware that the claimant would have a cause of action in negligence against the solicitors if he ended up with materially less than the proper value of his claim. This was his safety net if he went ahead with the action but the judge refused the application and he ended with a low award for lack of evidence supporting his claim for future loss. It would also have been possible to rely on bringing such a claim if he settled for £150,000, which was a significant undervalue. In both circumstances he would have been faced with the burden of proving that he would have succeeded in establishing his entitlement to the larger measure of damages if the solicitors had not been negligent in their handling of the action. It is not unlikely that if he had settled for the offer of £150,000, the wisdom of his taking that course would have been challenged in the subsequent proceedings. Any experienced advocate would know the difficulties of this type involved in a suit for professional negligence and would not lightly encourage a client to rely upon its complete success. One might well say in hindsight that the advice given by Ms Perry to proceed was a wrong decision, but I am not myself convinced that it was as mistaken a decision in all the circumstances as has been represented. The claimant had much to gain if the application succeeded, and the action would



a then have been relatively straightforward. He had the 'safety net' if it failed, even though allowance had to be made for the inherent difficulties in a professional negligence action. Above all, there was a strong case to be made that it would be artificial and unjust, despite all the errors of omission, to deprive the claimant of the opportunity to adduce evidence which would make such a profound difference to the value of his claim. I therefore am in agreement with the conclusion reached by Judge Geddes that the advice fell within the range of that to be expected of reasonably competent counsel of Ms Perry's seniority and purported experience.

[63] The majority of the Court of Appeal, having accepted Judge Geddes' finding that Ms Perry's assessment of the prospects of success of the application was not negligent, nevertheless went on to hold that she had been guilty of negligence in that she failed to give the claimant sufficiently detailed advice. Latham LJ, who dealt with this point ([2002] PNLR 961 at [43]), expressed the view that the claimant should have been advised specifically that there was a problem about the admission of medical evidence to prove future loss and close any gap in proving causation, and the chances of success in obtaining leave to adduce that evidence. Brooke LJ agreed with the reasons given by Latham LJ, while Hart J, though concluding that the advice to proceed with the action was wrong and negligent, appears to have been of a similar view. I have great difficulty in accepting that if Ms Perry was not at fault in deciding to advise the claimant to proceed with the action, she was negligent in failing to spell out the considerations which led her to give that advice. It involves the proposition that the claimant would, if he had been apprised of those considerations, have decided to accept the offer of £150,000, rejecting the advice which *ex hypothesi* was properly given. It also involves accepting the inference that he would, as he now avers, have so decided once he knew of the difficulties.

[64] The latter issue is analogous with those which arise in cases where it is claimed that medical practitioners have failed to give sufficient warning to patients of the consequences of treatment, which was itself carried out properly and without any negligence. In such cases the onus is upon the patients to prove that they would if properly warned have declined to undergo the treatment, one proposition which was accepted by all members of the Appellate Committee in the recent case of *Chester v Afshar* [2004] UKHL 41, [2004] 4 All ER 587, [2004] 3 WLR 927. Such claims not infrequently founder upon this point, for although the claimants regularly assert that they would have refused the treatment if fully advised, those assertions are not always accepted. In the present case the solicitors would have to establish on the balance of probabilities that the claimant would have refused the offer if given more detailed information. Ms Perry's advice as to the claimant's recommended course of action would have been the same, whether or not she gave a fuller explanation of the underlying factors, and it seems to me more than a little questionable whether he would then have rejected the advice. The submissions to the Court of Appeal and the cross-examination of Ms Perry tend to support the suggestion that the claimant was very dependent on her for advice and make it unlikely that he would have rejected it. If the appeal turned on this issue I should therefore be somewhat hesitant about agreeing that the claimant would have accepted the offer.

[65] The appeal does not in my view turn upon this point, for I consider that it was not incumbent upon Ms Perry to spell out all her reasoning, so she was not in breach of her duty of care to the claimant in the advice which she gave. Brooke LJ adverted in para [67] of his judgment, which I have quoted, to the

unfortunate results which would follow if advocates felt compelled always to hedge their opinions. They are, as he stated, paid to express their opinions, but not necessarily their full reasons. Naturally one cannot lay down a hard and fast rule, for circumstances will vary infinitely, but I should be slow to hold advocates to blame in cases such as the present if they concentrated on giving clear and readily understood advice to their clients about the course of action they recommended. Specifically, in the circumstances in which the claimant and Ms Perry found themselves at the door of the court on 6 April 1998 I do not consider that Ms Perry was guilty of any negligence of commission or omission in the advice which she gave to the claimant.

[66] This conclusion is sufficient to determine the appeal and makes it unnecessary to decide the issues of apportionment and the Court of Appeal's order as to costs. It is also strictly unnecessary to decide the issue of the applicability of s 1(5) of the Civil Liability (Contribution) Act 1978, but as it was fully argued before the House and the point may be raised in future cases I shall express my opinion shortly on it.

[67] Section 1(5) provides as follows:

'A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.'

It was argued on behalf of Ms Perry that the judgment given by Judge Geddes in her favour was by this provision made conclusive, so that it could not be challenged either in subsequent proceedings for contribution or by appeal in the action in which the judgment was given. I agree with the view expressed by Latham LJ ([2002] PNLR 961 at [10]):

'The purpose of the statutory provision is obvious. It is designed to ensure that a person is not exposed to the risks of further litigation after the issues have *prima facie* been resolved.'

He went on to say that the same considerations do not apply where all the relevant parties were present at and took a full part in the trial of those issues. Ms Perry's counsel took issue with this last statement, contending that the provision was designed to make the judgment of the trial court final as far as the successful defendant was concerned and to remove the risk, not only of a subsequent contribution being brought against him, but of an appeal being brought against the judgment in his favour. He pointed out that until the enactment of the Law Reform (Married Women and Tortfeasors) Act 1935 there was no right of contribution between concurrent tortfeasors, and in granting such a right Parliament placed limits upon it in the interests of finality. The 1978 Act extended the right of contribution to some extent, but it remained limited, and s 1(5) was intended to set one of those limits. The judge had held that Ms Perry was not liable to the claimant and the solicitors, the co-defendants, had discharged in full the award made in the claimant's favour. That had brought about finality which should not be disturbed and s 1(5) should be given its natural meaning, that the judgment in the High Court was conclusive.

[68] If Ms Perry's contention were correct, it would give rise to somewhat surprising results, which tend to support the proposition that this was not the

a meaning intended by Parliament in enacting s 1(5). In the first place, it would mean that in this situation the ordinary right of a litigant in the High Court to appeal to the Court of Appeal against an adverse decision would be barred, which one would not expect to find without very clear statutory provision. So long as the claimant is able to recover against the co-defendant found wholly to blame, he has no interest in bringing an appeal, so the co-defendant would be left with  
b no redress if he was aggrieved by the judgment. Secondly, if Ms Perry had only been joined by the solicitors as a Pt 20 defendant, but the claimant had not added her as a co-defendant, s 1(5) would not apply, since it was not an action 'brought ... by ... the person who suffered the damage in question against any person from whom contribution is sought'. The subsection would only apply if the latter is joined as a co-defendant, which would be a strange anomaly. Thirdly, the  
c categorical statement of Goddard LJ in *Hanson v Wearmouth Coal Co Ltd and Sunderland Gas Co* [1939] 3 All ER 47 at 55 has remained unchallenged until now and it is to be assumed that when the 1978 Act was enacted Parliament was aware of the state of the law. In that case the trial judge found in favour of the first defendant, a coal company, and held the second defendant, a gas company,  
d wholly to blame for the loss incurred by the plaintiff as the result of an explosion caused by a leakage of gas. The second defendant appealed, but the Court of Appeal upheld the judge's decision that the first defendant was wholly to blame. Goddard LJ said, however:

e 'It remains only to notice the argument of counsel for the coal company that, as the plaintiff did not appeal against the judgment entered for the coal company, the appeal of the gas company, in so far as it seeks to have them held liable for contribution, is incompetent. We cannot agree. The gas company were entitled at the trial, by reason of the provisions of the [1935 Act] to show, if they could, that the coal company were liable in whole or in  
f part for the accident so as to obtain the benefit of indemnity or contribution given by the Act. The duty of the court below was to decide on the rights of the parties at the date of the writ. The Court of Appeal must rehear the case and give the judgment which ought to have been given below, and, if the judgment below should have been that both defendants were liable, so that a right of contribution would arise, this court has power to enter judgment  
g accordingly, even though the plaintiff be content with judgment against one defendant.'

h It would be surprising if Parliament intended to restrict this right of appeal, and no indication of such an intention is anywhere apparent, which tends to support the conclusion that s 1(5) of the 1978 Act was not intended to create a restriction of that nature.

[69] In my opinion Goddard LJ's statement was good law at the time it was made, and there is every reason to interpret the 1978 Act in a way which brings one to the same conclusion. I note also that support for the solicitors' case on this issue may be found in some Australian and Hong Kong authorities, but I do not  
j find it necessary to discuss these decisions, save to say that they all appear to be correct statements of the law applicable in the respective jurisdictions. I therefore conclude that s 1(5) of the 1978 Act should be so construed as not to bar an appeal in a case such as the present. This could be done in either or both of two ways. One could construe the word 'judgment' as referring to a final judgment after any appeals have been determined, rather than the judgment at first instance of the trial judge; or one could confine the operation of the subsection to actions for

contribution subsequently brought, so excluding further proceedings by way of appeal in the original action. Whichever construction one adopts, I consider that the solicitors' right of appeal to the Court of Appeal was not barred by the operation of s 1(5). a

[70] For the reasons I have earlier given, however, I would allow the appeal from the order of the Court of Appeal and restore the order made by Judge Geddes, with costs to Ms Perry of the proceedings in the Court of Appeal and before this House. b

**LORD BROWN OF EATON-UNDER-HEYWOOD.**

[71] My Lords, for the reasons given in the speeches of my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell I too would allow this appeal and make the order proposed. c

*Appeal allowed.*

Dilys Tausz Barrister.



a R (on the application of Al-Hasan) v  
Secretary of State for the  
Home Department

b R (on the application of Carroll) v  
Secretary of State for the  
Home Department

[2005] UKHL 13

c HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

6-8 DECEMBER 2004, 16 FEBRUARY 2005

d *Natural justice – Prison – Discipline – Bias – Deputy prison governor present when governor approving squat search order – Prisoners refusing to comply with order – Deputy prison governor later adjudicating at prisoners' disciplinary hearings – Whether apparent bias.*

e The governor of a high security dispersal prison decided to search all prisoners and their cells in two wings of the prison. The prison officers instructed to carry out the search were told that the items being searched for were of a kind that could threaten the security of the prison and were of a nature that could be hidden in the anal or genital areas of prisoners being searched. The suspicion that there was anything concealed in the anal or genital area was the only  
f circumstance in which a squat search could be ordered. The governor specifically approved the decision to require the prisoners to squat as part of the search, and the deputy governor was present when he did so. The claimants were prisoners who both refused to obey an order to squat so they could be searched. The first claimant refused on the ground that he had not been given proper reasons for it; the second on the ground that a reasonable suspicion was required and there was  
g none in his case. The relevant prison rules provided that a prisoner was guilty of an offence against discipline if he disobeyed any lawful order and disciplinary proceedings were brought against both claimants. The rules required that every charge was to be inquired into by the governor. The governor appointed to hear the charges against the claimants was the deputy governor but the claimants  
h were not aware that he had been present when the squat order had been approved. The deputy governor heard the charges and ruled that the squat order had been lawful. He accordingly found both claimants guilty. They sought judicial review, asserting breaches of their human rights and of the common law principles of natural justice. Those challenges failed before the single judge and  
j the Court of Appeal. The claimants appealed. The issue before the House of Lords was whether the adjudications were properly to be regarded as vitiated by apparent bias on the part of the deputy governor.

**Held** – To avoid the appearance of bias a governor would either have had to have made it plain at adjudications that he himself had actually been present when the order had been confirmed, and not give the impression that he had known

nothing of it, and have sought the prisoners' consent to his nevertheless hearing the charges, or, alternatively, to have stood down to enable them to be heard by a different governor, if necessary from another prison, without any such previous involvement in the case. In the instant cases, although the deputy governor had undertaken the adjudications in the best of good faith and without any thought whatever that his earlier involvement in the matter could in any way be regarded as having compromised his independence and impartiality, the bias argument was made good. By the very fact of his presence when the search order was confirmed, the deputy governor had given it his tacit assent and indorsement. When thereafter the order was disobeyed and he had to rule upon its lawfulness, a fair-minded observer could all too easily have thought him predisposed to find it lawful as for him to have decided otherwise would have been to acknowledge that the governor ought not to have confirmed the order and that he himself had been wrong to acquiesce in it. Accordingly the appeals would be allowed and the findings of guilt would be quashed and deleted from the claimants' disciplinary records (see [1], [2], [12], [13], [16], [17], [37], [39], [43], [44], [46], below).

*Dimes v Grand Junction Canal* (1852) 3 HL Cas 759, *Porter v Magill* [2002] 1 All ER 465, *Millar v Dickson (Procurator Fiscal, Elgin)* [2002] 3 All ER 1041 and *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 applied.

*Davidson v Scottish Ministers* 2004 SLT 895, *Procola v Luxembourg* (1996) 22 EHRR 193, *McGonnell v UK* (2000) 8 BHRC 56 and *Pabla KY v Finland* [2004] ECHR 47221/99 considered.

## Notes

For apparent bias and interests which may give rise to the appearance of bias, see 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) paras 99, 100.

## Cases referred to in opinions

*Davidson v Scottish Ministers* 2004 SLT 895, HL.

*Dimes v Grand Junction Canal* (1852) 3 HL Cas 759, 10 ER 301, HL.

*Ezeh v UK* (2003) 15 BHRC 145, ECt HR.

*Fry, ex p* [1954] 2 All ER 118, [1954] 1 WLR 730, CA.

*Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856.

*Leech v Parkhurst Prison Deputy Governor, Prevot v Long Lorton Prison Deputy Governor* [1988] 1 All ER 485, [1988] AC 533, [1988] 2 WLR 290, HL.

*Locabail (UK) Ltd v Bayfield Properties Ltd, Locabail (UK) Ltd v Waldorf Investment Corp, Timmins v Gormley, Williams v HM Inspector of Taxes, R v Bristol Betting and Gaming Licensing Committee, ex p O'Callaghan* [2000] 1 All ER 65, [2000] QB 451, [2000] 2 WLR 870, CA.

*MacWilliam (JI) Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] EWCA Civ 556, [2003] 3 All ER 369, [2004] QB 702, [2004] 2 WLR 283.

*McGonnell v UK* (2000) 8 BHRC 56, ECt HR.

*McKerr, Re* [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807.

*McKieran's Application, Re* [1985] NI 385, NI CA.

*Millar v Dickson (Procurator Fiscal, Elgin)* [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615.

*Pabla KY v Finland* [2004] ECHR 47221/99, ECt HR.

*Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.

*Procola v Luxembourg* (1996) 22 EHRR 193, ECt HR.

- a** *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul), (2002) Times, 19 August.
- R v Deputy Controller of HMP Buckley Hall, ex p Thomas* [2000] COD 491.
- R v Deputy Governor of Camphill Prison, ex p King* [1984] 3 All ER 897, [1985] QB 735, [1985] 2 WLR 36, CA.
- b** *R v Frankland Prison Board of Visitors, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130, DC.
- R v HM Prison Service, ex p Hibbert* (16 January 1997, unreported).
- R v Hull Prison Board of Visitors, ex p St Germain, R v Wandsworth Prison Board of Visitors, ex p Rosa* [1979] 1 All ER 701, [1979] QB 425, [1979] 2 WLR 42, CA.
- R v Metropolitan Police Comr, ex p Parker* [1953] 2 All ER 717, [1953] 1 WLR 1150, DC.
- c** *S (children: care plan), Re, Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
- Saraiva de Carvalho v Portugal* (1994) 18 EHRR 534, [1994] ECHR 15651/89, ECt HR.
- d Cases referred to in list of authorities**
- A v Secretary of State for the Home Dept* [2002] EWCA Civ 1502, [2003] 1 All ER 816, [2004] QB 335, [2003] 2 WLR 564; *rvsd* [2004] UKHL 56, (2004) 17 BHRC 496, [2005] 2 WLR 87.
- Botta v Italy* (1998) 4 BHRC 81, ECt HR.
- e** *Campbell v UK* (1985) 7 EHRR 165, [1984] ECHR 7819/77, ECt HR.
- Canevi v Turkey App No 40395/98* (10 November 2004, unreported), ECt HR.
- Dad v General Dental Council* (2000) 56 BMLR 130, [2000] 1 WLR 1538, PC.
- Dove for Judicial Review of the Scottish Ministers in Relation to St Mary's Episcopal Primary School, Dunblane* (14 December 2001, unreported), Ct of Sess.
- f** *Eggs v Switzerland* (1978) 15 DR 35, E Com HR.
- Engel v Netherlands (No 1)* (1976) 1 EHRR 647, ECt HR.
- Ezeh v UK* (2002) 12 BHRC 589, ECt HR.
- Kanda v Government of Malaya* [1962] AC 322, [1962] 2 WLR 1153, PC.
- Lloyd v McMahon* [1987] 1 All ER 1118, [1987] AC 625, [1987] 2 WLR 821, HL.
- Maaouia v France* (2000) 9 BHRC 205, ECt HR.
- g** *McFeeley v UK* (1980) 20 DR 44, E Com HR.
- McGonnell v UK* (2000) 8 BHRC 56, ECt HR.
- Medicaments and Related Classes of Goods (No 2), Re* [2001] ICR 564, [2001] 1 WLR 700.
- Meyne-Moskalczuk v Netherlands* (9 December 2003, unreported).
- h** *Munjaz v Mersey Care NHS Trust, S v Airedale NHS Trust* [2003] EWCA Civ 1036, (2003) 74 BMLR 178, [2004] QB 395, [2003] 3 WLR 1505.
- Napier v Secretary of State for the Home Dept* [2004] EWHC 936 (Admin).
- Petrovic v Austria* (1998) 4 BHRC 232, ECt HR.
- Prince Hans-Adam II of Liechtenstein v Germany* (2001) 11 BHRC 526, ECt HR.
- j** *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735, [2002] 1 WLR 2515.
- R (on the application of Bennion) v Chief Constable of the Merseyside Police* [2001] EWCA Civ 638, [2001] IRLR 442, [2002] ICR 136.
- R (on the application of Carson) v Secretary of State for Works and Pensions, R (on the application of Reynolds) v Secretary of State for Works and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.

- R (on the application of Clift) v Secretary of State for the Home Dept* [2004] EWCA Civ 514, [2004] 3 All ER 338, [2004] 1 WLR 2223. a
- R (on the application of Douglas) v North Tyneside Metropolitan BC* [2003] EWCA Civ 1847, [2004] 1 All ER 709, [2004] 1 WLR 2363.
- R (on the application of Erskine) v London Borough of Lambeth* [2003] EWHC 2479 (Admin), [2003] All ER (D) 227 (Oct).
- R (on the application of P) v Secretary of State for the Home Dept*, *R (on the application of Q) v Secretary of State for the Home Dept* [2001] EWCA Civ 1151, [2001] 3 FCR 416, [2001] 1 WLR 2002. b
- R (on the application of Rogers) v Secretary of State for the Home Dept* [2002] EWCA Civ 1944.
- R (on the application of S) v Chief Constable of South Yorkshire*, *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196. c
- R v Admiralty Board of the Defence Council, ex p Coupland* [1996] COD 147, DC.
- R v Barnsley Metropolitan BC, ex p Hook* [1976] 3 All ER 452, [1976] 1 WLR 1052, CA.
- R v Brent London BC, ex p Assegai* (1987) 151 LG Rev 891, DC.
- R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, CA. d
- R v Eastbourne Magistrates' Court, ex p Hall* [1993] COD 140.
- R v Henley* [1892] 1 QB 504, DC.
- R v Hertfordshire CC, ex p Cheung* [1986] CA Transcript 287, (1986) Times, 4 April.
- R v Highbury Corner Magistrates' Court, ex p Uchendu* [1994] RA 51.
- R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206. e
- R v Pwllheli Justices, ex p Soane* [1948] 2 All ER 815, DC.
- R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
- R v Secretary of State for the Home Dept, ex p Gangadeen* [1998] 2 FCR 96, CA. f
- R v Secretary of State for the Home Dept, ex p Stroud* [1993] COD 75.
- Rasmussen v Denmark* (1985) 7 EHRR 371, [1984] ECHR 8777/79, ECt HR.
- Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, [2003] 2 WLR 388.
- Van Den Bouwhuijsen and Schuring v Netherlands* App No 44658/98 (16 December 2003, unreported), ECt HR. g
- Van der Mussele v Belgium* (1984) 6 EHRR 163, [1983] ECHR 8919/80, ECt HR.
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- Wilson v First County Trust (No 2)* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568. h
- Zehnalova v Czech Republic* App No 38621/97 (14 May 2002, unreported), ECt HR.

## Conjoined appeals

*R (on the application of Al-Hasan) v Secretary of State for the Home Department* j  
 Abdullah Muhammad Al-Hasan appealed with permission of the House of Lords Appeal Committee given on 27 November 2003 from the decision of the Court of Appeal (Lord Woolf CJ, Tuckey and Arden LJ) on 19 July 2001 ([2001] EWCA Civ 1224, [2002] 1 WLR 545) dismissing his appeal from the decision of Newman J on 16 February 2001 ([2001] EWHC Admin 110, [2001] HRLR 34) (sub nom *R (on the application of Carroll) v Secretary of State for the Home Department*) refusing his



a application for judicial review of decision of the Directorate of High Security Prisons taken on behalf of the Secretary of State on 11 January 2000 to uphold a finding of guilt on an offence of disobeying a lawful order contrary to r 47(19) of the Prison Rules 1964, SI 1964/388 after an adjudication conducted by Deputy Governor Copple of HM Prison Frankland. The facts are set out in the opinion of Lord Brown of Eaton-under-Heywood.

b *R (on the application of Carroll) v Secretary of State for the Home Department*  
 Michael Carroll appealed with permission of the House of Lords Appeal Committee given on 27 November 2003 from the decision of the Court of Appeal (Lord Woolf CJ, Tuckey and Arden LJ) on 19 July 2001 ([2001] EWCA Civ 1224, [2002] 1 WLR 545) dismissing his appeal from the decision of Newman J on 16 February 2001 ([2001] EWHC Admin 110, [2001] HRLR 34) refusing his application for judicial review of the decision of the Secretary of State made on 25 May 1999 to uphold the conviction of Mr Carroll for an offence of disobeying a lawful order contrary to r 47(19) of the Prison Rules 1964, SI 1964/388 after an adjudication conducted by Deputy Governor Copple of HM Prison Frankland.  
 c The facts are set out in the opinion of Lord Brown of Eaton-under-Heywood.  
 d

*Edward Fitzgerald QC and Hugh Southey (instructed by Deighton Guedalla) for Mr Al-Hasan.*

*Edward Fitzgerald QC and Kris Gledhill (instructed by Hodge Jones and Allen) for Mr Carroll.*

e *Philip Sales and Sam Grodzinski (instructed by the Treasury Solicitor) for the Secretary of State.*

Their Lordships took time for consideration.

f 16 February 2005. The following opinions were delivered.

#### **LORD BINGHAM OF CORNHILL.**

[1] My Lords, I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it, and for the reasons which he gives I would allow both appeals and make the orders which he proposes.  
 g

#### **LORD RODGER OF EARLSFERRY.**

[2] My Lords, I have had the privilege of considering in draft the speech which is to be delivered by my noble and learned friend, Lord Brown of Eaton-under-Heywood. Like him, I have not found this an easy case but, for the reasons he gives, I have come to the view that the appeal should be allowed.  
 h

[3] In the hearing before the House the focus came to be, not on any background knowledge which Mr Copple would have had about the search, but on his presence when the governor approved the general order for a squat search.  
 j For that reason, while the Human Rights Act 1998 does not apply to this case, the decisions of the European Court of Human Rights (the European Court), on the significance of an adjudicator's prior involvement in the subject of the dispute which he has to decide, may be helpful in formulating the approach of the common law in a case like the present.

[4] As Lord Brown notes, in *Pabla KY v Finland* [2004] ECHR 47221/99, the complaint about the adjudicator's prior involvement was thin indeed and the

application was rejected. The decision is worth noting, however, because the European Court emphasised (at para 29), by reference inter alia to its decision in *McGonnell v UK* (2000) 8 BHRC 56 at 66 (para 51), that art 6(1) does not require that a member state should comply with any theoretical constitutional concepts as such. The question is always simply whether the requirements of the convention are met in the particular case. Similarly, in a domestic law context, the question will turn, not on theoretical administrative or other concepts as such, but on whether the tribunal can be regarded as impartial and independent in the particular circumstances.

[5] In *McGonnell v UK* the applicant owned land in the parish of St Martin's in Guernsey. He made a number of applications for planning permission for residential use, but they were all rejected. In about 1986 he moved into a converted packing shed on his land. In 1988 a draft detailed development plan for the island was under consideration and, at the public inquiry, the applicant made representations to the effect that construction of a residential building on his land should be permitted. The inspector rejected that contention and supported the proposal in the draft development plan for the land to be zoned as an area reserved for agricultural purposes and in which development was generally prohibited. In 1990 the States of Deliberation, presided over by the Deputy Bailiff, Mr Graham Dorey, debated and adopted the development plan. Three years later the applicant made a formal application for a change of use for his land. The relevant planning committee rejected the application and the applicant appealed to the Royal Court, comprising the Bailiff, Sir Graham Dorey, and seven jurats. The applicant's representative accepted that the written statement in the development plan provided for no development other than Developed Glasshouse, but he submitted that there were none the less reasons to permit a change of use in the particular case. The Royal Court dismissed the appeal.

[6] The European Court held that there had been a violation of the applicant's art 6(1) right to have his civil rights determined by an independent and impartial tribunal. The European Court took the view that the fact that the Bailiff had, in his former capacity, presided over the States of Deliberation when it adopted the development plan, was capable of casting doubt on his impartiality when, as the sole judge of law, he subsequently determined the applicant's planning appeal in the Royal Court. It is important to notice the way that the court identified the issue (at 67 (para 55)):

'With particular respect to his presiding, as Deputy Bailiff, over the States of Deliberation in 1990, the court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue.' (My emphasis.)

In the eyes of the European Court, the potential difficulty arose because the Royal Court, including the Bailiff, was not simply having to interpret and apply the development plan: it was being asked to permit a departure from the plan, whose provisions the Bailiff might be supposed, by reason of presiding over the States of Deliberation, to have supported.

[7] In *Davidson v Scottish Ministers* 2004 SLT 895 an Extra Division of the Court of Session had to decide whether, having regard to s 21 of the Crown Proceedings Act 1947, it could grant an order for specific performance against the Scottish ministers. One of the judges in the Extra Division had been Lord Advocate at the

a time when the Scotland Act 1998 was passing through your Lordships' House in its legislative capacity. During the passage of the Bill, the Lord Advocate resisted a proposed amendment, on the ground that it was unnecessary, because the Scottish ministers were protected by the provisions of the 1947 Act which at present ensured that the Crown could not be subject to orders for specific performance. On that basis the proposed amendment was not pressed to a vote.

b [8] In those circumstances, the House held that, in his judicial capacity as a member of the Extra Division, the former Lord Advocate could not be seen to be impartial when deciding whether an order for specific performance against the Scottish ministers was competent. In the words of Lord Hope of Craighead (at 907 (para 56)), as Lord Advocate, he had—

c 'committed himself to the view, which in the Extra Division the Scottish Ministers too were advocating, that the effect of s 21 was that they were subject only to orders which were declaratory of the parties' rights.'

Similarly, for Lord Cullen of Whitekirk, what was crucial was that, as a government minister, the Lord Advocate had been promoting the protection of the Scottish ministers from judicial review. It was the exercise of that role, rather than any mere expression of view about the effect of s 21, that persuaded Lord Cullen that the judge was disqualified from sitting as a member of the Extra Division. Again, the decision in *Davidson's* case rests on its own very particular circumstances which bring it within the general scope of the reasoning of the European Court in *McConnell v UK*.

e [9] As the facts of the present case demonstrate, however, people who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles. In many continental systems, at various stages of their careers judges spend time as legal civil servants in ministries, drafting and advising on legislation. Undoubtedly, when they return to the bench, it is expected that they will use their experience to enrich their work. Today, British judges draw on their previous work, whether as advocates, legal civil servants or academic lawyers. Therefore, they may well have to decide a point which they had argued as counsel, or on which they had written an article—or, even, which they had decided in a previous case. In various political or other contexts, judges may have publicly advocated or welcomed the passing of the legislation which they later have to apply. Judges who have served in some capacity in the Law Commissions may have to interpret legislation which they helped to draft or about which they helped to write a report. The knowledge and expertise developed in these ways can only help, not hinder, their judicial work.

h [10] It would be absurd, then, to suggest that in such situations their previous activities precluded the judges from reaching an independent and impartial judgment, when occasion demanded. The authoritative decision in *Locabail (UK) Ltd v Bayfield Properties Ltd*, *Locabail (UK) Ltd v Waldorf Investment Corp*, *Timmins v Gormley*, *Williams v HM Inspector of Taxes*, *R v Bristol Betting and Gaming Licensing Committee*, *ex p O'Callaghan* [2000] 1 All ER 65, [2000] QB 451 is a resounding rejection of any such approach. In any event, if proof were needed, experience confirms that judges are quite capable of acting impartially in such cases. Judges have not infrequently been party to decisions overruling their own

previous decisions. Similarly, in *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] EWCA Civ 556 at [158], [2003] 3 All ER 369 at [158], [2004] QB 702) sitting in the Court of Appeal, Peter Gibson LJ freely admitted that he had taken a different view from the one adopted in a report which he had previously subscribed as Chairman of the Law Commission. In *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, Lord Mackay of Clashfern took part in a decision in which the House struck down a system adopted by a local authority for 'starring' the essential milestones of their care plan adopted under the Children Act 1989. The appeal turned on identifying a cardinal principle of the Act—a piece of legislation for which Lord Mackay, as Lord Chancellor, had been the lead minister when the Bill was going through this House in its legislative capacity. More than that, as he explained (at [108]) he had actually given a lecture in which he suggested the idea of starring stages. At the beginning of the appeal, however, he informed counsel of this and they did not object to his sitting. So any question of apparent bias was resolved. Again, since Lord Mackay agreed with the decision to disapprove the starring system, the informed and fair-minded observer would have seen that he was well able to judge the matter independently and impartially when called upon to do so.

[11] Nor should it be supposed that only professional judges are capable of the necessary independence of approach. That would be to disregard the realities of life in many organisations today. For example, on a daily basis, head teachers have to apply school rules which they have helped to frame. By virtue of their knowledge of the way the school works and of its problems, they will often be best placed to apply the rules sensitively and appropriately in any given situation. Again, it is not to be assumed that the head teachers' mere involvement in shaping the rules means that a fair-minded observer who knew how schools worked would conclude that there was a real possibility that they would not be able to apply the rules fairly. The same goes for managers in businesses and for officers in the armed forces who are committed to upholding the edifice of lawful orders on which the services rest. Equally, I have no doubt that an informed and fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them. In all these situations, if things do go wrong, the decision can be judicially reviewed or challenged in an employment tribunal, as the case may be. The present case is an example of that safeguard in action.

[12] Nothing in the decision of the House today casts any doubt on the validity of the decisions of such bodies taken in the ordinary way. The circumstances of the present case were most unusual, however. The appellants chose to challenge the lawfulness of the general order for a squat search which they had refused to obey. Since Mr Copple had been present when the governor approved that particular order, and had not dissented from that approval, an informed and fair-minded observer could infer that Mr Copple had thereby tacitly accepted that the order was lawful in the situation then facing the prison authorities. If so, that observer might further conclude that there was a real possibility that Mr Copple would be biased if he later had to adjudicate on the appellants' challenge to the validity of the selfsame order. On this very limited ground, which is explained more fully by Lord Brown, I have come to the view that the appeal should be allowed.



**BARONESS HALE OF RICHMOND.**

a [13] My Lords, I have had the advantage of reading the opinions of my noble and learned friends, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, and I agree with them. In particular, I would wish to associate myself with the powerful observations of Lord Rodger. So powerful are they that they might have been thought to lead to a different conclusion in this case. I would like, therefore, to expand a little upon why they do not.

b [14] The inter-relationship between management and the fair administration of discipline in institutional settings and disciplined services has long been a source of concern. It used to be thought that the courts could not supervise the disciplinary actions of prison governors, chief constables, chief fire officers and the like, because to do so would interfere with the free and proper exercise of their disciplinary powers: see *R v Metropolitan Police Comr, ex p Parker* [1953] 2 All ER 717 at 721, [1953] 1 WLR 1150 at 1155, *Ex p Fry* [1954] 2 All ER 118 at 119, [1954] 1 WLR 730 at 733 per Lord Goddard CJ. Then it was held that the disciplinary decisions of prison boards of visitors could be distinguished from those of prison governors and were amenable to judicial review: see *R v Hull Prison Board of Visitors, ex p St Germain*, *R v Wandsworth Prison Board of Visitors, ex p Rosa* [1979] 1 All ER 701, [1979] QB 425. But it was still thought that the governor's role in maintaining good order and discipline within the prison was part of his overall function of managing the prison: see *R v Deputy Governor of Camphill Prison, ex p King* [1984] 3 All ER 897, [1985] QB 735. In the words of Lawton LJ ([1984] 3 All ER 897 at 902, [1985] QB 735 at 749) it was thought that '[m]anagement without discipline is a recipe for chaos'.

e [15] Others, however, had difficulty in drawing a logical distinction between the disciplinary functions of governors and boards of visitors: see *Re McKieran's Application* [1985] NI 385. In England and Wales, the distinction was abolished by the decision of this House in *Leech v Parkhurst Prison Deputy Governor, Prevot v Long Larton Prison Deputy Governor* [1988] 1 All ER 485, [1988] AC 533. Since then it has been clear that the functions of a governor adjudicating upon disciplinary charges are separate and distinct from his functions in running the prison; they are subject to the supervision of the courts in their compliance with the rules of natural justice. This distinction was perhaps even more important during the years following 1992 when all prison discipline was in the hands of the governor.

f [16] Of course, as Newman J said ([2001] HRLR 731 at para 38) it is inherent in the system of prison discipline that it is administered by those with responsibility for managing the prison. Sometimes it will not be possible to keep the two functions distinct. But in this case it could have been done. Giving the order and deciding upon its lawfulness could have been more clearly separated. Giving an order to search prisoners for illicit substances is part of the function of running the prison. In other contexts one would not normally expect the person who gave such an order also to adjudicate upon whether or not it was lawful, at least when the order was so sensitive and the consequences of an adjudication so serious. The lawfulness of a police officer's order to stop and search a suspect will not be decided by the police officer but by a court in any later proceedings resulting from it. The deputy governor in this case did not give the order but he was closely associated with it. The first reports about the indications given by the dogs and the negative findings of the search of the classroom area were made to him on the Friday. The decision to order a lock-down search was made as a result. He was there on the Monday morning when the governor approved the principal officer's decision to require prisoners to squat. In those circumstances,

however professional the deputy governor was in his approach to his task, a fair-minded and informed observer would conclude that there was a real possibility that he would be predisposed to uphold the legality of the order. Although any other governor from within or outside the prison would have had to be briefed on the reasons for the search, it must have been practicable for someone who had not been so closely associated with giving the order to have conducted the adjudications based upon it. For those reasons I agree that the appeals should be allowed.

**LORD CARSWELL.**

[17] My Lords, I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood. For the reasons which they have given I would allow the appeals and make the orders proposed.

**LORD BROWN OF EATON-UNDER-HEYWOOD.**

[18] My Lords, strip searches are a normal part of prison life, particularly for category A prisoners in high security prisons. Squat searches, however, the most extreme and intrusive form of strip searches in which the prisoner is required to bend over or squat, are altogether less routine. They can only lawfully be ordered for good reason. Rule 39(2) of the Prison Rules 1964, SI 1964/388 (now replaced by the Prison Rules 1999, SI 1999/728), made under the Prison Act 1952, provides: 'A prisoner shall be searched in as seemly a manner as is consistent with discovering anything concealed.' Consistently with that rule the Prison Security Manual dictates the only circumstances in which a squat search may be ordered: 'If you suspect there is anything concealed in the anal or genital area, ask [the prisoner] to bend over or squat.'

[19] On Monday 23 November 1998 a squat search was ordered of all 184 prisoners held on F and G wings of HM Prison Frankland, a high security dispersal prison holding some 550 prisoners. The previous Friday, two dogs trained in arms and explosives detection had given positive indications within one of the prison's classrooms, a classroom used only by prisoners from those two wings. A search of the classroom and the surrounding area having revealed nothing, it was decided to carry out a lock-down search of both wings with the prisoners confined to their cells.

[20] These two appellants, both then long-term category A prisoners, were on the affected wings and amongst those ordered to squat (although in the event the search was called off after 94 prisoners had been searched). The appellants, however, unlike the rest, refused to obey the order. Mr Carroll refused on the ground that he had not been given proper reasons for it; Mr Al-Hasan (formerly known as Anthony Steele) on the ground that a reasonable suspicion was required and there was none in his case.

[21] Disciplinary proceedings were brought against both appellants under r 47(19): 'A prisoner is guilty of an offence against discipline if he ... disobeys any lawful order.'

[22] Rule 48(3) requires that 'every charge shall be inquired into by the Governor'. The governor appointed to hear the charges against these appellants was Deputy Governor Copple. Separate adjudications were held, respectively on 17 December 1998 and 2 March 1999, in each case following adjournments to enable the prisoner to obtain legal advice (although each was refused legal representation for the hearing). In both cases there was no dispute that the order

- a had been disobeyed; the defence of each was rather that the order had not been 'lawful'. Mr Copple ruled in both cases that the order was lawful and accordingly found both appellants guilty, findings later upheld by the Secretary of State. The penalty imposed on Mr Carroll was two additional days' detention, ten days' cellular confinement and ten days' stoppage of earnings. He was at the time serving a sentence of 15 years for offences of robbery and assault. Mr Al-Hasan
- b was penalised by the stoppage of 15 days' earnings and the forfeiture of certain privileges. He was and remains a life sentence prisoner, serving four life sentences for offences committed whilst in prison.

- [23] Both appellants brought judicial review proceedings seeking to quash the findings of guilt recorded against them. The challenges were advanced on a wide-ranging basis, asserting breaches of arts 5(4) and 6 of the European
- c Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), and breaches of the common law principles of natural justice. The challenges were heard together and failed both before Newman J in the Administrative Court on 16 February 2001 and before the Court of Appeal (Lord Woolf CJ, Tuckey and Arden LJ) on
- d 19 July 2001 ([2001] EWCA Civ 1224, [2002] 1 WLR 545).

- [24] The Court of Appeal heard the appeals together with another appeal (from the Divisional Court) by a third prisoner, Mr Greenfield, who was also challenging an adjudication. Since the three appeals were thought to involve a number of common issues, your Lordships too heard them together. By then, however, the respondent Secretary of State had conceded—following the judgment of the Grand
- e Chamber of the European Court of Human Rights in *Ezeh v UK* (2003) 15 BHRC 145—that Mr Greenfield's adjudication had breached art 6 so that the only real issue left in his case was a claim for damages under s 8 of the 1998 Act. By the conclusion of the three-day hearing before your Lordships, the arguments had narrowed still further and it had become clear that no real overlap remained
- f between Mr Greenfield's appeal and those of these two appellants, Mr Carroll and Mr Al-Hasan. Judgment is therefore being given separately in Mr Greenfield's case ([2005] UKHL 14, [2005] All ER (D) 238 (Feb)).

- [25] As now appears, these appellants' appeals raise essentially just one issue, an issue common to both. Put at its simplest the issue is whether these adjudications are properly to be regarded as vitiated by apparent bias on
- g Mr Copple's part, in particular having regard to his earlier involvement in the events leading to the decision to order a squat search. As, moreover, will shortly appear, this only became an issue—only, indeed, *could* become an issue—once the challenge had been launched and Mr Copple (very properly) had given his detailed account of the facts of the case.

- h [26] The facts most directly relevant to the issue are these. The initial decision to carry out a search of all prisoners and their cells on F and G wings was taken, as already indicated, on Friday 20 November 1998 following the failure to find in or around the classroom the substances suggested by the trained dogs to be there. The decision was taken by the governor, Mr Woods, and was relayed to Principal
- j Officer Markham who was made aware of the indications from the dogs and of the security implications of the search. For good reasons (of no materiality on this appeal) it was decided to postpone the search until after the weekend. On the Monday morning Principal Officer Markham instructed a number of prison officers to carry out the search. He explained to them that the items being searched for were of a kind that could threaten the security of the prison and were of a nature that could be hidden in the anal or genital areas of the prisoners being

searched. In the course of that morning Governor Woods was briefed in relation to the search and he specifically approved the decision to require the prisoners to squat as part of the search. Mr Copple himself was present when this approval was given. a

[27] At the first instance hearing before Newman J and again before the Court of Appeal it appears that the major thrust of the fairness challenge related less to Mr Copple's own prior involvement in the actual decision-making process than to his background knowledge of the general circumstances in which the search had come to be ordered. It is instructive to see how the Court of Appeal, in a lengthy and impressive judgment which had to deal also with a host of other issues, dealt with this particular issue ([2002] 1 WLR 545): b

'[57] The first specific allegation made by Mr Fitzgerald is that Deputy Governor Copple was not an appropriate person to conduct the adjudication. It is not suggested that he was motivated by any personal bias or malice against Mr Fitzgerald's clients. It is, however, submitted that because of his background knowledge, he should have disqualified himself. If he was required to do so, then it would mean that it would be necessary for a governor to be transferred from another prison to conduct the adjudication. It is not disputed by Mr Sales that in the appropriate circumstances this can be done. However, it is clearly inconvenient to do this and can have disadvantages. c

[58] We have already set out the extent of Deputy Governor Copple's knowledge. Mr Fitzgerald in his additional submissions sought to establish there was here a credibility issue and issues which required resolution of disputes of fact. There was ground for challenging the bona fides of the order for a squat search. However, we do not consider that this is a realistic assessment of the situation. Mr Sales accepts that there has to be cause for a squat search. However, it is far fetched to suggest that there was not cause for the governor of the prison to come to the decision that the search was necessary and that there were not circumstances where the material for which the search was taking place could have been secreted in intimate parts of the prisoner's body. d

[59] Because category A prisoners were involved and it was important to protect sources of information, any adjudicating officer would need background information of the sort that Deputy Governor Copple had in order to rule on the admissibility of questioning of witnesses. This is analogous to the situation which was considered in (*R v Frankland Prison Board of Visitors, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130). The board of visitors no longer has disciplinary powers but, although those powers were greater than those of the governor, the powers were of a similar nature. As was pointed out in that case ([1986] 1 All ER 272 at 277, [1986] 1 WLR 130 at 135) it can assist the achievement of justice in disciplinary proceedings for the adjudicator to have knowledge of the workings of a particular prison. e

[60] Here this was the situation in relation to Deputy Governor Copple. Because the lawfulness of the order was being challenged, it was apparent there could be questions which required, if they were answered, the revelation of information which the prison could reasonably wish to remain confidential in the interests of security. For example, in prisons, sources of information are vital to the maintenance of security and control. They have to be protected because they can readily lead to the revelation of the f



a existence of an informer. If questioning is only curtailed in those situations  
where there is an informer, this will result in identifying that there is an  
informer in those cases where the questioning is curtailed. This would in  
itself be a reason for being circumspect before allowing the questioning  
which was refused by Deputy Governor Copple. The nature of the  
information here made curtailment necessary. There was sensitive  
b information involved. As Newman J stated:

“even if the question was apt to open up a line of defence, then in my  
judgment there was a clear and legitimate interest in ensuring that the  
sensitive security information was not disclosed to the claimant and  
Deputy Governor Copple was sufficiently independent and indeed well  
placed, because of his knowledge of the security information, to decide  
c whether fairness required the question to be answered.”

[61] Like Newman J, we would reject the submission that unfairness  
occurred through the refusal to permit questions. In applying the approach  
that justice must not only be done but be seen to be extended to prisoners,  
the reasonable onlooker must be assumed to know of the needs for security  
and control in prison. In our judgment the reasonable onlooker would  
d conclude that not only was Deputy Governor Copple in a position to provide  
a just hearing, he did so and justice was seen to be done. If it were necessary  
for a reasonable onlooker to do so, he would be entitled to take into account  
the fairness of the whole procedure, including the fact that the courts could  
supervise how the adjudication was carried out on an application for judicial  
e review.’

[28] Those paragraphs in the Court of Appeal’s judgment to my mind provide  
a convincing answer to the main argument then being advanced on behalf of  
these two appellants, namely that Mr Copple, by the very fact that he knew of the  
f security concerns which had occasioned the search, was thereby disqualified  
from hearing the charges through being unable to adjudicate fairly upon them.  
As the Court of Appeal pointed out, it was clearly necessary that sensitive security  
information was not disclosed to the prisoners in the course of the adjudications  
and, to guard against that risk, any governor trying these charges would  
necessarily have had to be given in advance of the hearing precisely the same sort  
g of background information about the search as Mr Copple already had. Principal  
Officer Markham, for example, had to be told by Mr Copple not to answer a  
question put by Mr Carroll: ‘What were these items that intelligence indicated  
could threaten the security of the establishment?’ These adjudications could not  
properly have been conducted by a governor unaware of the background. So  
h much, indeed, Mr Fitzgerald QC on behalf of these appellants now accepts.

[29] What, however, Mr Fitzgerald does not accept is that Mr Copple could  
properly decide the central question raised by the prisoners on these  
adjudications, the legality or otherwise of the orders to squat. He could not bring  
the necessary degree of independence and impartiality to that task. Mr Carroll’s  
j defence to the charge against him was in terms: ‘a blanket order that everyone  
must squat is illegal’. That, therefore, was the critical issue on which Mr Copple  
had to rule. Having been present when the general order for a squat search was  
approved by the governor, could he properly do so? Or might he reasonably be  
supposed to have pre-judged the issue? That precise question, although  
seemingly raised below as part and parcel of the natural justice challenge, appears  
not to have been addressed by the Court of Appeal. Perhaps it was lost sight of

amidst the myriad other arguments advanced. Be that as it may, it is now, as already indicated, the principal issue for your Lordships' decision on the present appeal.

[30] The common law test for bias has been authoritatively settled by the recent decisions of this House in *Porter v Magill* [2001] UKHL 67 at [103], [2002] 1 All ER 465 at [103], [2002] 2 AC 357 and *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [14], [2004] 1 All ER 187 at [14], [2003] ICR 856:

'The question is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.'

[31] Unknown to the appellants at the time of these adjudications, or indeed at the time when their judicial review proceedings were first brought, Mr Copple not merely knew of the background to this search but had actually himself been present when the squat order was approved. This fact only emerged when Mr Copple gave his statement in Mr Al-Hasan's case on 5 July 2000 (rather oddly it did not appear in his earlier statement of 15 May 2000 in Mr Carroll's case). How would the fair-minded observer regard that? Would he think there was a real possibility that, Mr Copple having at the very least acquiesced in the order for a squat search, he would later at the adjudication stage be predisposed to find it lawful?

[32] In addressing this all-important question it is helpful to take note of a line of recent authority culminating in the decision of this House in *Davidson v Scottish Ministers* 2004 SLT 895. In *Davidson's* case the House affirmed the decision of the Second Division of the Court of Session to set aside decisions made by an Extra Division of that court on the ground that they were vitiated by apparent bias and want of objective impartiality on the part of one member of the court, Lord Hardie. What essentially had happened was that the Extra Division had been called upon to decide as a question of law whether s 21 of the Crown Proceedings Act 1947 prevented the Scottish courts from ordering specific performance against the Scottish ministers as part of the Crown. Some three years earlier Lord Hardie as Lord Advocate had assured the House of Lords in its legislative capacity that such was indeed the position. In reaching its conclusion the House examined a number of cases in the European Court of Human Rights concerning the circumstances in which a judge's prior involvement in the eventual question for decision could be said to raise doubts as to the domestic court's independence and impartiality.

[33] In *Procola v Luxembourg* (1996) 22 EHRR 193, for example, the court concluded, perhaps not surprisingly, that as four of the five members of the Conseil d'Etat had previously contributed to an advisory opinion on the lawfulness of a proposed new regulation, their subsequent ruling confirming its lawfulness breached art 6(1). I need cite only para 45 of the court's judgment (at 206–207):

'The Court notes that four members of the *Conseil d'Etat* carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's *Conseil d'Etat* the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion

a previously given. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question ...'

b [34] A similar conclusion was reached by the court in *McGonnell v UK* (2000) 8 BHRC 56, concerning the Bailiff of Guernsey's determination of an appeal which turned upon the application of a development plan in which he had personally been involved whilst in government. Again, a single paragraph of the court's judgment suffices:

c '57. The court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court ...' (See (2000) 8 BHRC 56 at 67.)

d [35] In *Pabla KY v Finland* [2004] ECHR 47221/99, a decision of the European Court of Human Rights dated 22 June 2004, the court's decision went the other way. The complaint there was that a member of the Finnish Parliament had sat as an expert member of the Court of Appeal. The barrenness of the complaint on the particular facts of that case appears clearly from para 34 of the court's judgment:

e 'Accordingly, the court concludes that, unlike the situation examined by it in the cases of [*Procola v Luxembourg* and *McGonnell v UK*], [the member of Parliament] had not exercised any prior legislative, executive or advisory function in respect of the subject matter or legal issues before the Court of Appeal for decision in the applicant's appeal. The judicial proceedings therefore cannot be regarded as involving "the same case" or "the same decision" in the sense which was found to infringe art 6(1) in the two judgments cited above. The court is not persuaded that the mere fact that [the member of Parliament] was a member of the legislature at the time when he sat on the applicants' appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract.'

h [36] Those authorities I have found helpful. The others cited to us I confess I have not. *R v Frankland Prison Board of Visitors, ex p Lewis* [1986] 1 All ER 272, [1986] 1 WLR 130 (the case discussed in para [59] of the Court of Appeal's judgment) goes essentially to the degree of background knowledge the tribunal may properly have when adjudicating on a prison disciplinary charge, no longer at issue on these appeals. That is true also of the unreported first instance decisions in *R v HM Prison Service, ex p Hibbert* (16 January 1997, unreported) and *R v Deputy Controller of HMP Buckley Hall, ex p Thomas* [2000] COD 491. As for such cases as *R (on the application of Holmes) v General Medical Council* [2002] EWCA Civ 1104, [2002] All ER (D) 524 (Jul) and *Saraiva de Carvalho v Portugal* (1994) 18 EHRR 534 decided on 22 April 1994), these address the very different question of how far a judge may properly have had some prior judicial involvement in a case he ultimately has to decide.

[37] I return, therefore, against the background of the relevant case law, to the critical question: how would a fair-minded observer regard these appellants' adjudications? Would he think it a real possibility that Mr Copple, having been present when the squat search order was confirmed by the governor, would be predisposed thereafter to find it lawful? Would he, in the language of the Strasbourg court, feel 'doubt, however slight its justification', about Mr Copple's impartiality, 'legitimate grounds for fearing' that Mr Copple may have been influenced by his prior participation in the decision-making process?

[38] In resisting the appeal, Mr Sales for the respondent Secretary of State submits that on the particular facts of this case the answer to those questions is No: the line, he submits, was not crossed. Mr Copple, he contends, had not here been exercising 'any legislative, executive or advisory function' (*Pabla KY v Finland*) in respect of the squat order whose legality he was later being required to adjudicate upon. He was merely present when Governor Woods gave his approval to the order. Mr Sales further argues that in assessing the objective appearance of the fairness of these adjudications regard must be had to the statutory context in which they were held. Parliament has charged governors and their deputies with the task of adjudicating on prison disciplinary offences. True, as the Court of Appeal noted in para [57] of its judgment, another governor can always be brought in from another prison, but this is a most exceptional and no doubt inconvenient course. Regard should also be had, submits Mr Sales, to the existence of other institutional constraints and safeguards surrounding the adjudicative process: the requirement for the Secretary of State to confirm any finding of guilt, the possibility of complaint to the Prison Ombudsman, and, most significantly of all, the availability of judicial review by which the legality of any disputed order can be tested. Finally, Mr Sales reminds us, both courts below (including in particular a Court of Appeal presided over by Lord Woolf CJ with all his expertise and experience in this field of law) found nothing intrinsically unfair in Mr Copple adjudicating on these charges; in determining the objective impression given by these adjudications, he submits, the House should give due weight to these earlier findings.

[39] For my part I have not found this an easy case. There is undoubted force in Mr Sales' arguments and there can be no question but that Mr Copple himself undertook these adjudications in the best of good faith and without any thought whatever that his earlier involvement in the matter could in any way be regarded as having compromised his independence and impartiality. On balance, however, I have come to the conclusion that the bias argument is here made good. At the end of the day it seems to me that by the very fact of his presence when the search order was confirmed, Mr Copple gave it his tacit assent and indorsement. When thereafter the order was disobeyed and he had to rule upon its lawfulness, a fair-minded observer could all too easily think him predisposed to find it lawful. After all, for him to have decided otherwise would have been to acknowledge that the governor ought not to have confirmed the order and that he himself had been wrong to acquiesce in it.

[40] It was not Mr Fitzgerald's primary argument that Mr Copple, quite apart from his own acquiescence in the order, would in any event have been inclined to uphold its legality in deference to the governor's position as his superior officer. Rather he assumes that Mr Copple was sufficiently independent of the governor to have reached his own independent view of the order's legality when eventually this came to be questioned at the adjudications. This assumption carries with it, however, the further assumption that, had Mr Copple had any



a doubts about the order when initially it fell for confirmation by the governor on the Monday morning, he would have felt able, indeed obliged, to question it and if necessary disassociate himself from it at the time. In short, any argument that Mr Copple might in any event on the adjudication have been expected to rubber-stamp the governor's order is really subsumed in the main argument that he had already by then committed himself to its validity.

b [41] From all this it follows that to have avoided the appearance of bias Mr Copple would either have had to make plain at the adjudications that he himself had actually been present when the squat search order was confirmed (rather than give the impression, as he appears to have done, that he had known nothing of it) and sought the prisoners' consent to his nevertheless hearing the charges, or alternatively stood down to enable them to be heard by a different governor (if necessary from another prison) without any such previous involvement in the case.

c [42] There remains only the question of what relief should follow upon this conclusion. Mr Fitzgerald submitted that the findings of guilt must now be quashed and deleted from the respective appellant's disciplinary records. d Mr Sales contests this, submitting that in the event no possible injustice was done to these appellants: as was later clearly established by the Court of Appeal's judgment, and indeed is not now disputed, this search order was in fact perfectly lawful. It cannot sensibly be supposed, therefore, that there could have been any different outcome to the adjudications whoever had heard them.

e [43] On this question I entertain not the slightest doubt that Mr Fitzgerald is right. Indeed it seems to me clear both as a matter of principle and authority that once proceedings have been successfully impugned for want of independence and impartiality on the part of the tribunal, the decision itself must necessarily be regarded as tainted by unfairness and so cannot be permitted to stand. There are f 150 years ago in *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759, 10 ER 301 the House of Lords set aside Cottenham LC's decree affirming the Vice-Chancellor's decision in favour of a company in which Cottenham LC himself was a shareholder. As Lord Campbell said ((1852) 3 HL Cas 759 at 793, 10 ER 301 at 315):

g 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred ... And it will have a most salutary influence on h [inferior] tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside.'

j [44] Only recently, in *Millar v Dickson* (*Procurator Fiscal, Elgin*) [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615, Lord Bingham of Cornhill took the same view with regard to a number of decisions reached by temporary sheriffs contrary to art 6 of the convention:

[16] ... There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs

involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But ... it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.'

So too here: the findings of guilt against these appellants must now be expunged.

[45] For completeness I add only this. If your Lordships share my view upon these appeals, they will owe their success entirely to well established principles of common law. Both adjudications took place before the Human Rights Act 1998 came into force. They cannot, therefore, be impugned under domestic law by reference to the convention: the non-retrospectivity of the Act is now, of course, firmly established—see most recently *Re McKerr* [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807. There can accordingly be no question of any award of damages in these cases even supposing, which may be doubted, that, had a successful challenge been available under the convention, there then would have been. As it happens, neither appellant will in fact have served any additional days' detention pursuant to these adjudications. The order that Mr Carroll serve two additional days was in the event nullified by a combination of circumstances, namely his own decision on 16 October 1998 to postpone a Parole Board review of his case coupled with his eventual release on licence on 21 February 2001 on the recommendation of the Parole Board prior to his mandatory release date. Mr Al-Hasan as a life sentence prisoner could not be, and was not, ordered to serve additional days; and his offences, it is acknowledged, were such that the adjudication can have no possible impact upon whatever may be the final release date in his case.

[46] These observations, however, are by the way. Limited though the effect of these adverse adjudications was upon these appellants, they are entitled to have them set aside.

*Appeals allowed.*

Dilys Tausz Barrister.

**a Polanski v Condé Nast Publications Ltd**  
**[2005] UKHL 10**

HOUSE OF LORDS

**b LORD NICHOLLS OF BIRKENHEAD, LORD SLYNN OF HADLEY, LORD HOPE OF CRAIGHEAD,  
 BARONESS HALE OF RICHMOND AND LORD CARSWELL**  
 17, 18 NOVEMBER 2004, 10 FEBRUARY 2005

**c Evidence – Witness – Witness in foreign jurisdiction – Examination of witness by live  
 television link – Claimant applying to give evidence in libel action brought by him by  
 video conference link to avoid risk of arrest and extradition – CPR 32.2.**

**d** The claimant, a French citizen who lived in France, was suing the defendant publisher for libel in respect of an article published in the United Kingdom. The claimant did not wish to come to the United Kingdom to give oral evidence in person at the trial of his action as he was a fugitive from justice in the United States and did not wish run the risk of being extradited. He therefore sought a pre-trial direction that he be allowed to give his evidence from France by means of a video conference link, pursuant to CPR 32.2<sup>a</sup> which provided that the court ‘may allow a witness to give evidence through a video link or by other means’.

**e** The judge gave that direction. The defendant appealed. The Court of Appeal ruled that the judge had been wrong to make the order, holding that the general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than facilitating it. The claimant appealed. The issue before the House of Lords was whether the administration of justice would be

**f** brought into disrepute if the judge’s order were allowed to stand.

**g Held – (Lord Slynn and Lord Carswell dissenting)** Special cases might arise, but the general rule should be that in respect of proceedings properly brought in the domestic courts, a claimant’s unwillingness to come to the United Kingdom because he was a fugitive from justice was a valid reason, and could be a sufficient reason, for making a video conferencing order. A fugitive from justice, despite his status, was entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He could bring or defend proceedings even though he was, and remained, a fugitive. If the administration of justice were not thus

**h** brought into disrepute, it was difficult to see why it should be regarded as brought into disrepute by permitting the fugitive to have recourse to a procedural facility flowing from a technological development readily available to all litigants. In the instant case, the fact that the claimant’s reluctance to come to the United Kingdom was grounded in a fear that he might be extradited and receive a custodial sentence in the United States, did not take the case out of the general

**j** rule. Accordingly, the appeal would be allowed (see [22], [25], [26], [31], [33], [59], [61], [65], [66], [69], below).

*Rowland v Bock* [2002] 4 All ER 370 approved.

Decision of the Court of Appeal [2004] 1 All ER 1220 reversed.

<sup>a</sup> CPR 32, so far as material, is set out at [8], below

## Notes

For the court's power to allow use of video links and general guidance to video conferencing, see 17(1) *Halsbury's Laws* (4th edn reissue) paras 1013, 1014.

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*Arab Monetary Fund v Hashim* (21 March 1997, unreported), CA.

*Eliazer v Netherlands* (2001) 37 EHRR 892, [2001] ECHR 38055/97, ECt HR.

*Evans, Re* [1994] 3 All ER 449, [1994] 1 WLR 1006, HL.

*Hadkinson v Hadkinson* [1952] 2 All ER 567, [1952] P 285, CA.

*Hunter v Chief Constable of the West Midlands* [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

*McElhinney v Ireland* (2001) 12 BHRC 114, ECt HR.

*Motorola Credit Corp v Uzan* [2003] EWCA Civ 752, [2004] 1 WLR 113.

*O'Brien v Chief Constable of the South Wales Police* [2003] EWCA Civ 1085, [2003] All ER (D) 381 (Jul).

*Phillips v Symes* [2003] EWCA Civ 1769, [2003] All ER (D) 105 (Dec).

*Rowland v Bock* [2002] EWHC 692 (QB), [2002] 4 All ER 370.

*Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.

*Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

*X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1, [1990] 2 WLR 1000, HL.

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*Cartwright v Superintendent of Her Majesty's Prison* [2004] UKPC 10, [2004] 1 WLR 902.

*Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91, CA.

*Cross v Kirkby* [2000] CA Transcript 321.

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*Governor of Ashford Remand Centre, ex p Postlethwaite* [1988] AC 924, [1987] 3 WLR 365, HL.

*Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] 1 All ER 30.

*Grobelaar v News Group Newspapers Ltd* [1999] CA Transcript 1135.

*H v UK* (1985) 45 DR 281, E Com HR.

*Holman v Johnson* (1775) 1 Cowp 341, 98 ER 1120, [1775–1802] All ER Rep 98.

*Ismail, Re* [1998] 3 All ER 1007, [1999] 1 AC 320, [1998] 3 WLR 495, HL.

*Kakis v Government of the Republic of Cyprus* [1978] 2 All ER 634, [1978] 1 WLR 779, HL.

*Kindler v Canada* (Minister of Justice) [1993] 4 LRC 85, Can SC.

*Launder v UK* (1985) 45 DR 281, E Com HR.



- a* *Liangsiriprasert v United States Government* [1990] 2 All ER 866, [1991] 1 AC 225, [1990] 3 WLR 606, PC.
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- Post Office Counters Ltd v Mahida* [2003] EWCA Civ 1583, [2003] All ER (D) 372 (Oct).
- Price v Price (t/a Poppyland Headware)* [2003] EWCA Civ 888, [2003] 3 All ER 911.
- b* *R v Governor of Brixton Prison, ex p Levin* [1997] 3 All ER 289, [1997] AC 741, [1997] 3 WLR 117, HL.
- R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23.
- Revill v Newbery* [1996] 1 All ER 291, [1996] QB 567, [1996] 2 WLR 239, CA.
- Richardson v Mellish* (1824) 2 Bing 229, 130 ER 294, [1824–34] All ER Rep 258.
- c* *Schmidt v Federal Republic of Germany* [1994] 3 All ER 65, [1995] 1 AC 339, [1994] 3 WLR 228, HL.
- Shevill v Presse Alliance SA* Case C-68/93 [1995] All ER (EC) 289, [1995] 2 AC 18, [1995] 2 WLR 499, [1995] ECR I-415, ECJ.
- Shevill v Presse Alliance SA* [1996] 3 All ER 929, [1996] AC 959, [1996] 3 WLR 420, HL.
- d* *Swaptronics Ltd, Re* [1998] All ER (D) 407.
- United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 4 All ER 289, [2004] 1 WLR 2241.
- Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249, [2002] 3 All ER 78, [2002] 1 WLR 218.
- Von Hannover v Germany* (2004) 16 BHRC 545, ECt HR.

## Appeal

- The claimant, Roman Polanski appealed with permission of the House of Lords Appeal Committee given on 23 February 2004, from the decision of the Court of Appeal (Simon Brown, Jonathan Parker and Thomas LJ) on 11 November 2003 ([2003] EWCA Civ 1573, [2004] 1 All ER 1220) allowing the appeal of the defendant, Condé Nast Publications Ltd, from the order of Eady J made on 9 October 2003 allowing Mr Polanski's application under CPR 32.3 to give evidence by video conference link from France in the trial of his libel action against Condé Nast. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

- g* *Richard Spearman QC* (who did not appear below), *Heather Rogers* and *Justin Rushmoore* (instructed by *Schillings*) for Mr Polanski.
- David Pannick QC* (who did not appear below), *Manuel Barca* and *Aidan Eardley* (instructed by *Reynolds Porter Chamberlain*) for Condé Nast.

- h* Their Lordships took time for consideration.

10 February 2005. The following opinions were delivered.

## *j* LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, Condé Nast Publications Ltd publishes the magazine *Vanity Fair* in this country. Roman Polanski, the celebrated film director, is suing Condé Nast for libel in respect an article included in the July 2002 edition of this magazine.

[2] The words of which Mr Polanski complains refer to an incident said to have taken place 35 years ago. On the night of 8 August 1969 Mr Polanski's wife,

the actress Sharon Tate, was murdered at their home in California, United States of America, by members of the so-called 'Manson Family'. Mr Polanski was working in London at the time. He flew to California and remained there until after his wife's funeral on 13 August 1969. On his return journey from Los Angeles to London he stopped in New York. He went to 'Elaine's' restaurant. There he met the actress Mia Farrow. That was on 27 August 1969 or thereabouts.

[3] The July 2002 edition of *Vanity Fair* contained a feature article about 'Elaine's'. The article included the following passage:

"‘The thing about Elaine's,’ says Lewis Lapham, ‘is that nobody will allow himself to be impressed by anybody. You could say, ‘I just sold 17,000 copies of my book today,’ and they’d ask what you did yesterday. The only time I ever saw people gasp in Elaine's was when Roman Polanski walked in just after his wife Sharon Tate had been viciously murdered by the Manson clan. I was sitting at a table with a friend of mine who had brought the most gorgeous Swedish girl you ever laid eyes on. I don't think I've ever seen a more beautiful woman. Polanski came over and asked to join us. It turned out that Polanski had been in London when the atrocity took place, and he was on his way back to Hollywood for the burial. The Swedish beauty was sitting next to me. Polanski pulled up a chair and inserted himself between us, immediately focusing his attention on the beauty, inundating her with his Polish charm. Fascinated by his performance, I watched as he slid his hand inside her thigh and began a long, honeyed spiel which ended with the promise ‘And I will make another Sharon Tate out of you’.”"

[4] Mr Polanski sought a correction and apology. *Condé Nast* refused. *Condé Nast* was willing to consider for publication a letter setting out Mr Polanski's position, but its solicitors said 'our clients stand by their story'. Mr Polanski began these proceedings on 20 August 2002. It is now common ground that, contrary to what was stated in the *Vanity Fair* article, the meeting at Elaine's took place on Mr Polanski's return journey to London after his wife's burial.

[5] The trial of these proceedings has yet to take place. There are three issues in the proceedings. The first issue concerns the meaning of the words. Mr Polanski's case is that the words bear the following defamatory meanings: that on his way to attend the burial of his wife, who had just been viciously murdered, he had stopped in New York and publicly and shamefully seduced the female companion of one of the other customers at Elaine's; that as an inducement for her sexual favours he had promised to make the girl famous; and that by this conduct he had shown such appalling and callous indifference to the fate of his murdered wife that even the hardened regulars of Elaine's had gasped in astonishment. No evidence is admissible on this issue.

[6] The second issue is justification. *Condé Nast* allege that the words were true in so far as they bear the meaning that, even though his wife had just been viciously murdered, Mr Polanski showed a callous indifference to her memory by shamelessly exploiting her name and the prospect of emulating her fame in order to make sexual advances to another man's female companion whom he had only just met in a restaurant. This allegation of fact is denied by Mr Polanski. At the trial he will rely primarily on his own evidence and that of Ms Farrow. *Condé Nast* will rely on the evidence of Mr Lapham and the 'friend of mine' to whom the article referred, Mr Edward Perlberg. The third issue is damages.

a [7] Thus far Mr Polanski's proceedings are straightforward. But there is a complication, which has given rise to this interlocutory appeal. Mr Polanski is a fugitive from justice. In August 1977 he pleaded guilty before a Californian court to a charge of unlawful sexual intercourse with a girl aged 13 years. He underwent tests ordered by the court, spending 42 days in the state penitentiary for this purpose. He then fled from the United States before he was sentenced.

b He returned to his home in France. As a French citizen he cannot be extradited from France to the United States. Since then he has never visited the United States again. Nor has he ever returned to the United Kingdom. If he came to this country he would be at risk of being extradited to the United States of America.

c [8] In these circumstances Mr Polanski has said he will not come to this country to give oral evidence at the trial of his libel action. Instead, he has sought a pre-trial direction that he may be allowed to give his evidence from France by means of a video link, pursuant to CPR 32.3. This rule provides the court 'may allow a witness to give evidence through a video link or by other means'.

d [9] Eady J gave this direction on 9 October 2003. The judge said the reason underlying the application was unattractive, but this did not justify depriving Mr Polanski of his chance to have his case heard at trial. The Court of Appeal, comprising Simon Brown, Jonathan Parker and Thomas LJ, discharged the judge's order: [2003] EWCA Civ 1573, [2004] 1 All ER 1220, [2004] 1 WLR 387. The general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than to facilitate this. The judge's order overlooked and undermined this policy. Giving evidence by video conference

e link is not yet the procedural norm. Mr Polanski is seeking an indulgence from the court. In denying him that indulgence the court is not shutting him out from access to justice; the choice is entirely his.

f [10] The question raised by this appeal is whether, as the Court of Appeal held, the judge misdirected himself in principle when exercising his discretion in favour of permitting Mr Polanski to give his evidence by video conference link. The issue is whether the administration of justice would be brought into disrepute if the judge's order were allowed to stand.

#### THE PARTIES' INTERESTS

g [11] One matter is clear. There can be no doubt that, as between Mr Polanski and Condé Nast, the judge's order was rightly made. The Practice Direction supplementing CPR Pt 32 provides that when the use of video conferencing is being considered a judgment must be made on cost saving and on whether use of video conferencing 'will be likely to be beneficial to the efficient, fair and economic disposal of the litigation'. As between the parties that test is satisfied in

h the present case.

j [12] Several points can be noted in this regard. First, there is no question of this libel action being an abuse of the process of the court. True it is that the principal circulation of Vanity Fair is in the United States of America: 1.13m copies at the relevant time. Its circulation in Europe is much smaller. In mid-2002 the circulation of the magazine in England and Wales was 53,000 copies and in France 2,500 copies. It is also true that Mr Polanski has not set foot in England since February 1978. His home is in France and has been so for more than 25 years. But Mr Polanski's reputation is international. Despite the facts just mentioned Condé Nast does not suggest Mr Polanski's choice of England as the forum for his proceedings is improper. He is entitled to bring this action in this country in respect of the publication of the offending article which took place

here. Thus the question is not *whether* the action should be tried here. The question is *how* it should be tried. a

[13] Next, objections about the form in which evidence may be given at the trial usually arise when one party claims a particular course would be prejudicial to him in the conduct of the litigation. That is not so in the present case. Condé Nast has no relevant interest in Mr Polanski being required to give his evidence in person in court. A direction that Mr Polanski's evidence may be given by means of video conferencing, or 'VCF' in short, would not prejudice Condé Nast to any significant extent. If anything, as Simon Brown LJ observed, any prejudice would more likely be suffered by Mr Polanski, by reason of the lessened impact of his evidence and celebrity status on the jury. b

[14] Condé Nast does not suggest otherwise. Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF as it could be if given in court. Eady J, an experienced judge, said that cross-examination takes place 'as naturally and freely as when a witness is present in the court room'. Thomas LJ said that in his recent experience as a trial judge, giving evidence by VCF is a 'readily acceptable alternative' to giving evidence in person and an 'entirely satisfactory means of giving evidence' if there is sufficient reason for departing from the normal rule that witnesses give evidence in person before the court: see [2004] 1 All ER 1220 at [60]. Whether Mr Polanski's reason is sufficient is the all-important question to which I shall return. c

[15] Thirdly, if a VCF order is refused Mr Polanski will be gravely handicapped in the conduct of these proceedings. In practice he will either abandon his action or, possibly, continue but under the serious disadvantage that his oral evidence on the crucial dispute of fact, concerning what took place at the restaurant, will not be placed before the jury. Either way, in its conduct of this litigation Condé Nast will receive an unjustified windfall at the expense of Mr Polanski. Condé Nast will find itself in the fortunate position of not being called to account for having published what may be a serious libel. d

#### THE PUBLIC INTEREST IN THE ADMINISTRATION OF JUSTICE

[16] Unfair consequences of this kind, prejudicial to one party and correspondingly beneficial to the other, are not unusual when questions of 'public policy' arise. Public policy is based on wider considerations than the interests of the parties themselves. But this does not mean the consequences for the parties are irrelevant when considering wider questions of public policy. On the contrary they may be of relevance and importance. They are so in the present case. They are one of the factors the court will take into account when deciding whether a VCF order in respect of Mr Polanski's evidence would bring the administration of justice into disrepute. Mr Pannick QC, appearing for Condé Nast, rightly accepted this. e

[17] This approach accords with the contemporary trend in this area of the law. The trend on matters of this kind is to look broadly at the requirements of justice. Whether the use of the court's procedures in a particular way would bring the administration of justice into disrepute or, as it is sometimes put, would be an affront to the public conscience, calls for an overall balanced view. This does not mean the courts now apply lower standards in the administration of justice or that the public conscience is now less easily affronted. Rather, it means the courts increasingly recognise the need for proportionality. The sanction must be appropriate having regard to all the circumstances. Indeed, an over-rigid interpretation of the requirements of public policy in this field may be f



a counter-productive. A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute. It may also involve a breach of the parties' rights under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

b [18] A similar approach is now adopted in cases where a party seeking to be heard by the court is in contempt of court. That fact is not of itself a bar to the contemporaneous hearing: see Denning LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 574–575, [1952] P 285 at 298, approved by Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 at 11, [1991] 1 AC 1 at 46. In *Arab Monetary Fund v Hashim* (21 March 1997, unreported), quoted by Potter LJ in the judgment of the Court of Appeal in *Motorola Credit Corp v Uzan* [2003] EWCA Civ 752 at [48], [2004] 1 WLR 113 at [48], Lord Bingham of Cornhill CJ said the preferable approach is to ask—

c 'whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.'

d [19] The same type of problem arises from time to time where a claimant, in order to pursue his claim, is forced to rely on his own illegal conduct. Then, on grounds of public policy, the court may refuse to aid him. This principle was affirmed, in a somewhat rigid form, in *Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340. Whether this is the last word on this controversial subject remains to be seen. That is not an issue arising on this appeal.

#### e FUGITIVES FROM JUSTICE

f [20] Against this background I turn to consider the point of legal principle raised by this appeal. A fugitive from justice is unwilling to come to this country to give evidence in person in civil proceedings properly brought by or against him. Can that be a sufficient reason for making a VCF order? Or would such an order, made for that reason, bring the administration of the law into disrepute?

g [21] These questions did not arise in past years. In the past oral evidence required physical presence. But recent advances in telecommunication technology have made VCF a feasible alternative way of presenting oral evidence in court. The issue before the House is whether the development of this new facility should [enure] for the benefit of fugitives from justice as much as it does for other parties to litigation.

h [22] There are three possible answers on this issue. They may be broadly summarised as follows: (1) as a general rule a fugitive's unwillingness to return to the jurisdiction of this country is a valid reason, and can be a sufficient reason, for making a VCF order; (2) as a general rule a fugitive's unwillingness to return is not a valid reason for making a VCF order; and (3) there is no general rule: everything depends on the circumstances.

j [23] Possibility (3) is not attractive. That would leave at large the answer to the question of legal policy raised by this appeal. That would not be satisfactory. The fugitive's reason for seeking a VCF order must, as a matter of legal policy, either be acceptable in principle or not. The House must give guidance on this issue. So the choice lies between answers (1) and (2).

[24] A number of features are to be noted. First, in the present case Mr Polanski's criminal conduct did not take place in this country. But the public

interest in furthering the proper processes of investigation, trial and punishment of criminal offences committed in the United Kingdom applies equally where an extradition crime has been committed or allegedly committed in a country with which the United Kingdom has a relevant extradition treaty. Countries which are parties to an extradition treaty or the like have a mutual interest in seeing that persons who commit crimes in one country do not escape trial or punishment by fleeing abroad: see Lord Templeman in *Re Evans* [1994] 3 All ER 449 at 450, [1994] 1 WLR 1006 at 1008. a  
b

[25] Second, a fugitive from justice is not as such precluded from enforcing his rights through the courts of this country. This is so whether the fugitive is claimant or defendant. Mr Polanski's status as a fugitive offender does not deprive him of any rights he would otherwise possess in respect of the subject matter of this action. His flight from California in 1978, and the steps he has taken ever since to remain beyond the reach of the Californian court, do not preclude him from bringing proceedings in England in respect of damage to his reputation flowing from publication of defamatory material in this country. c

[26] At first sight this may seem unattractive. It may seem unattractive that a person can, at one and the same time, evade justice in respect of his criminal conduct and yet seek the assistance of the courts in protection of his own civil rights. But the contrary approach, adopted in the name of the public interest, would lead to wholly unacceptable results in practice. It would mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That could not be right. Such harshness has no place in our law. Mr Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement. d  
e

[27] Thirdly, a direction that a fugitive such as Mr Polanski may give his evidence by use of VCF is a departure from the normal way a claimant gives evidence in this type of case. But the extent of this departure from the normal should not be exaggerated. It is expressly sanctioned by the CPR. The power conferred by the rules is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an 'indulgence'. f

[28] Fourthly, in the situation under consideration a VCF order will not assist the fugitive's evasion of justice. Whether a VCF order is made or not, the fugitive will not come to this country. He will not put himself at risk of arrest. In the present case, come what may, Mr Polanski's longstanding evasion of justice will continue. It will be unaffected by the court's decision on whether to make or refuse a VCF order. The effect of making a VCF order will be different. In the present case the effect will be to relieve Mr Polanski from one of the disadvantages of his fugitive status, namely, that he cannot travel freely to a country which has a relevant extradition treaty with the United States of America. To that extent a VCF order will enable Mr Polanski to sidestep one of the adverse consequences of his own criminal conduct and flight from justice. A VCF order will enable him to present his evidence orally to an English court in proceedings properly brought by him here, without being physically present in the court room. g  
h  
j

[29] Thus the practical consequences of the alternative answers on this issue are that if a court makes a VCF order, the fugitive will be relieved of a disadvantage otherwise attendant upon his fugitive status; but if the court refuses to make a VCF order, the fugitive's oral evidence will not be available at the trial. By adopting the latter course the court will in effect be saying to the fugitive

a 'unless you surrender your fugitive status you cannot pursue (or, as the case may be, defend) your civil proceedings'.

b [30] I understand the intuitive dislike of relieving a fugitive of a disadvantage which until recently was inherent in his self-created status. Until recently the fugitive had to make up his mind whether (a) to surrender his fugitive status and give his oral evidence in court or (b) to maintain his flight from justice and suffer whatever disadvantages this might have in civil proceedings to which he was a party as claimant or defendant.

c [31] I understand that. But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive. To regard the one as acceptable and the other as not smacks of inconsistency. If a fugitive is entitled to bring his proceedings in this country there can be little rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which is now readily available to all litigants. For obvious reasons, it is not a facility claimants normally seek to use, but it is available to them. To withhold this facility from a fugitive would be to penalise him because of his status.

f [32] That would lack coherence. It would be to give with one hand and take away with the other: a fugitive may bring proceedings here, but his position as a fugitive will tell against him when the court is exercising its discretionary powers. It would also be arbitrary in its practical effect today. A fugitive may bring proceedings here but not if it should chance that his own oral evidence is needed. Then, despite the current availability of VCF, he cannot use that facility and a civil wrong suffered by him will pass unremedied.

g [33] For this reason I consider the judge was entitled and, indeed, right to exercise his discretion as he did. *Rowland v Bock* [2002] EWHC 692 (QB), [2002] 4 All ER 370 was correctly decided. There Newman J made a VCF order in respect of a claimant who risked arrest and extradition to the United States of America on charges of fraud. No doubt special cases may arise. But the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, for making a VCF order. I respectfully consider the Court of Appeal fell into error by having insufficient regard to Mr Polanski's right to bring these proceedings in this country even though he is and will continue to be a fugitive from justice.

j [34] I would allow this appeal and restore the judge's order. Mr Polanski was convicted of a serious crime. His reluctance to return to this country is grounded in a fear that he may be extradited and receive a custodial sentence in California. That does not take the case out of the general rule. However, at the trial the jury will be told these facts and will take them into account on all issues to which they are relevant.

## USE OF A CLAIMANT'S STATEMENTS AS HEARSAY EVIDENCE

[35] I add a brief footnote on a different procedural point raised before the Court of Appeal. Having regard to the conclusion I have reached on the main issue this point does not strictly arise on this appeal. But it is a point of general importance to practitioners. In the present case the Court of Appeal ([2004] 1 All ER 1220 at [53]) set aside the judge's VCF order and added this:

'and [we] further indicate that, if the [claimant] were to seek to put in his statements as hearsay evidence and the [defendants] in those circumstances were to apply to call him to be cross-examined upon their contents, the court would be bound to allow such application and if the [claimant] were not to attend court in person for such cross-examination, the court would then be bound to exclude the statements from evidence.'

[36] I agree with the Court of Appeal that the court's case management powers under CPR 32.1 are wide enough to enable the court to make the orders indicated by the Court of Appeal in this passage. But I do question whether in the present case, had a VCF order been refused, the court would have been 'bound' to make an order excluding Mr Polanski's statements from evidence if he did not present himself in court for cross-examination. Such an exclusionary order should not be made automatically in respect of the non-attendance of a party or other witness for cross-examination. Such an order should be made only if, exceptionally, justice so requires. The overriding objective of the CPR is to enable the court to deal with cases justly. The principle underlying the Civil Evidence Act 1995 is that in general the preferable course is to admit hearsay evidence, and let the court attach to the evidence whatever weight may be appropriate, rather than exclude it altogether. This applies to jury trials as well as trials by judge alone, as noted by Brooke LJ in the judgment of the court in *O'Brien v Chief Constable of the South Wales Police* [2003] EWCA Civ 1085 at [68], [69], [2003] All ER (D) 381 (Jul) at [68], [69].

## LORD SLYNN OF HADLEY.

[37] My Lords, the appellant, who lives in France, claims that he was libelled in an article published in July 2002 in the United States, in this country and in France in the magazine *Vanity Fair* by the respondents. The article made allegations against him of his behaviour in New York in August 1969. The details are set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead to which I refer without repeating.

[38] The appellant has issued proceedings in England but not in the United States or in France. He says that though he can validly issue proceedings here in respect of the libel (which is correct) he cannot come to give oral evidence here because he would be liable to be, and would be likely to be, extradited to the United States to be sentenced in connection with an offence of unlawful sexual intercourse with a 13-year-old girl in 1977 to which offence he pleaded guilty. He fled the United States between conviction and sentence and has not been back there or to the United Kingdom since. As a French citizen he cannot be extradited from France to the United States of America to be sentenced.

[39] He asks accordingly that he should be allowed to give evidence from Paris by video link under CPR 32.3 which provides that 'The court may allow a witness to give evidence through a video link or by other means'. On the face of it there is no restriction on the court's power to permit evidence to be given by video link but the grant of permission is a matter for the discretion of the court which itself



a in my view may be affected by policy as well as by case management considerations.

[40] His present application raises at least two policy considerations which are in conflict. The first is that the court should not frustrate his accepted right to sue in the civil courts here by refusing a procedural step provided for by the rules when there is no valid reason to do so. The second is that the civil courts should  
b not take steps the effect of which is to frustrate or impede the due execution of the criminal procedure of another state with which the United Kingdom has an extradition treaty and under which if the appellant were in England the United Kingdom would be required to respond to a request for his extradition so that he could be sentenced and obliged to comply with any sentence imposed.

[41] On the one hand thus if he comes here to give evidence and is extradited  
c the criminal proceedings in the Californian court can continue, as in the interests of justice it is said they should. It was a serious offence which he admitted and he only avoided punishment because he had the wherewithal to flee, and did flee, the United States to live in a country from which he could not be extradited. On the other hand if he is allowed to give evidence by video link he will not be  
d extradited, the criminal proceedings in California will not continue and he will avoid punishment. He will, however, be able to pursue his civil claim for libel in England. If he cannot give evidence by video link he will not realistically be able to come here to give evidence or he will be arrested and extradited. If he cannot give oral evidence in one way or another his case probably cannot be pursued effectively or perhaps at all.

[42] There are strong arguments both in favour of and against his being  
e allowed to give evidence by video link as the judgments of Eady J on the one hand and the Court of Appeal on the other ([2003] EWCA Civ 1573, [2004] 1 All ER 1220, [2004] 1 WLR 387), and the differing views that my noble and learned friends Lord Nicholls and Lord Carswell show. They are set out so clearly that it  
f is not necessary to repeat them more.

[43] It seems to me however that as a starting point it is important to recall that although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological developments, evidence by video link is both an efficient and an effective way of providing oral evidence both  
g in-chief and in cross-examination. Eady J's experience led him 'to believe that there is in most cases very little, if any, actual disadvantage or prejudice to either side when that means is adopted' and that 'my experience is that the process of cross examination takes place as naturally and freely as when a witness is present in the courtroom'. Thomas LJ's opinion was very much to the same effect. It may be, however, that in different types of case the balance tilts more in favour  
h of evidence in a courtroom. It has been suggested that defamation actions are one such type of case. Even so it seems to me clear that video link evidence cannot be ruled out ab initio as not being effective in this sort of case.

[44] However, as to whether as a general procedure, video link evidence should be allowed, it is relevant to refer to annex 3 to the Practice Direction to  
j CPR Pt 32. It is said that (see para 2):

'[Video conferencing (VCF)] is, however, inevitably not as ideal as having the witness physically present in court ... A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation.'

[45] As between the parties, if all other questions of policy are ignored, it seems here that the use of video link could be efficient and fair and contribute to the economic disposal of the litigation. If indeed there is any disadvantage it may be to the person asking for video link evidence and it is not established that the respondents would be adversely affected by the use of video link evidence.

[46] It weighs heavily in the appellant's favour that this article, if not true, is a serious and unpleasant libel only published some 33 years after the incident and with a motive about which it would be wrong to speculate. On any view it is one in which his desire to clear his name from the slur, whatever other suggestions may have been made about his conduct in sexual matters, is well understandable.

[47] It is also clear that whether or not he could have sued in France or the United States of America he was entitled to start an action here and for it to be pursued in accordance with our procedural rules, those which are mandatory and those which include the power of the court to regulate the way in which evidence may be given. It is clear that the fact that he is a fugitive offender does not bar him from starting proceedings any more than an alleged terrorist is barred from claiming that his human rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 have been violated.

[48] It does not, however, follow that when it comes to the exercise of its discretion as to how permissive powers are exercised, the court cannot have regard to all the circumstances of the particular case. The guidance notes state 'A judgment must be made in every case in which the use of VCF is being considered' in respect of the matter specified. In my view those matters are not exclusive and it may be necessary to consider the significance of other matters.

[49] It is thus in my opinion relevant to inquire why he asks for this permission. The reason is clear and there is only one reason. It is to avoid the risk or likelihood of arrest and extradition and to escape sentence and punishment in the United States of America for an admitted offence. No other reason is suggested as to why video link evidence should be provided or is needed.

[50] In this connection the appellant can no doubt say that the extradition treaty does not in terms require the United Kingdom to seek to bring him here or to avoid any step which would result in his not having to come here. It only needs to extradite when he is in fact in the United Kingdom. At present he is not actually in the United Kingdom so that there is no treaty obligation to extradite. But that is too narrow a construction of the appropriate policy. Just as the United Kingdom has an interest in ensuring that people wanted here for criminal trial or following conviction here are brought here by extradition from other states, so by the very nature of the extradition process the United Kingdom has an interest in seeing that those who have been convicted are returned, in this case, to carry out their sentences. It seems to me that to accede to a request like the present, whose avowed sole aim is to avoid his being extradited, in the absence of other overriding considerations compelling the grant of the application, is contrary to public or judicial policy.

[51] The position might well be different if there is a valid self-standing reason for allowing the evidence to be given by video link and the avoidance of punishment or extradition are incidental consequences. So also it may in other cases be relevant to consider whether being a defendant rather than a plaintiff (so that there is no choice about being a party to the proceedings) would more readily justify the order for a video link.

a [52] It is relevant in the present case to consider whether proceedings elsewhere were open to the appellant. It seems that he could not sue in the United States whilst out of the jurisdiction as a fugitive offender and if he were to go back and take his sentence it might not be possible for him effectively to pursue his claim. To say that he could leave the claim until he was free again after serving due sentence is subject to obvious difficulties. I am prepared to assume  
b that he could not effectively take proceedings in the United States. But the same is not true it seems of his position in France of which he is a citizen and where he resides. True there is a short limitation period but as far as I can see he began his action in England well within the limitation period applicable in France when he could have sued there. I have not seen an acceptable excuse put forward on his behalf as to why he could not have sued in France. The publication in France was  
c in smaller numbers than in England and much less than that in the United States of America. It may be for that and other reasons that he would be likely to recover less damages in France than he would in the United Kingdom. That does not seem to be here a significant reason for not suing in France since, as I understand it, the appellant's motive is not to secure a large sum of money but to  
d clear his reputation of what he regards as a nasty slur. Qualitatively if not quantitatively that could be done as well in France as in England.

[53] It has been suggested that since the language of the article is English it could be more easily dealt with in an English speaking country. There are cases where that is likely to be true, where there are nuances or refinements of language not easy to translate. The words here are, however, direct and clear. I  
e do not see that a French judge would have difficulty in understanding what is said very baldly or what is its alleged effect.

[54] It does not follow, as seems to be suggested, that if the video link is refused here a fugitive offender can never in any case assert his civil rights without risking extradition and imprisonment. His evidence may not be needed  
f where he is asserting either a right to property or damages for breach of a written contract which is admitted. He may be able to sue elsewhere.

[55] I agree with Jonathan Parker LJ that an English court would be most unlikely to grant a video link approval where the sole reason was that the applicant should be able to avoid going back to England where he would be liable to sentence and perhaps punishment or indeed liable to prosecution. It seems to  
g me, as a matter of comity, that the same should apply to an application by the United States between which country and the United Kingdom an extradition treaty exists. If he was sought in order to face charges rather than to receive sentence for a conviction following a plea of guilty, different considerations might, but would not necessarily, arise.

h [56] The task of the court here is one of balancing different policy considerations and not merely deciding case management. Where a person convicted on his own admission flees the jurisdiction, it seems to me that in the absence of special factors compelling a different result, a video link conference may and should here be refused where the sole reason for asking for it is that he  
j wishes to escape conviction or sentence in the country where he has commenced proceedings or to avoid extradition to another country for the same reason. The mere fact that the person cannot pursue proceedings here does not necessarily mean that a video link must or should be granted. The policy requirement of satisfying the criminal sentence is by no means less important than the desirability of his suing in libel for an allegation which is serious but no more serious than the criminal offence of which he has been convicted. The possibility

of suing in France is a further contraindication to any obligation to grant such a video link. a

[57] Accordingly in my view the learned judge to whose great experience in these matters tribute has rightly been paid did not give the necessary weight to the policy arguments to which I have referred.

[58] I agree with what Lord Carswell has said about possible cross-examination on written statements admitted by way of a hearsay notice and like Simon Brown LJ I do not consider that to refuse a video link would amount to a breach of art 6 of the convention. I would, therefore, like Lord Carswell and substantially for the reasons he gives, dismiss the appeal. b

### LORD HOPE OF CRAIGHEAD. c

[59] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. I agree with it, and for all the reasons that he has given I would allow the appeal and restore the order of Eady J. But, as we are differing from a unanimous decision of the Court of Appeal (Simon Brown, Jonathan Parker and Thomas LJ) and as we are not ourselves unanimous, I should like to explain briefly in my own words why, like my noble and learned friend Baroness Hale of Richmond, I too have come to this conclusion. d

[60] As Lord Nicholls points out, it would not be satisfactory for your Lordships to dispose of this issue, as the Court of Appeal did, by saying that it all depends on the circumstances: see [2003] EWCA Civ 1573 at [46], [2004] 1 All ER 1220 at [46], [2004] 1 WLR 387. A general rule must be identified. The question then is, what is the general rule to be? Is the fact that the applicant for an order under CPR 32.3 wishes to remain outside the United Kingdom so that he can avoid the normal processes of the law in this country a sufficient reason in itself for refusing to allow him to give evidence by means of a video link? Or is the court, as a general rule, not entitled to decline to make the order on this ground? e

[61] I take as my starting point Eady J's observation that nothing that had been said to him led him to conclude that he would be justified in shutting out the appellant from access to justice in these proceedings in his attempt to vindicate himself in respect of the publication in this jurisdiction of the *Vanity Fair* article. The question whether the administration of justice would be brought into disrepute if his order is allowed to stand is said to raise a question of public policy. But it also raises a question about access to justice. On the one hand a fugitive from justice must accept the consequences of his criminal act. He is not entitled to seek the assistance of the court in seeking to avoid these consequences. That is the essence of the public policy objection. But access to justice is also founded on the rule of law, and in this respect too the rule of law informs public policy. Where civil rights have been infringed the law provides remedies. To deny a fugitive access to the courts where his rights have been infringed is to deny him access to those remedies. f

[62] As the search is for a general rule, the particular circumstances of this case need to be viewed more generally. The appellant complains of libel. But others in his position may have claims in this jurisdiction for the infringement of their property rights, as Lady Hale has pointed out, or may have claims for damages for personal injury. The general rule must be capable of being applied generally, irrespective of the nature of the civil right that the fugitive seeks to enforce. The principle which guarantees access to justice does not distinguish between g h j



a different types of claim, nor does it distinguish between different classes of litigant.

[63] The appellant did not commit his criminal act in this country. That does not, of course, mean that the public interest in furthering the ends of justice is less important in his case than it would have been if his crime had been committed here. The general rule ought not to depend on where or when the crime was committed. So it should be capable of being applied generally to all fugitives, irrespective of the jurisdiction in which the crime was committed and irrespective of the particular processes which the authorities might wish to pursue against him were he to set foot in this country.

[64] But not all fugitives abroad can remain at large indefinitely. Extradition is the normal process by which they can be brought here to face justice, and in the majority of cases extradition will be available. Where extradition arrangements are in place fugitives abroad are likely, as are domestic fugitives who are seeking to escape the ends of justice, to wish to remain out of sight for as long as possible. They are not likely to risk revealing their whereabouts by pursuing civil claims in this country. So we are not dealing here with fugitives who are amenable to the ordinary processes. The class of fugitives who will be in a position to seek an order under CPR 32.3 without compromising their liberty is a limited one. It is limited to fugitives who cannot legally be extradited to this country, or who cannot legally be extradited to countries to which the United Kingdom would be under an obligation to extradite them if they were to come here. In practice the class is confined to fugitives in countries with whom there is no extradition treaty and to those like the appellant to whom, as citizens of the countries in which they reside, a constitutional right is given not to be extradited.

[65] This brings me to what I see as the critical factor. It is the factor that leaves me in no doubt that the general rule should be that the fugitive's unwillingness to come to this country is not in itself a reason for refusing to allow his evidence to be given through a video conference link. This is that the granting or refusing of the order will have no effect whatever on the claimant's continued status as a fugitive. The granting of the order will not help him to escape from the normal processes of the law, nor will declining to grant the order do anything to assist them. This is because he is already beyond the reach of those processes. So long as the claimant remains where he is, and irrespective of whether or not the order is made, those processes will be incapable of reaching him if he is a member of that class of fugitives that cannot be extradited.

[66] The appellant is in that position because he has an undoubted constitutional right, as a citizen of France, not to be extradited. That is his right, and he wishes to exercise it. He is not trying to hide from anybody. It is incorrect, then, to say that his sole aim in seeking the order is to avoid being extradited. He does not need the help of the courts of this country to do that. This is not why he asks for the order to be made in his case. His reason for asking for the order to be made is so that he can give evidence in a case where, leaving aside issues of public policy, he has a legitimate interest in doing so. The effect of refusing the order will not be to assist the normal processes of the law. Its only effect will be to deny him access to justice. I think that Eady J was right to see this as the crucial point which justified the making of the order in his case. But now that we are looking for a general rule, I would hold that the appellant's case falls within the generality of cases where the fact that the claimant wishes to remain outside the United Kingdom to avoid the normal processes of law in this country is not a

ground for declining to allow him to remain abroad and give his evidence by video conferencing (VCF). a

[67] There is however a further point which should be mentioned. For the reasons that Lady Hale has given, with which I respectfully agree, I think that the Court of Appeal went too far when it held that the court would be bound to exclude the appellant's witness statement, which would otherwise be admissible as hearsay evidence under s 1(1) of the Civil Evidence Act 1995, if he did not attend court in person for cross-examination. There are, of course, various procedural safeguards, failure to give effect to which may affect the weight to be given to the evidence. The power under CPR 33.4(1) to permit another party to call the maker of the statement for the purpose of cross-examining him is one of those safeguards. But a failure to attend for cross-examination does not in itself make such a statement inadmissible. b c

[68] The appellant has made it clear that he would be willing to make himself available for cross-examination by VCF if his request that he should be allowed to give his evidence by this means were to be refused on grounds of public policy. Eady J tells us that in his experience the process of cross-examination in this way takes place as naturally and freely as when a witness is in the court room. So it cannot be said that the appellant was seeking to obtain a tactical advantage by offering himself for cross-examination by this means, or that he was attempting to prevent a proper evaluation of the hearsay evidence: see s 4(2)(f) of the 1995 Act. The objection to his giving evidence by this means on grounds of public policy, if upheld, would not have justified the sanction of refusing to admit the witness statement into evidence, for what it might be worth. This is a further indication that the interests of justice are better served in this case by allowing him to give his evidence by VCF, as he seeks to do. d e

#### BARONESS HALE OF RICHMOND.

[69] My Lords, I agree, for all the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, that this appeal should be allowed and the judge's order restored. In brief: (1) as between the parties to this action, there is no doubt that this order was correctly made. The respondent will suffer no prejudice from the appellant's evidence being given in this way; it is common ground that any prejudice will be suffered by the appellant, not least because the jury will be forcibly reminded of the reasons why he is not present in person and will be obliged to take them into account where they are relevant. (2) As between the competing public interest arguments, there is a strong public interest in allowing a claim which has properly been made in this country to be properly and fairly litigated here. (3) Against that, there is also a strong public interest in not assisting a fugitive from justice to escape his just deserts. But the appellant will escape those deserts whether or not the order is made. He will continue to be outside the reach of the United States authorities in any event. All the refusal to allow his evidence to be given by video conferencing (VCF) will do is effectively to deprive him of his right to take action to vindicate his civil rights in the courts of this country. (4) If this were almost any other cause of action, I venture to think that the outcome would not be in doubt. Suppose, for example, that the appellant had suffered personal injuries while in transit from the United States to France and his evidence was necessary to prove either the circumstances of the accident or the extent of his injuries: would we hesitate to allow it to be given by VCF? Suppose, perhaps more plausibly, that there were a dispute about whether the appellant had intellectual f g h j

a property rights in one of his films which is distributed or marketed here: would we hesitate to allow his evidence to be given by VCF? It should not make a difference that the right in question is the right to such reputation as he has, rather than a right to bodily integrity or a right to property. That reputation was attacked in an English language publication and is most appropriately defended in an English language jurisdiction. (5) Generally, therefore, I agree that this should be an acceptable reason for seeking a VCF order, although there may be cases in which the affront to the public conscience is so great that it will not be a sufficient reason. This is not such a case.

c [70] I wish, however, to expand a little on the question of whether the appellant's witness statement should have been admitted if he were not permitted to give oral evidence by VCF. The judge assumed that if he were not called to give evidence, his witness statement would be admitted as hearsay evidence. The Court of Appeal took the view that it would not: indeed they said in terms that if the appellant failed to attend in person to be cross-examined on his witness statement, the court would be 'bound' to refuse to admit it: see [2003] EWCA Civ 1573 at [53], [2004] 1 All ER 1220 at [53], [2004] 1 WLR 387. In my view this goes far too far.

e [71] It remains the general procedural rule that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence: see CPR 32.2(1)(a). But in civil proceedings this is now a matter of procedure rather than substance. The substantive rule is that all relevant evidence is admissible unless there is a rule excluding it. There used to be a rule excluding hearsay evidence, that is, a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated: see s 1(2) of the Civil Evidence Act 1995. To this rule there were numerous exceptions which deprived it of much of its force in civil proceedings. But in 1995 the rule itself was abolished. Section 1(1) of the 1995 Act provides simply that: 'In civil proceedings evidence shall not be excluded on the ground that it is hearsay.'

g [72] This new rule is *not* made subject to the later provisions of the Act which provide for procedural safeguards where hearsay evidence is to be adduced. Section 2 requires a party proposing to adduce hearsay evidence to give such notice of that fact as is reasonable and practicable in all the circumstances to enable the other party to deal with it. But a failure to comply with this requirement (or with the rules of court dealing with how such notice is to be given) 'does not affect the admissibility of the evidence'; rather it may be penalised in costs and taken into account in assessing weight: see s 2(4).

h [73] Section 3 gives power for rules of court to provide that if the party adducing hearsay evidence does not call the maker of the statement to give evidence in person, the other party may do so and may cross-examine him as if he had been called by the party adducing the statement; see also CPR 33.4. Nothing in s 3 or in the CPR provides or suggests that if the maker does not attend for cross-examination at trial his statement becomes inadmissible. j Section 4 provides for the considerations relevant to assessing the weight (if any) to be given to hearsay evidence, the first of which is whether it would have been reasonable or practicable for the maker of the statement to be called as a witness. Section 5(2) provides that the same evidence of credibility or of inconsistent statements is admissible as would be admissible had the maker of the statement been called to give evidence: see also CPR 33.5. Section 6 deals with the

treatment of statements made by people who *are* called as witnesses in the proceedings. a

[74] The substantive law following the 1995 Act, therefore, is that relevant hearsay is always admissible; there are various procedural safeguards aimed at reducing the prejudice caused to an opposing party if he is not able to cross-examine the maker of the statement; but the principal safeguard is the reduced—even to vanishing—weight to be given to a statement which has not been made in court and subject to cross-examination in the usual way. The court is to be trusted to give the statement such weight as it is worth in all the circumstances of the case. b

[75] The 1995 Act was the result of the recommendations of the Law Commission in their report on *The Hearsay Rule in Civil Proceedings* (Law Com No 216) (1993). The main objection to the proposed abolition of the rule was that it might lead to 'superfluous, repetitious, or prolix evidence prolonging trials unnecessarily' (para 4.20). The Commission had canvassed the possibility of an express rule allowing the exclusion of otherwise admissible evidence if its probative value were outweighed by considerations of undue delay, waste of time, or the needless presentation of cumulative evidence. But they declined to recommend an express statutory provision to that effect, for several reasons. One was that they believed that 'although not well known, the power to exclude repetitious and superfluous evidence in fact already exists' (para 4.22(ii)); the scope of the power is explained in paras 4.49 to 4.58). The project referred to the Commission by the Lord Chancellor (as a result of a recommendation of the Civil Justice Review in 1988) had been limited to the hearsay rule in civil proceedings, whereas any statutory provision to this effect could not sensibly be limited to hearsay evidence. The power to exclude needlessly prolix or repetitious evidence was part of the courts' inherent power to control their own proceedings. There was a developing trend away from the judge as 'passive umpire' and towards much stricter court control of the proceedings both before and during the trial. Civil procedure was then in the process of review and development which culminated in the CPR. Hence if it were thought that the courts' exclusionary powers should be made more explicit, this should be done by rules of court rather than by primary legislation (see paras 4.22–4.24, 4.62–4.64). c  
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[76] Thus we find that the power of the court to control evidence is spelled out in CPR 32.1: g

'(1) The court may control the evidence by giving directions as to—(a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court. h

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination.'

[77] This is clearly part of the powers of active case management which permeate the whole of the CPR, all of which are subject to the overriding objective set out in CPR 1.1: j

'(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable—(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with



a the case in ways which are proportionate—(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.'

b [78] It is well within this objective to seek to get the parties to agree as many facts as possible, to limit the number of witnesses who may be called to give evidence on a particular issue, or to restrict the amount of documentary evidence placed before the court. But it would be a strong thing indeed to use such case management powers to exclude the admissible evidence of one of the parties on the central facts of the case. There may be circumstances in which this could be done. The unreasonable refusal of that party to subject himself to cross-examination may be one of them. It might be grossly unjust to the other party, even contrary to his right to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms c 1950 (as set out in Sch 1 to the Human Rights Act 1998), to decide a claim principally on the untested evidence of a party who had not been subject to cross-examination of any sort. But that is not this case. The appellant is quite willing to be cross-examined by a procedure which is agreed will cause no prejudice to the respondent. Accordingly, I share the view of the judge that it would be difficult, not only to exclude his witness statement but also to accord it less weight on the ground that he was unwilling to be cross-examined. In those circumstances, it is infinitely preferable to allow him to give his evidence orally and be cross-examined on it by video link.

f [79] I do not think that CPR 32.7 is any real help on this issue. It is expressly limited to 'a hearing other than the trial'. The general rule at such hearings is still that evidence is given in writing: see CPR 32.2(1)(b). This is no longer limited, as it was under the previous rules, to evidence given on affidavit. The previous rules also made provision, equivalent to that in CPR 32.7, for the court to give permission for the person giving that evidence to be cross-examined and for his evidence not to be used without the court's permission if he failed to attend as required by the court. There is no equivalent express provision as to what is to happen at trial. The considerations applicable to satisfying the overriding objective when an action is being tried are obviously different from those applicable at an interlocutory stage. Even at that stage, the Court of Appeal has hesitated to exclude such evidence altogether: see *Phillips v Symes* [2003] EWCA g Civ 1769, [2003] All ER (D) 105 (Dec).

j [80] The 1995 Act and the CPR are part of a new approach to civil litigation in this country. The court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. The court is to be trusted to evaluate the weight of the relevant evidence for itself. The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not.

## LORD CARSWELL.

[81] My Lords, the appellant Roman Polanski is unwilling to come to this country lest he be arrested and extradited to the United States of America to receive punishment for an offence of unlawful sexual intercourse with a 13-year-old girl which he committed in California in 1977. He fled that jurisdiction in 1978 after pleading guilty to the offence and spending some six weeks in prison undergoing pre-sentence tests, but before sentence was pronounced by the court. He has resided since then in France, from which country he cannot be extradited to the United States, as he has French citizenship and the French Republic will not extradite its citizens. If he were to come to this country he would be liable to be extradited under the terms of the extradition treaty with the United States.

[82] The appellant has brought an action in which he has claimed damages for libel against the respondents, the publishers of the magazine *Vanity Fair*, in respect of the publication in this country of an article which was contained in the July 2002 issue of the magazine and published in several countries. The content of the publication and the issues in the action have been set out in the opinion of my noble and learned friend Lord Nicholls of Birkenhead and I need not repeat them.

[83] In an interlocutory application in the action the appellant sought a pre-trial direction that he be allowed to give his evidence from France by means of a video conferencing link (VCF), pursuant to CPR 32.3, which provides that 'The court may allow a witness to give evidence through a video link or by other means'. His admitted object in seeking this direction is to avoid the necessity of coming to this country, with the concomitant risk that he would be arrested and extradited.

[84] Certain matters are not in dispute. The technology used in giving evidence by VCF is good, so that there is little disadvantage to the other party, as Eady J said in his ruling to which I shall refer. That disadvantage has not, however, been entirely eliminated, and it is to be noted that in para 2 of the VCF guidance set out in annex 3 to *Practice Direction—Written Evidence*, set out in CPR PD 32, it is stated, after the advantages have been enumerated:

'It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use ... In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it.'

I would refer also to the discussion in the judgment of Simon Brown LJ in the Court of Appeal (see [2003] EWCA Civ 1573 at [27], [29], [2004] 1 All ER 1220 at [27], [29]), [2004] 1 WLR 387), in which he accepted that by reason of the factors there set out 'VCF evidence is less ideal even than usual in a case like this'.

[85] Eady J gave a direction on this issue in a ruling on 9 October 2003, in which he carefully set out the several factors which he considered should be balanced in reaching his decision. His conclusion was:

'In all the circumstances, it seems to me that the considerations which I have to take into account in the exercise of my discretion weigh very heavily in favour of this route being taken and the countervailing disadvantage to the defendants is in my judgment very small, if any.'

a If the only factors to be weighed in the balance were those which operated to confer advantage or impose disadvantage on one or other of the parties, I should have no hesitation in accepting that this was a proper and correct exercise of Eady J's discretion.

b [86] In giving his ruling, however, the judge did not take into account the factor of public policy, which was the foundation for the Court of Appeal's reversal of his decision. In pursuance of the principle that people should not be permitted to escape the consequences of their criminal conduct, the law discourages litigants from escaping the normal process of the law, a policy which the order permitting the appellant's evidence to be taken by VCF would tend to undermine. It is one species of the genus described by Lord Diplock in *Hunter v Chief Constable of the West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536 as—

c 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of procedure rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.'

d The principle is one which should be applied on grounds of public policy, not for the benefit of a party who may gain by its application.

e [87] After weighing the relevant considerations, including the principle of public policy which I have described, the Court of Appeal held that in all the circumstances of the case Eady J was wrong to give a direction permitting the appellant to give his evidence by video link. Simon Brown LJ set out his conclusions at [2004] 1 All ER 1220 at [47]:

f 'This respondent is a fugitive offender, convicted of a serious offence for which he has yet to be sentenced. Anxious though he may be to nail what he says is the lie about his having sought (34 years ago) to exploit his tragically deceased wife's name, such a libel action is, as Mr Shields submits, a "volunteer action" (or "action for choice") and, moreover, one which could more appropriately have been brought in the United States where the principal publication took place or in France where the respondent lives. He is invoking this court's jurisdiction for his own benefit, not defending a claim brought against him. He should not be permitted to litigate on special terms. No libel action has ever yet been fought in this country in the claimant's absence (although in one action the claimant gave no evidence at all, and in another the claimant gave evidence by VCF as to damages). This is not the appropriate case for that unique distinction. Clearly the court's general policy should be to discourage litigants from escaping the normal processes of the law, rather than to facilitate this. The order made below to my mind overlooks and undermines that policy. If an order is properly to be made in favour of this claimant then it is difficult to imagine a case when it would not be.'

j Jonathan Parker LJ said (at [58]):

'Had Mr Polanski been convicted in England, it seems to me inconceivable that the English courts would have allowed him, as claimant, to conduct civil litigation here via VCF solely in order to enable him to continue to escape the consequences of his conviction; and I cannot see why the fact that his

conviction was in the United States, with whom the United Kingdom has an extradition treaty, makes any difference.’ a

Thomas LJ concluded (at [63]):

‘In the result there can be no reason, let alone sufficient reason, which can properly be advanced to permit the respondent to give his evidence by VCF and thus to depart from the normal rule that a witness should give evidence in person in the court room and be cross-examined in person on it. He is not being shut out from access to justice; it is entirely his decision as to whether he comes to London to give evidence in support of his claim.’ b

[88] There is an important countervailing factor, that the courts should be slow to resort to public policy considerations which will defeat a claim that ex hypothesi is a good cause of action. That factor was clearly articulated by Lord Lowry in *Spring v Guardian Assurance plc* [1994] 3 All ER 129 at 153, [1995] 2 AC 296 at 326: c

‘I also believe that the courts in general and your Lordships’ House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that ex hypothesi is a perfectly good cause of action. It has been said that public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of on mere generalities and that the burden of proof lies on those who assert that the court should not enforce a liability which prima facie exists. Even if one should put the matter in a more neutral way, I would say that public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail.’ d e

[89] I acknowledge and accept the importance of this principle, which underlies the conclusion of those of your Lordships who would allow the appeal. The ground on which I respectfully differ from that conclusion is that in my judgment greater weight requires to be given to the implications of a decision allowing the appellant to give evidence in this case by video link. f

[90] I may state at once that I would not support the application of the principle in such a way that a person in the position of the appellant would become in effect an outlaw. Mr Pannick QC for the respondents, quite rightly in my opinion, disclaimed reliance on any such use of the principle. I also respectfully agree with the view expressed by Lord Nicholls of Birkenhead in [19] of his opinion that it is not appropriate to have resort to the doctrine of *ex turpi causa non oritur actio*. Nor is it necessary to import into our legal system the full rigour of the fugitive offender doctrine accepted in courts in the United States. g

[91] Where I part company with the majority of your Lordships is in the application of the opposing principles and the weight which should be given to each in a case such as the present. Before the Court of Appeal counsel for the appellant was prepared to accept that, in some cases at least, the court could properly refuse to make a VCF order in favour of a fugitive from justice, that is to say, a litigant who had committed an offence in this country and had left the jurisdiction in order to avoid arrest. Before the House, however, this concession was not forthcoming. If a VCF order is made in the present case in favour of the appellant, one might next find such a fugitive from justice claiming that there is h j



a no sustainable reason why it should be refused to him. For the courts to permit  
a fugitive to give his evidence by video link so that he could stay out of the  
jurisdiction and avoid arrest would in my opinion affront the public conscience  
and bring the administration of justice into disrepute. I do not consider that that  
case could be distinguished by the argument that it would constitute an abuse of  
b the process of the court and that the present case would not fall into that  
category. I do not find it necessary to attempt in this opinion to define the limits  
of abuse of the process of the court, for it seems to me that both that area of the  
law and the one invoked on behalf of the respondent in the present case are  
applications of the same principle, viz the power of the court to prevent misuse  
of its procedure in a way which would bring the administration of justice into  
disrepute.

c [92] When one accepts the validity of the proposition that a claimant who has  
fled from justice in this jurisdiction should not receive the assistance of the court  
to bring a civil claim without giving his evidence in person in court in the  
ordinary fashion, then I do not think that one can easily reach a different  
conclusion in respect of an offender in another jurisdiction who wishes to avoid  
d extradition from this country. They seem to me to be governed by the same  
principle, and if there is a difference between them it is only one of degree. I  
cannot myself accept that, absent other distinguishing factors, it is right to refuse  
one permission to give evidence by VCF and give it to the other.

[93] I therefore consider that the Court of Appeal was correct in its approach  
to the issue. The court has to weigh up a number of considerations. Those which  
e Lord Nicholls has discussed in his opinion are of course of importance and due  
weight must be given to them, as also to those enumerated in the judgment given  
by Simon Brown LJ ([2004] 1 All ER 1220 at [46]). One must take into account on  
one side of the equation the fact that the technology is now well established and  
its use would not cause much prejudice to the respondent. If, as appears  
f probable, the appellant would be unlikely to succeed in his case if he were unable  
to give evidence is obviously a consideration of great strength. As against that is  
the fact that he could have brought timeous proceedings in France if his main  
object is, as he claims, to clear his name—he commenced the action in England  
before the time limit had expired in France. Most heavily against him has to be  
weighed the factor, which to my mind is a very powerful one, that the claimant  
g wishes to have the assistance of the court to give his evidence in a special way,  
which will enable him to avoid the consequences of his criminal act. I consider  
that it would be quite wrong to allow him to do that, even if it were to mean that  
the exercise of his right of action for the publication in this country of a  
defamatory article is fatally inhibited. I agree with the Court of Appeal that this  
h factor should prevail when the balancing exercise is carried out and that the order  
was wrongly made by the judge.

[94] Counsel for the appellant also argued that the refusal to permit the  
appellant to give evidence by video link, which was tantamount to excluding him  
from presenting his case in court, constituted a breach of art 6 of the European  
j Convention for the Protection of Human Rights and Fundamental Freedoms  
1950 (as set out in Sch 1 to the Human Rights Act 1998). I would not accept this  
argument. The European Court of Human Rights has stated and regularly  
applied the principle that the right of access is not absolute. So in *A v UK* (2002)  
13 BHRC 623 at 640, having stated in para 73 of its judgment that the right of  
access to a court constitutes an element inherent in the right to a fair hearing, the  
court continued:

'74. However, the right of access to court is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the state. In this respect, the contracting states enjoy a certain margin of appreciation, although the final decision as to the observance of the convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved ...'

[95] In *Eliazer v Netherlands* (2001) 37 EHRR 892 the court dismissed an application from a person who had been convicted in absentia on an appeal and refused a hearing by the Netherlands Supreme Court because no appeal lay against proceedings in absentia. The court reiterated the same principle (at 897 (para 30)):

'The Court recalls that the right to a court guaranteed by Article 6 of the Convention, of which the right of access is one aspect, is not absolute. It may be subject to limitations, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved. In addition, the compatibility of limitations under domestic law with the right of access to a court guaranteed by Article 6 of the Convention will depend on the special features of the proceedings concerned and account must be taken of the whole of the proceedings conducted in the domestic legal order as well as the functions exercised by a court of cassation whose admissibility requirements are entitled to be more rigorous than those of an ordinary appeal court.'

In *McElhinney v Ireland* (2001) 12 BHRC 114 the court dismissed an application brought by an applicant who claimed that he had been injured by a shot fired by a British soldier who had been carried for two miles into the Republic of Ireland, clinging to the applicant's vehicle following an incident at a checkpoint. He brought proceedings in the Irish courts, which dismissed his claim on the ground of state immunity. The judgment was mainly concerned with the principle of state immunity, but the court (at 125 (paras 39, 40)) added a further ground for rejecting the application: since the applicant could have sued the British government in the Northern Irish courts, the decision of the Irish court did not in these circumstances exceed the margin of appreciation allowed to states in limiting an individual's right of access to court. I accordingly consider that, in application of the principle contained in these cases, no breach of art 6 was involved in the decision of the Court of Appeal to refuse the appellant permission to give his evidence by video link.

[96] I should mention in conclusion one other suggested course which was discussed in the judgment of Thomas LJ and in argument before the House. This was that the appellant might seek to have his written statement admitted by way of hearsay notice given in pursuance of CPR 33.2. Under CPR 33.4, however, the respondent might apply to the court to permit the appellant to attend to be

*a* cross-examined. If he then refused to come to this country for that purpose, then I think that the same policy reasons apply as in the issue of permitting him to give his evidence by video link and that the grounds for allowing the statement to be admitted in evidence are no stronger. I therefore consider that in those circumstances the court should clearly use the provisions of CPR 32.1 to exclude the statement from use in evidence.

*b* [97] For the reasons which I have given I would therefore dismiss the appeal.

*Appeal allowed.*

Dilys Tausz Barrister.

# R (on the application of Gillan and another) a v Metropolitan Police Commissioner and another

[2004] EWCA Civ 1067 b

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, BUXTON AND ARDEN LJ

12, 13, 29 JULY 2004

*Police – Powers – Power to stop, search and detain – Searching for articles of a kind which could be used in connection with terrorism – Senior police officer issuing authorisation – Secretary of State confirming authorisation – Whether authorisation and confirmation lawful – Whether exercise of search powers lawful – Human Rights Act 1998, Sch 1, Pt I, arts 5, 8, 10, 11 – Terrorism Act 2000, ss 44, 45, 46.* c

In August 2003 an assistant commissioner of the Metropolitan Police gave an authorisation relating to the whole of the Metropolitan district under s 44<sup>a</sup> of the Terrorism Act 2000 which allowed police officers to stop and search pedestrians and vehicles, drivers, and passengers without any necessity for reasonable grounds for suspicion. Such an authorisation could only be given if the person giving it considered it expedient for the prevention of acts of terrorism. Under s 45<sup>b</sup> of the 2000 Act the power conferred by a s 44 authorisation could be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and could be exercised whether or not the police officer had grounds for suspecting the presence of articles of that kind. The authorisation lasted for the maximum period of 28 days and was part of a rolling programme of successive authorisations. Each was confirmed by the Secretary of State for the Home Department under s 46<sup>c</sup> of the 2000 Act. The authorisations and confirmations were not made public. In September 2003 an arms fair was held in Docklands, East London, and protests took place against it. The strategy of the police commander in charge included the use of s 44 powers. The first claimant was a student on his way to join a demonstration. He was stopped and searched under s 44. The second claimant, a journalist who was in the area to film the protests, was also stopped and searched under s 44. The claimants applied for judicial review, contending that the authorisation had been ultra vires; that the use of the authorisation by police officers to stop and search the first claimant and other protesters was contrary to the legislative purpose and unlawful; and that the decisions to authorise, and the use of, the powers under ss 44 and 45 of the 2000 Act were a disproportionate interference with, inter alia, the rights to liberty and security, respect for private life, freedom of expression and freedom of assembly and association arising respectively under arts 5<sup>d</sup>, 8<sup>e</sup>, 10<sup>f</sup> and 11<sup>g</sup> of the j

a Section 44 is set out at [5], below

b Section 45 is set out at [5], below

c Section 46, so far as material, provides: '(3) The person who gives an authorisation shall inform the Secretary of State as soon as is reasonably practicable. (4) If an authorisation is not confirmed by the Secretary of State before the end of the period of 48 hours beginning with the time when it is given—(a) it shall cease to have effect at the end of that period ...'



- a European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in the Human Rights Act 1998). The applications were dismissed, and the claimants appealed. They contended, *inter alia*, (i) that a restricted meaning was required to be given to the word 'expedient' in s 44; (ii) that the use of stop and search powers under the authorisation against the claimants had thwarted or frustrated the legislative purpose of the 2000 Act; and
- b (iii) that the authorisation, its confirmation and the use of the stop and search powers thereunder constituted a disproportionate interference with the claimants' convention rights.

c **Held** – (1) There was no justification, even under the necessary restrictive construction, for giving other than the ordinary meaning to the language of ss 44 and 45 of the 2000 Act. The word 'expedient' should be given its ordinary meaning of advantageous, and it was entirely consistent with the framework of the legislation that a power of that sort should be exercised when a senior police officer considered that it was advantageous to exercise the power for the prevention of acts of terrorism. So interpreted, the existence of ss 44 and 45 could

d not conflict with the convention (see [30]–[32], below).

(2) The general approach that the court should adopt when reviewing the exercise of a power which was provided by Parliament for the prevention of terrorism was that the court would not readily interfere with the judgment of the authorities as to the action that was necessary. However, what action was or was

e not proportionate was an issue for the judgment of the court and it would usually place in the scales the authorities' evaluation of the action needed to avoid a terrorist incident as against the court's assessment of the effect on a member of the public (see [33], [35], below).

(3) In the instant case, the stopping and searching of the claimants, using the powers vested in the police under the authorisation pursuant to s 44 of the 2000 Act, was justifiable under art 5(1)(b) of the convention as detention in order to secure the fulfilment of any objective prescribed by law. While art 8 applied to the stop and search process, arts 10 and 11 could not be invoked, as in view of the very limited powers of detention that were created by s 45(4) there was nothing

g in the general powers created by the terms of the 2000 Act and the authorisations given under it that threatened either the right of freedom of expression or the right of assembly. However, while a police officer did not have to have grounds for suspecting the presence of suspicious articles before stopping a citizen in any particular case, he could only be authorised to use those powers for limited

h d Article 5, so far as material, provides: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (b) the lawful arrest or detention of a person ... in order to secure the fulfilment of any obligation prescribed by law ...'

e Article 8, so far as material, provides: '1. Everyone has the right to respect for his private ... life ... 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ...'

j f Article 10, so far as material, provides: '1. Everyone has the right to freedom of expression ... 2. The exercise of these freedoms ... may be subject to such ... restrictions ... as are prescribed by law and necessary in a democratic society, in the interest of national security ... or public safety ...'

g Article 11, so far as material, provides: '1. Everyone has the right to freedom of peaceful assembly ... 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety ...'

purposes and where a decision had been made that the exercise of the powers was expedient for the serious purpose of the prevention of acts of terrorism. That system, so controlled, could not be said to be arbitrary in any sense that deprived it of the status of being 'not in accordance with a procedure prescribed by law' or 'not in accordance with the law' in the autonomous meaning of 'law' as understood in convention jurisprudence. Nor did the lack of publication of authorisations and their confirmation mean that what occurred was not a procedure prescribed by law (see [44], [47], [49], below).

(4) Given the history of global and national incidents of terrorism, the authorisation and confirmation of a random power of search could not, as a matter of general principle, be said to be an unacceptable intrusion, that was neither necessary nor proportionate, into the human rights of those who were searched in the absence of some identified specific threat. The rolling programme of authorisation did no more than enable the commander in a particular area to have the powers available when operationally required without going back to the Secretary of State for a particular use (see [50], [51], below).

(5) Having regard to the nature of the arms fair, its location, and the fact that a protest was taking place, the police commander had been entitled to decide that s 44 powers should be exercised in connection with the arms fair (see [52], below).

(6) The onus was on the commissioner of police to show that the interference with the claimants of which complaint was made was lawful. It was not possible to say, on the evidence before the court, that that onus had been discharged. Accordingly, the appeal against the Secretary of State would be dismissed and there would be no order in relation to the appeal against the commissioner of police (see [56], [58], below).

Per curiam. It is important that, if the police are given exceptional powers, because of threats to the safety of the public, they are prepared to demonstrate that they are being used with appropriate circumspection (see [54], below).

## Notes

For interference with terrorist organisations, see Supp to 11(1) *Halsbury's Laws* (4th edn) (reissue) paras 102–138, and for the rights to liberty and security, respect for private life, freedom of expression and freedom of association and assembly, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 127–129, 150, 158–161.

For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 8, 10, 11, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705, 707.

For the Terrorism Act 2000, ss 44, 45, 46, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue), 2093, 2094, 2095.

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- f** *Esbest v UK* (1994) 18 EHRR CD 72, E Com HR.  
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- g** *Ireland v UK* (1978) 2 EHRR 25, [1978] ECHR 5310/71, ECt HR.  
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## Appeal

The claimants Kevin Gillan and Pennie Quinton appealed with permission of the Divisional Court (Brooke LJ and Maurice Kay J) from its decision on 31 October 2003 ([2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct)) dismissing their applications for judicial review of the lawfulness of their being stopped and searched on 9 September 2003 by police officers relying on an authorisation made under s 44 of the Terrorism Act 2000 by Assistant Commissioner Veness of the Metropolitan Police and confirmed by the Secretary of State for the Home Department. The facts are set out in the judgment of the court. g

h

*Rabinder Singh QC and Rajiv Menon* (instructed by *James Welch, Liberty*) for the appellants.

*John McGuinness QC* (instructed by *David Hamilton*) for the commissioner. j

*Philip Sales and Philip Coppel* (instructed by the *Treasury Solicitor*) for the Secretary of State.



a 29 July 2004. The following judgment of the court was delivered.

## LORD WOOLF CJ.

### INTRODUCTION

b [1] This is an appeal against the decision on 31 October 2003 of the Divisional Court (Brooke LJ and Maurice Kay J) ([2003] EWHC 2545 (Admin), [2003] All ER (D) 526 (Oct), (2003) Times, 5 November which dismissed the appellants' claims for judicial review. The appellants had challenged the lawfulness of their being stopped and searched on 9 September 2003 by police officers. The police officers rely on an authorisation made under s 44 of the

c Terrorism Act 2000 by the assistant commissioner of the Metropolitan Police and its subsequent confirmation by the Secretary of State to justify their actions.

d [2] The Divisional Court granted permission to appeal because the claims of the appellants, which were brought by Liberty, raise issues of importance as to the role of the courts when proceedings for judicial review involve issues of national security and the extent of the powers of the police under s 44 of the 2000 Act to stop and search random members of the public.

### THE LEGAL FRAMEWORK

e [3] Because the statutory provisions are critical to the outcome of these appeals, it is convenient to begin by examining them.

#### *Sections 41–43: the 'reasonable suspicion' provisions*

f [4] Part V of the 2000 Act provides the police with wide-ranging powers for use in countering terrorism. Sections 41, 42 and 43 are provisions relating to the arrest or stop and search of an individual where the police officer has a reasonable suspicion that the individual in question is a terrorist. These provisions are not directly at issue in this appeal. Their relevance is because the powers that are in issue do not require for their use that the police officer exercising the power has to have a reasonable suspicion.

#### *Sections 44–47: stop and search pursuant to an authorisation*

g [5] The relevant parts of ss 44 and 45 of the 2000 Act with which we are primarily concerned are in terms that are different in important respects and we set them out below (emphasis added):

h 44.—(1) An authorisation under this subsection authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search—(a) the vehicle; (b) the driver of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a passenger.

j (2) An authorisation under this subsection authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search—(a) the pedestrian; (b) anything carried by him.

(3) *An authorisation under subsection (1) or (2) may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.*

(4) *An authorisation may be given ... (b) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police ...* a

45.—(1) The power conferred by an authorisation under section 44(1) or (2)—(a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind. b

(2) A constable may seize and retain an article which he discovers in the course of a search by virtue of section 44(1) or (2) and which he reasonably suspects is intended to be used in connection with terrorism.

(3) A constable exercising the power conferred by an authorisation may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves. c

(4) Where a constable proposes to search a person or vehicle by virtue of section 44(1) or (2) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped. d

(5) Where—(a) a vehicle or pedestrian is stopped by virtue of section 44(1) or (2), and (b) the driver of the vehicle or the pedestrian applies for a written statement that the vehicle was stopped, or that he was stopped, by virtue of section 44(1) or (2), the written statement shall be provided. e

(6) An application under subsection (5) must be made within the period of 12 months beginning with the date on which the vehicle or pedestrian was stopped.

[6] The combined effect of ss 44 and 45 is that, after an authorisation is given by a senior officer under s 44, a police officer in uniform will be able to stop and search vehicles and persons without there being any precondition of reasonable grounds of suspicion. f

[7] Section 46 deals with the duration of the authorisation. Each authorisation must be given for a specific period of time, and in no case can a period be greater than 28 days (although, as explained below, 'rolling authorisations' are possible). Where an authorisation has been given, the Secretary of State must be given notice of it as soon as is reasonably practicable (see s 46(3)). The Secretary of State must decide whether or not to confirm the authorisation. If it is not confirmed within 48 hours of the time it was given, the authorisation ceases to have effect (see s 46(4)). If the Secretary of State decides to confirm the authorisation he may do so either for the whole of the period authorised under s 44 or for any shorter period. Pursuant to s 46(5) and (6), the Secretary of State may also vary or cancel an authorisation. g  
h

[8] It will be noted that, while s 44 confers an extremely wide power to intrude on the privacy of members of the public, there are significant statutory restraints on its use. There is: (i) the requirement for the authorisation by a senior police officer and its confirmation by the Secretary of State; (ii) the limited life of the authorisation and the requirement for it to be regularly renewed; and (iii) the precisely defined purpose for which the power may only be exercised. j

- a [9] It is an offence under s 47 not to stop when required to do so or to interfere with the exercise of the power.

#### THE CODE OF PRACTICE

- b [10] Before proceeding further reference should be made to the Police and Criminal Evidence Act 1984 Code of Practice A, issued by the Secretary of State for the Exercise by Police Officers of Statutory Powers of Stop and Search which came into force on 1 April 2003 (the code). It is required to be readily available at all police stations for consultation by all police officers. Its existence should be known to all police officers. The first general principle to which it refers (p 2 (para 1.1)) is that the powers must be 'used fairly, responsibly, with respect for people being searched'.

- c [11] The code has a section dealing with s 44 of the 2000 Act powers. It summarises the effect of the provisions to which we have referred. Included in the information provided is the statement (p 8 (para 2.25)) that the 'powers must not be used to stop and search for reasons unconnected with terrorism' and that the power should be used (p 9 (para 2.26)) 'to search only for articles which could be used for terrorist purposes'. The code also contains valuable requirements as to recording and monitoring of the use of powers that should help to avoid the powers being abused. The code also has notes of guidance amplifying the provisions of the code. The existence of the code is a further safeguard designed to combat the risk of abuse of stop and search powers.

- d [12] A statement of Catherine Byrne describes the process of authorisation and confirmation. The authorisation is reviewed by the appropriate departments in New Scotland Yard and the Home Office. The authorisation is then considered in detail by the Secretary of State before the confirmation is issued.

#### f THE SEQUENCE OF EVENTS

##### *The authorisations*

- g [13] On 13 August 2003, Assistant Commissioner Veness of the Metropolitan Police gave an authorisation under ss 44(1) and (2) of the 2000 Act in relation to the whole of the Metropolitan district. The authorisation ran for 28 days until 9 September 2003. It was duly confirmed by the Secretary of State. On 9 September 2003, Assistant Commissioner Veness gave a further authorisation under the same provisions, again in relation to the whole of the Metropolitan district. This authorisation again ran for 28 days until 6 October 2003. On 11 September 2003, the Secretary of State confirmed the further authorisation under s 46(4) of the 2000 Act, making no variations to it. This was part of a programme of successive authorisations or a 'rolling programme' which has been taking place since the coming into force of ss 44–47 of the 2000 Act on 19 February 2001.

- j [14] The appellants made a successful application that further evidence should be admitted for the hearing of this appeal. The evidence relates to the number of people who have been stopped and searched since the 'rolling' s 44 authorisation in the Metropolitan district came into force. The appellants suggest that the evidence shows that the authorisations have become part of 'day-to-day policing'. They rely on the evidence in support of their contention that the making of the authorisation and the exercise of the powers under Pt V

of the 2000 Act constitute a disproportionate infringement of fundamental rights.

*The searches of the appellants*

[15] Between 9 and 12 September 2003, there was a Defence Systems and Equipment International Exhibition (the arms fair) at the ExCeL centre in Docklands, East London. The arms fair was the subject of protests. The policing of the protests was under the control of Commander Messenger. He set the strategy which included the use of s 44 powers.

[16] The first appellant is a 26-year-old student. At about 10.30 am on 9 September 2003, he was riding a bicycle and carrying a rucksack near the arms fair; he was on his way to join a demonstration against the arms fair. The first appellant was stopped and searched by two police officers who told him he was being searched under s 44 of the 2000 Act for articles concerned in terrorism. He was handed a notice to that effect. He says he was told in response to his question as to why he was being stopped that it was because a lot of protestors were about and the police were concerned that they would cause trouble. Nothing incriminating was found (although certain papers, which had a connection with the demonstration but no connection with terrorism, were seized by the officers) and the first appellant was allowed to go on his way. He was detained for roughly 20 minutes.

[17] At about 1.15 pm on 9 September 2003, the second appellant, wearing a photographer's jacket, carrying a small bag and holding a camera in her hand, was stopped close to the arms fair. She had apparently emerged from some bushes. The second appellant was in the area to film the protests against the arms fair. She was searched by a police officer from the Metropolitan Police notwithstanding that she showed her press cards to show who she was. She was told to stop filming. The police officer told her that she was using her powers under ss 44 and 45 of the 2000 Act. Nothing incriminating was found and the second appellant was allowed to go on her way. The record of her search showed she was stopped for five minutes but she thought it was more like thirty minutes. She says she felt intimidated and she was so distressed that she did not feel able to return to the demonstration although it had been her intention to make a documentary or sell footage of the demonstration.

[18] Following complaints from the appellants and others, Liberty investigated the extent and duration of the authorisations being granted. It appears that, up until the point that Liberty became involved, each authorisation had been given and confirmed without this being made public.

THE ORIGINAL GROUNDS OF CHALLENGE

[19] The nature of the appellants' case has developed as these proceedings continued. The original grounds of challenge can be summarised as follows.

(i) The 13 August 2003 authorisation and its successor were ultra vires.

(ii) The use of the s 44 authorisation by police officers to stop and search the first appellant and other protestors was contrary to the legislative purpose and unlawful. In the circumstances it was clear that the guidance given to police officers was either non-existent or calculated to cause officers to misuse the powers. In the alternative, the guidance given was inadequate or misleading.

(iii) The decisions to authorise and the use of the powers under ss 44 and 45 to stop and search the appellants and other protestors were a disproportionate



- a interference with the rights arising under arts 5, 8, 9, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

THE DECISION OF THE COURT BELOW

b *The first ground of challenge*

- [20] The court noted (at [31]) that the appellants' then counsel (who did not appear before us) had submitted that there were a number of 'clear indications' that Parliament intended a s 44 authorisation to be given and confirmed only in response to 'an imminent terrorist threat to a specific location in respect of which normal police powers of stop and search were inadequate'. This very narrow interpretation of the s 44 powers was rejected by the court. It was inconsistent with the structure of the 2000 Act. Parliament had envisaged that an anti-terrorist authorisation might encompass an entire police area or district.

- c [21] Section 44(4) gave the relevant senior officer a broad discretion as to the width of the authorisation required, subject to the Secretary of State's confirmation. The court rejected the appellants' construction and concluded (at [35]) that 'the judicial function in scrutinising a decision of this kind is necessarily a limited one'. The assessment of national security and the measures required to protect it was one primarily for the government and Parliament. There was no ground upon which the court should set aside the decision in question.

*The second ground of challenge*

- f [22] The second challenge was against the police alone. The court noted that the court faced considerable difficulty because of the paucity of evidence submitted by the police relating to the second ground. Given the sweeping nature of the powers, the police were obliged to take particular care to ensure that such powers were not used arbitrarily or capriciously. If the police did not take care, they would leave themselves open to challenges such as the present one or even private law actions.

- g [23] The court stated (at [56]) that it had 'reviewed the evidence in this case anxiously'. There was (at [58]) 'just enough' evidence available to persuade the court that, in the absence of any evidence that the powers in question were being habitually used on occasions which might represent symbolic targets, the arms fair was an occasion where the use of s 44 was needed, 'but it was a fairly close call' and the police needed to review their practices. The court was also
- h satisfied that the assistant commissioner understood the purpose of the s 44 powers and the need to ensure that they were not misused.

*The third ground of challenge*

- j [24] The third ground was founded on the proposition that the s 44 authorisations and the exercise of the powers under them constituted a disproportionate interference with the appellants' rights under arts 5, 8, 9, 10 and 11 of the convention. The appellants had submitted that the use of the powers in question (although they could, in appropriate circumstances, permissibly interfere with fundamental rights) was not proportionate in the context of peace protestors. Additionally, the scale of interference was

significantly more in this instance than what was necessary to accomplish the legislative purpose. a

[25] The court noted (at [61]) that 'if there were any question of the police using these powers as part of day-to-day policing on the streets of London' then the appellants' submission with regard to the proportionality of the powers' use would have 'considerable force'. However, there was no evidence of this before the court. The court concluded that the threat posed by terrorist activity was such that it provided the necessary justification for any violation of the appellants' rights under arts 8, 9, 10 and 11 that might otherwise be established. No breach of art 5 was either pursued by counsel or found. b

#### OUR CONCLUSIONS ON THE GROUNDS OF APPEAL c

[26] There are six grounds of appeal before us which differ from those argued in the court below. We will set them out and will then seek to provide an answer as well as dealing with our concern, that echoes that of the Divisional Court, as to the limited nature of the evidence produced in these proceedings. d

##### *The first ground*

(a) This is that the Divisional Court erred in concluding that the authorisation made by the first respondent on 13 August 2003, and confirmed by the second respondent on 14 August 2003, was lawful. The ground is linked to an allegation that the Divisional Court had inappropriately shown deference to the decision of the respondents in coming to their interpretation of the powers contained in s 44. In particular, Mr Rabinder Singh QC argues that a restricted meaning was required to be given to the word 'expedient' in s 44(3). By contrast he contends that the only conclusion that can be drawn from the extent of the use of the powers is that the authorisations were being used as an additional tool by the police with the 'full sanction' of both respondents. This is not what Parliament intended and therefore the making and confirmation of the authorisations was unlawful. e f

##### *The second ground*

(b) The Divisional Court erred in concluding that the use of stop and search powers under the authorisation against the appellants did not thwart or frustrate the legislative purpose of the 2000 Act. This ground is based on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997. It primarily concerns the first respondent since it is a ground that deals with the exercise of the authorisation under s 44, and does not directly relate to the second respondent. The appellants submit that there was a failure on the part of the police to ensure that the duty to give appropriate instructions to officers relating to the exercise of powers under s 44 was actually effected. As the appellants note, the statement of Commander Messenger (who was in charge of policing the arms fair) does not reveal what instructions (if any) were given to officers under his command prior to the stop and search of the appellants on 9 September 2003. The appellants contend that: (a) the only thing that officers were told was that a s 44 authorisation was in force; and (b) there is no evidence that the respondents had intelligence that the arms fair was a terrorist target or that terrorists were amongst the ranks of those protesting (point (b) is not in dispute). g h j

*The third ground*

- a (c) The allegation is that the Divisional Court failed to construe ss 44–47 of the 2000 Act in accordance with the ‘principle of legality’. The appellants describe the principle of legality as being ‘that fundamental rights cannot be overridden by, or pursuant to, general words’ and submit that such a principle was recognised in *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115. Although this argument was not advanced in the same terms in the Divisional Court, it is similar to the appellants’ submission as to statutory construction which was argued below. The appellants argue that the Divisional Court’s construction (at [81]) of the word ‘expedient’ in s 44(3) as ‘advantageous’ or ‘suitable to the circumstances of the case’ should have taken into account more fully the following wording, namely: ‘for the prevention of acts of terrorism’.
- b
- c Fundamental rights were being overridden by the wide interpretation of the ‘general’ word ‘expedient’.

*The fourth ground*

- d (d) Here it is contended that the Divisional Court failed to construe ss 44–47 of the 2000 Act in accordance with the requirements of s 3 of the 1998 Act so that it would be compatible with rights under the convention, in particular those contained in arts 5, 8, 10 and 11.

*The fifth ground*

- e (e) This ground is also based on the 1998 Act. It is suggested that the Divisional Court erred in concluding that the authorisation, its confirmation and the use of the stop and search powers thereunder were prescribed by law, and constituted a disproportionate interference with the appellants’ rights under arts 5, 8, 10 and 11. The appellants contend that the authorisation, its confirmation and the use of powers under it are not prescribed by law since the expression ‘prescribed by law’ requires a provision to be ‘adequately accessible and reasonably foreseeable’.
- f The making of the confirmation and the extent of the authorisation were not made public and it was only when Liberty started to ask questions that its existence became known. The citizen could do nothing to ‘regulate their conduct to avoid being stopped and searched’. In addition, the appellants submit
- g that the authorisation and the use of powers under it, against peace protestors, are not a proportionate means of achieving the legislative purpose of preventing acts of terrorism. Interference with human rights had not been minimised. The power was being used as if it were ‘part of day-to-day policing on the streets of London’.

*The sixth ground*

- h (f) The contention under this head is that the Divisional Court failed to give any consideration to art 15 of the convention and the power of the United Kingdom to take measures to derogate from its obligations in times of public emergency threatening the life of the nation. Had there been such an emergency, Parliament
- j would and should have made an appropriate derogation rather than passing ‘legislation in a vague and overbroad manner’. It is also argued that if there were really a public emergency threatening the nation, Parliament, as is permitted by art 15, would have derogated from its obligations under the convention in order to address such an emergency. If no such derogation is made, then the 2000 Act should be construed very narrowly and in accordance with the convention.

## CONCLUSIONS

[27] To resolve the issues to which this appeal gives rise it is important to have clearly in mind the different levels at which the complaints need to be considered. These levels are as follows: (i) that of the 2000 Act. What is suggested is that s 44, in view of its subject-matter; should be construed restrictively. We will describe this as the 'interpretation question'; (ii) that of the assistant commissioner (here Mr Veness) who in his discretion granted the authorisations. We will describe this as the 'authorisation question'; (iii) that of the Secretary of State, in exercising his discretion to confirm the authorisations. We will refer to this as the 'confirmation question'; (iv) that of the officer (here Commander Messenger) who was in charge of the police officers who were to exercise the power to stop and search. We will refer to this as the 'command question'; and (v) that of the officers who respectively stopped and searched each of the appellants. We will refer to this as the 'operational question'.

[28] Consideration of the issues at each level has in common the need to take into account the nature of the statutory power granted by the 2000 Act and the impact on such a power of both the common law and the 1998 Act. Random searching is a significant interference with the rights of the individual and, if challenged, requires those responsible to establish that it is legally justified.

[29] A number of the appellants' contentions are couched in terms that are critical of the Divisional Court's reasoning. We are not impressed by that criticism, which we consider is based on a misreading of the judgment. However, we do not propose to deal expressly with the criticism; what we are concerned with is what is the right answer to the issues and as we will express our views as to this, our views on the specific criticisms of the approach adopted by the Divisional Court will not advance this appeal.

## THE INTERPRETATION QUESTION

[30] The interpretation of the 2000 Act is a matter of law for the courts. There is no question of this court showing deference or respect to the views of the respondents because of the subject-matter of the legislation. On the contrary, as the statutory power enables the appropriate senior police officer to authorise interference with the freedom of the citizen, backed by a criminal sanction to support compliance, the power has to be restrictively construed. However, this does not assist the appellants, since even adopting a restrictive approach to the construction, there is no justification for giving other than the ordinary meaning to the language of ss 44 and 45 of the 2000 Act. It is clear that Parliament, unusually, has permitted random stopping and searching, but, as we have already indicated when examining the language of the relevant sections, made the use of that power subject to safeguards. The power is only to be used for a single specified purpose for a period of an authorisation granted by a senior officer and confirmed by the Secretary of State. Furthermore, the authorisation only has a limited life unless renewed.

[31] We do not find it surprising that the word 'expedient' should appear in s 44(3) in conjunction with the power to authorise. The statutory scheme is to leave how the power is to be used to the discretion of the senior officer. In agreement with the Divisional Court, we would give the word its ordinary meaning of 'advantageous'. It is entirely consistent with the framework of the legislation that a power of this sort should be exercised when a senior police officer considers it is advantageous to exercise the power for the prevention of acts of terrorism.



a [32] Interpreted in this way, ss 44 and 45 could not conflict with the provisions of the articles of the convention. If those articles were to be infringed it would be because of the manner of the exercise of the power, not its existence. Any possible infringement of the convention would depend on the circumstances in which the power that the sections give is exercised.

b THE SUPERVISION BY THE COURT

[33], This brings us to the general approach that the courts should adopt when reviewing the exercise of a power which is provided by Parliament for the prevention of terrorism. Possible terrorist activities create unusual difficulties for the authorities who have the responsibility for preventing them happening. Quite apart from the serious direct damage that they can cause, c there is the continuing damage that can result from the fear of the public of further incidents. In addition, the range and nature of the terrorist incidents that are possible increase the difficulty in taking preventive action. For this reason, the courts will not readily interfere with the judgment of the authorities as to the action that is necessary. They will therefore usually not interfere with d the authorities' assessment of the risk and the action that should be taken to counter the risk.

[34] This does not mean the courts do not have an important role in supervising the decisions and actions of the authorities. 'Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law.' (See *In the Matter of an Application under e section 83.28 of the Criminal Code* [2004] 2 SCR 248 at 260 (para 6) per McLachlin CJ and Iacobucci, Major and Arbour JJ, with whom Bastarache and Deschamps JJ agreed.) Courts can ensure the authorities do not stray beyond the four corners of the power they have been given. They can ensure that the power is used only in furtherance of the purpose for which the power was f provided and they can ensure its use is necessary and proportionate.

[35] Avoiding the use of the word 'deference' because of its inaccurate connotations, the position is that, while the courts will respect the authorities' view as to matters of security, this does not mean that the court has no role as to proportionality. What action is or is not proportionate is still very much an g issue for the judgment of the court. The court will usually place in the scales the authorities' evaluation of the action needed to avoid the terrorist incident as against the court's assessment of the effect on the member of the public. But the ultimate determination of what is or is not proportionate still rests with the court. This task has to be performed in accordance with the approach indicated by Lord Steyn in *R (on the application of Daly) v Secretary of State for the Home Dept h* [2001] UKHL 26 at [27], [2001] 3 All ER 433 at [27], [2001] 2 AC 532.

ARTICLES 5, 8, 10 AND 11

[36] In addition, the court can and will here have to determine whether there is any infringement of the articles of the convention relied on by the j appellants. On the facts of these appeals the question arises how far arts 5, 8, 10 and 11 can assist the appellants. Here, art 5 creates a difficulty of a more general nature. When a stop and search takes place the individual is detained in the sense that, if he does not stop and permit the search, the individual will commit an offence but if the process is carried out with due expedition it should only last minutes. Does such a process constitute detention within the meaning of

that term in art 5? If it does, many activities that are routine today will be within the reach of art 5, including the search of bags on entering certain public premises and security checks at airports. a

[37] Whilst, under the convention, an arrest clearly triggers art 5 protection, the exercise of police powers that fall short of arrest but none the less prevent an individual from doing what he or she likes, falls into a grey area. Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. In line with its previous approach in *Engel v Netherlands* (No 1) (1976) 1 EHRR 647 at 669 (para 58), in *Guzzardi v Italy* (1980) 3 EHRR 333 at 362 (para 92) of its judgment the European Court of Human Rights (ECt HR) reminded itself that art 5 contemplates the 'physical liberty of the person' and that its aim is to ensure that no one should be deprived of this liberty in an 'arbitrary' fashion. The ECt HR recognised that mere restrictions on liberty of movement are governed by art 2 of the Fourth Protocol to the convention which provides that: '(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.' b

[38] However, this distinction between 'deprivation of liberty' and 'deprivation of liberty of movement' can prove very difficult to make; as the ECt HR noted in *Guzzardi v Italy* at 363 (para 93) of its judgment: c

'The difference between deprivation of and restriction upon liberty is nonetheless merely one of *degree or intensity*, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.' (Emphasis added.) d

[39] In determining whether the level of restraint involved amounts to a detention within the meaning of art 5, the ECt HR stated (at 362–363, para 92): e

'... the starting point must be [the] concrete situation and account must be taken of a whole range of criteria such as the *type, duration, effects and manner of implementation* of the measure in question.' (Emphasis added.) f

[40] Based on these criteria, cases will, depending on their specific facts, fall on one side or the other of the 'dividing line'. Lester and Pannick *Human Rights Law and Practice* (2nd edn, 2004) p 163 (para 4.5.3) provides a number of examples of what will constitute an infringement of art 5. In *Guzzardi v Italy* itself, the ECt HR held that a suspected Mafia member was deprived of his liberty during one phase of his detention, when he was made the subject of a compulsory residence order requiring him to live on a small island subject to strict police supervision. In *Engel v Netherlands* the ECt HR held that 'strict arrest' imposed on soldiers for disciplinary offences amounted to a deprivation of liberty despite the different standards that apply to army personnel. In *Hojemeister v Germany* (6 July 1981, unreported), the European Commission of Human Rights (the Commission) held that detention incidental to a lawful search was not sufficient to trigger art 5 protection. g

[41] Lester and Pannick note (p 164, para 4.5.4) that 'detention does, however, depend upon the intention of the authorities'. Accordingly, where the police intend merely to question a suspect without detaining him, art 5 will h

a not apply. In *X v Germany* (1981) 24 DR 158 at 161, the Commission decided that the object of police action was not clearly to deprive those involved of their liberty; the police action was: 'simply to obtain information from them about how they obtained possession of the objects found on them and about thefts which had occurred in the school previously.' The Commission therefore held that a ten-year-old girl who was questioned at a police station for two hours  
b without being arrested, locked into a cell or formally detained was not deprived of her liberty for the purposes of art 5.

[42] On the other hand, Professor Feldman *Civil Liberties and Human Rights in England and Wales* (2nd edn, 2002) p 304 recognises that, at least prima facie, brief detainment of the type associated with stop and search powers could fall within the ambit of art 5:

c 'Where a person is briefly detained on the street or at a customs post in order to check for stolen, prohibited, or dutiable goods, there is a deprivation of liberty, albeit only for a short period: the person is not free to move anywhere without the agreement of the officer until the procedure is complete.'

d [43] He does note, however, that the detainment would only, in the general course, last a very short time, and therefore makes the qualification (p 307):

e 'Under ECHR Article 5(1) and the Human Rights Act 1998, a deprivation of liberty does not take place if someone is detained for a very limited time. Searches of the person falling short of arrest entail a detention for only a short period.'

[44] In the current appeal it is not essential to decide whether the stopping and searching of the appellants, using the powers vested in the police under the authorisation pursuant to s 44 of the 2000 Act, fell within art 5 because, as we  
f will see, it was justifiable under art 5(1)(b) as detention in order 'to secure the fulfilment of any obligation prescribed by law'.

[45] However, if this point had to be decided, we would conclude that the stop and search powers should not be considered to constitute an infringement of art 5. We agree with Sir Gerald Fitzmaurice, who in a dissenting opinion in  
g *Guzzardi v Italy* (1980) 3 EHRR 333 at 378–379 (para 6), urges that, in the light of the existence of art 2 of the Fourth Protocol, the ambit of art 5 should be construed strictly:

h 'The existence of [art 2 of the Fourth Protocol] shows either that those who originally framed the Convention on Human Rights did not contemplate that [art 5] should go beyond preventing actual deprivation of liberty, or to extend to mere restrictions on freedom of movement ... The resulting picture is that [art 5] of the Convention guaranteed the individual against illegitimate ... imprisonment, or confinement so close as to amount to the same thing—in sum against deprivation of liberty stricto  
j sensu—but it afforded no guarantee against restrictions ... falling short of that.'

[46] Taking into account: (i) the likely limited nature of any infringement of art 5 in any normal stop and search; (ii) the fact that the main aim of a stop and search will not be to deprive an individual of his liberty but rather to effect a verification of one form or another (for example, the rapid verification that the

person stopped is not carrying articles of a kind that could be used in connection with terrorism); and (iii) art 2 of the Fourth Protocol which, in dealing specifically with the right to liberty of movement, gives some indication of the intended scope of art 5, the better view is that a short detention pursuant to a stop and search power will normally fall outside art 5. a

[47] The application of the other articles is more straightforward. The first respondent was prepared to accept that art 8 applies to the stop and search process and we accept that this is the correct approach. However, we do not consider that arts 10 and 11 could be invoked. This is because, in so far as this complaint relates to the general powers created by the terms of the 2000 Act and of the authorisations given under it, (see [26](d), above) those powers are, by s 45(1)(a) of the 2000 Act, strictly limited to searching for articles of a kind which could be used in connection with terrorism. So exercised, and in particular in view of the very limited powers of detention that are created by s 45(4), there is nothing in them that threatens either the right of freedom of expression or the right of assembly. Furthermore, the power, if properly exercised by the police, would not have any chilling effect on the rights protected by arts 10 and 11. b  
c  
d

[48] The case might be different if the powers, ostensibly granted for the limited purposes of the 2000 Act, were in fact used, wrongly, in order to control or deter attendance at demonstrations. The evidence of the two appellants, that we have recorded at [16]–[17], above, gives some cause for concern in those respects, particularly in view of the alleged seizure from the first appellant of papers relating to the demonstration, and the alleged prevention of the second appellant from filming. However, as we indicate at [55]–[56], below, those issues were not tested in these proceedings, because the thrust of the appellants' case, and thus the response of the respondents, was directed primarily at the general conformity of the legislation with arts 10 and 11: on which issue, as we have said above, the legislation itself cannot be criticised. e  
f

[49] The appellants suggest that the exceptions to arts 5, 8, 10 and 11 cannot be relied upon because either what took place was 'not in accordance with a procedure prescribed by law' or 'not in accordance with the law'. This is because the law was not published and was arbitrary. We do not accept that this is the position. 'The law' that is under criticism here is the statute, not the authorisation. That law is just as much a public record as is any other statute. And the provisions are not arbitrary in any relevant sense. Although the police officer does not have to have grounds for suspecting the presence of suspicious articles before stopping a citizen in any particular case (see s 45(1)(b)), he can only be authorised to use those powers for limited purposes, and where a decision has been made that the exercise of the powers is expedient for the serious purpose of the prevention of acts of terrorism (see s 44(3)). The system, so controlled, cannot be said to be arbitrary in any sense that deprives it of the status of 'law' in the autonomous meaning of that term as understood in convention jurisprudence. In addition, while the authorisations and their confirmation are not published because, not unreasonably, it is considered publication could damage the effectiveness of the stop and search powers, and as the individual who is stopped has the right to a written statement under s 45(5), in this context the lack of publication does not mean that what occurred was not a procedure prescribed by law. g  
h  
j



## THE AUTHORISATION AND CONFIRMATION QUESTIONS

a [50] We turn to the authorisations made by Assistant Commissioner Veness and their confirmation by the Secretary of State. The scale of terrorist incidents around the globe is so well known it hardly required evidence to establish that this country is faced with a real possibility of terrorist incidents. However, the evidence surveys the history of global and national incidents (connected with  
b the problems in Northern Ireland) that have already occurred. In such a situation, the authorisation and confirmation of a random power of search provided by Parliament subject to the safeguards we have identified, cannot, as a matter of general principle, be said to be an unacceptable intrusion, that is neither necessary nor proportionate (as those terms are used in a convention context), into the human rights of those who are searched in the absence of  
c some identified specific threat. The disadvantage of the intrusion and restraint imposed on even a large number of individuals by being stopped and searched cannot possibly match the advantage that accrues from the possibility of a terrorist attack being foiled or deterred by the use of the power.

[51] Does the fact that we now know what has been taking place is an  
d extensive blanket or 'rolling' programme alter the situation? We do not think so. The evidence justifying this way of using the power could be more satisfactory, but in view of the evidence provided by the Secretary of State as to the process of confirmation, we are satisfied that the rolling programme is justified in the present situation. It did no more than enable the commander in a particular area to have the powers available when this was operationally  
e required without going back to the Secretary of State for confirmation of a particular use. At this level there is nothing to support the suggestion of the appellants that authorisation and confirmation were not being granted and obtained for the purpose identified by the 2000 Act but rather for day-to-day policing. It is clear that there is no ground on which it would be appropriate for  
f a court to interfere with or even criticise the authorisation and confirmation programme.

## THE COMMAND QUESTION

[52] This is confirmed by the evidence that is available relating to the use of  
g the authorisation and confirmation in conjunction with the arms fair that led to these proceedings. Having regard to the nature of the fair, its location near an airport and a previous site of a terrorist incident (connected with the Northern Ireland problems) and the fact that a protest was taking place, Commander Messenger was entitled to decide that s 44 powers should be exercised in connection with the arms fair.

h [53] The commander's responsibilities in relation to s 44 did not end with his designating the fair as an appropriate event in connection with which stop and search powers should be used. Indeed, we do not believe for a moment that he would regard it as all that was required. We expect that he would agree with us that officers who were to exercise the powers should receive carefully  
j designed instructions (or if this had been done previously, a reminder) on their use. The evidence as to what happened is lamentable. There is reference to the officers being told they could use their powers and a slide being shown. There is little else, and there is no evidence of an explanation being given to the officers who would be dealing with the public as to the limits on their powers or how the powers should be deployed.

[54] The inadequate nature of the evidence (of which the Divisional Court also complained without any attempt to rectify the position being made for the appeal, possibly for technical reasons) is particularly surprising because this is clearly a test case. It is important that, if the police are given exceptional powers (such as those under consideration here) because of threats to the safety of the public, they are prepared to demonstrate that they are being used with appropriate circumspection. This is in addition to the general obligation on parties conducting judicial review proceedings to do so openly or, as it has been said by Lord Donaldson of Lynton MR, with the cards face up (see *Naylor v Preston Area Health Authority* [1987] 2 All ER 353 at 360, [1987] 1 WLR 958 at 967). We appreciate that in this area discretion as to disclosure needs to be exercised so that information that could be operationally prejudicial is not disclosed. However, this consideration would not apply to making clear that proper instructions were given to officers exercising the powers. While it was legitimate to use the power if those doing so were made properly aware of their responsibilities, it is quite a different matter if the basic requirements of good administration were being neglected.

#### THE OPERATIONAL QUESTION

[55] We received no satisfactory explanation from the first respondent as to the inadequacies of the evidence. However, it was clear to us that part of the explanation could be that while the nature of the appellants' case has changed as the proceedings progressed, it has been, as Mr Singh accepts, focused on the issues of principle and not on the circumstances of the individual appellants. It was no doubt also recognised that proceedings for judicial review are not the correct forum in which to investigate factual issues. None the less, it is still regrettably the position that in answer to the respondents' statements of what happened to them, the only response is the notes made by the police officers. We are without any statements from the officers.

[56] The onus is on the first respondents to show that the interference with the appellants of which complaint is made was lawful. It is not possible to say that the onus has been discharged on the evidence before us. On the appellants' evidence, remarks were made that suggest that the powers could have been used in order 'to police' the protest. This would not be a lawful use of the power. We have also pointed out at [48], above the potential evidential difficulties under arts 10 and 11 that are presented by some parts of the appellants' evidence. As we have said, the form of these proceedings does not permit the resolution of those matters; but we feel sure that the respondents will wish to review very carefully those aspects of this operation, and of the briefing that the officers on the ground received before performing their powers and duties under the 2000 Act. This is the sum of what can be said on the limited evidence available.

#### ARTICLE 15

[57] Lastly, we should, for the sake of completeness, deal with art 15. The appellants rely on art 15. The argument is that if there is a terrorist or public emergency, this country could have derogated from the convention to the extent that was justified by the emergency. This did not happen so there cannot be an emergency that justifies the use of stop and search powers. This argument is based on a logical fallacy. If, as the respondents contend and we

a accept, the use of powers given by s 44 does not necessarily involve any violation of the articles relied on that is not capable of being justified, it is unnecessary to take advantage of art 15 as long as the power is used in a manner that does not offend the convention.

## REMEDIES

b [58] Mr Singh accepted that, in view of the history of these proceedings, the only appropriate remedy to which the appellants could be entitled would be a declaration. We are prepared to hear the parties on the question of relief. However, it may be of assistance if we indicate that our provisional view is that this judgment is best left to speak for itself and that no order should be made on the appeal either as to the merits or costs.

c *Appeals dismissed against the Secretary of State. No order made in appeals against the commissioner.*

Kate O'Hanlon Barrister.

## Sandhu v Gill

[2005] EWHC 43 (Ch)

CHANCERY DIVISION

LIGHTMAN J

13, 26 JANUARY 2005

*Partnership – Dissolution – Effect – Profits – Profits earned by partnership business after dissolution – Outgoing partner entitled to share of profits attributable to use of his share of partnership assets – Meaning of ‘share of partnership assets’ – Partnership Act 1890, s 42(1).*

The claimant and the defendant agreed, as partners at will, to purchase a property, convert it, and carry on the business of an old peoples' residential home. They entered into a partnership deed under which the claimant was to manage the residential home, net profits were to be applied first in paying a salary to the claimant for his management services, and subject thereto were to be divided equally between them. The partnership assets were to belong to the partners equally. The parties each agreed to contribute an equal capital sum, but in fact the claimant was only able to contribute substantially less than his share and borrowed the balance from the defendant. He agreed to repay the loan after the sale of certain investment properties and paid the defendant the rental income in lieu of interest. The claimant managed the residential home until the date on which the effect of the actions of the parties was that the partnership was dissolved. The defendant then carried on the business on his own account, without consent of the claimant. The claimant commenced proceedings seeking the winding up of the partnership. An issue arose as to the entitlement of the claimant to a share of the revenue profits attributable to the use of the partnership assets made by the defendant between the date of dissolution and the conclusion of the winding up. Section 42(1)<sup>a</sup> of the Partnership Act 1890 provided, inter alia, that where any member of a firm ceased to be a partner, and the continuing partner carried on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner then, in the absence of any agreement to the contrary, the outgoing partner was entitled, at his option, to such share of the profits made since the dissolution as the court found to be attributable to the use of his share of the partnership assets, or to interest on the amount of his share of the partnership assets. The claimant submitted: (i) that the words 'share of the partnership assets' in s 42(1) of the 1890 Act meant 'share of the proprietary ownership of everything belonging to the partnership at the date of dissolution having money value'; (ii) that the profits were attributable in part to the services of the defendant and in part to the use of partnership assets; and (iii) that therefore (subject to a payment to the defendant as a fair return of his services) the balance of the profits should be divided equally between the claimant and the defendant reflecting the half share which each of them had at the date of dissolution in the partnership assets. The defendant contended: (i) that 'share of partnership assets' in s 42(1) of the 1890 Act meant

<sup>a</sup> Section 42, so far as material, is set out at [1], below



- a 'share of net partnership assets after payment of all debts and liabilities owing to non-partners', (ii) that by reason of the disproportionate share of advances and capital provided by the defendant and sums due from the claimant to the defendant at the date of dissolution the value of the claimant's share of the net partnership assets was nil or considerably less than half; and (iii) that therefore the claimant was entitled either to no share of the profits or alternatively to the proportion of the net profits after deduction of the management charge which his share of the net assets bore to the total net assets of the partnership at the dissolution date. The master decided that, subject only to the entitlement of the defendant to a payment in respect of the provision of his services of carrying on the business during the period between the dissolution of the partnership and its winding up, the claimant was entitled to a half share of the profits made by the defendant during that period. The defendant appealed.

**Held** – On the true construction of s 42(1) of the 1890 Act 'share of the partnership assets' meant the outgoing partner's share in the proprietary ownership of assets belonging to the partnership. Where reference in the 1890 Act was intended to be made to a partner's interest in net assets or the surplus of partnership assets after satisfying the partnership liabilities, that was expressly stated. Accordingly, the decision of the master had been correct, and the appeal would therefore be dismissed (see [16]–[18], [22], below).

*Manley v Sartori* [1926] All ER Rep 661 applied.

*Taylor v Grier (No 3)* (unreported, 12 May 2003) not followed.

## Notes

For profits made after dissolution, see 35 *Halsbury's Laws* (4th edn reissue) para 118.

For the Partnership Act 1890, s 42, see 32 *Halsbury's Statutes* (4th edn) (2004 reissue) 1007.

## Cases referred to in judgment

- Barclays Bank Trust Co Ltd v Bluff* [1981] 3 All ER 232, [1982] Ch 172, [1982] 2 WLR 198.
- Bourne, Re* [1906] 2 Ch 427, CA.
- De Renzy v De Renzy* [1924] 43 NZLR 1065.
- Manley v Sartori* [1927] 1 Ch 157, [1926] All ER Rep 661.
- Pathirana v Pathirana* [1967] 1 AC 233, [1966] 3 WLR 666.
- Popat v Shonchhatra* [1997] 3 All ER 800, [1997] 1 WLR 1367, CA.
- Taylor v Grier (No 3)* (unreported, 12 May 2003), Ch D (Newcastle Dt Reg).
- Willett v Blanford* (1842) 1 Hare 253, 66 ER 1027.
- Yates v Finn* (1880) 13 Ch D 839.

## Cases referred to in skeleton arguments

- Ashworth v Munn* (1880) 15 Ch 363, CA.
- Simpson v Chapman* (1853) 4 De GM & G 154.
- Mellersh v Keen* (1859) 27 Beav 236.

## Appeal

The defendant, Hardip Singh Gill, appealed with permission of Lightman J from the decision of Master Bowles on 24 September 2004 in partnership proceedings winding up a partnership between the claimant, Kulbir Singh Sandhu, and the defendant, that subject to the entitlement of Mr Gill to a payment in respect of the provision of his services of carrying on the business previously carried on by the partnership between the date of the dissolution of the partnership and the completion of the winding up, Mr Sandhu was entitled to a half share of the revenue profits made by Mr Gill during that period. The facts are set out in the judgment.

Mark Blackett-Ord (instructed by SKT Thobhani, Wembley) for Mr Gill.

Timothy Walker (instructed by Lindops, Southend-on-Sea) for Mr Sandhu.

*Cur adv vult*

26 January 2005. The following judgment was delivered.

## LIGHTMAN J.

### INTRODUCTION

[1] This is an appeal from a decision dated 24 September 2004 (the decision) of Master Bowles. It is concerned with the construction of s 42 of the Partnership Act 1890 (the Act) and in particular with the entitlement of an outgoing partner in respect of the profits made by a continuing partner attributable to his use of partnership assets between dissolution of the partnership and completion of its winding up. Section 42(1) of the Act reads as follows:

‘Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.’

The issue between the parties focuses on the meaning of the words ‘share of the partnership assets’.

### FACTS

[2] The full facts of this case are set out in the decision. It is sufficient to say that in 1995 the claimant Mr Sandhu and the defendant Mr Gill agreed as partners at will to purchase the property known as 59 Mountdale Gardens, Leigh-On-Sea, Essex (the property) to convert the property into an old peoples’ residential home and to carry on business of such a home at the property. The property was accordingly purchased, converted and used.

a [3] The parties executed a partnership deed (the deed) on 12 September 1995 setting out the terms of the partnership. By the deed the parties agreed that Mr Sandhu should manage the home and that the net profits should be applied first in payment of a salary to Mr Sandhu in respect of the provision of such services (the figure of £22,000 a year was agreed in the course of the proceedings) and subject thereto should be divided equally between them, and  
b that the partnership assets (which included the property) should belong to the partners equally.

c [4] The parties agreed to make equal contributions to the capital of the partnership of approximately £85,000. Mr Gill made his contribution in 1995. Mr Sandhu had only sufficient liquid funds to pay £21,250 and borrowed the balance from Mr Gill. Mr Sandhu agreed to repay the loan on the sale of certain  
d properties in which he had invested and in the meantime to pay to Mr Gill in lieu of interest the rental income obtained from them.

e [5] Mr Sandhu managed the home from the date that it opened until 12 April 1999 when differences arose between the parties leading Mr Gill to exclude Mr Sandhu from the property on that date. Mr Gill thereafter without the  
d consent of Mr Sandhu carried on the business on his own account. It is agreed that the partnership was dissolved on that date. The business proved profitable under the management of Mr Gill and indeed as well as producing revenue profits the business over that period has increased in value from £600,000 to  
e £850,000, producing a capital profit of £250,000.

f [6] It is common ground that: (1) substantially more was due to Mr Gill than to Mr Sandhu in respect of payment of capital and advances and that Mr Sandhu owed a substantial sum to Mr Gill in respect of his loan of the larger part of his share of capital; and (2) at the date of dissolution of the partnership the assets of the partnership were sufficient to pay debts to non partners and advances from the partners, but were insufficient to repay to the partners their capital in full.

#### THE ISSUE

g [7] Mr Sandhu commenced these proceedings on 7 May 1999 seeking the winding up of the partnership. A multitude of issues were raised in the proceedings which came before and were resolved by Master Bowles. It was clear and common ground that Mr Sandhu was entitled to share the capital profit of £250,000: the full proceeds of sale falls to be applied in accordance with  
h s 44 of the Act (see *Barclays Bank Trust Co Ltd v Bluff* [1981] 3 All ER 232, [1982] Ch 172). But there was an issue as to the entitlement of Mr Sandhu to a share of the revenue profits made by Mr Gill between 12 April 1999 and the conclusion of the winding up.

j [8] Mr Sandhu contended that: (1) in s 42 'share of the assets of the partnership' means 'share of the proprietary ownership of everything belonging to the partnership at the date of dissolution having money value'; (2) the profits were attributable in part to the services of Mr Gill and as to the balance to the use of partnership assets; and (3) accordingly (subject to a payment to Mr Gill of a fair return for his services) the balance of the profits should be divided equally between Mr Sandhu and Mr Gill reflecting the half share which each of them had at the date of dissolution in the partnership assets.

[9] Mr Gill however contended that: (1) in s 42 the term 'share of the partnership assets' means 'share of net partnership assets after payment of all debts and liabilities owing to non-partners'; (2) by reasons of the disproportionate share of advances and capital provided by Mr Gill and the sums due from Mr Sandhu to Mr Gill at the date of dissolution the value of Mr Sandhu's share of the net partnership assets was nil or considerably less than half; and (3) for that reason Mr Sandhu was entitled either to no share of the profits or alternatively to the proportion of the net profits after deduction of the management charge which his share of the net assets bore to the total net assets of the partnership at the dissolution date. In a word Mr Gill contended that Mr Sandhu should receive the proportion of the profits which reflects the value of his share or interest in the partnership.

[10] The master upheld Mr Sandhu's contention and decided that, subject only to the entitlement of Mr Gill to a payment at the rate of £22,000 per annum in respect of the provision of his services of carrying on the business of the home during the period, Mr Sandhu was entitled as claimed to a half share of the profits made by Mr Gill. The master ordered an interim payment of £25,000 and refused permission to appeal. An application was made to me for permission to appeal on this one issue. On the appeal Mr Gill relied on a decision which supported his contention but which had not been cited to the master, namely the decision of Judge Behrens in *Taylor v Grier (No 3)* (unreported, 12 May 2003). In the circumstances I gave permission to appeal and now determine the substantive appeal.

#### THE LAW

[11] At common law subject to the provision of the partnership agreement each partner has a proprietary interest in all the assets of the partnership. The size of the proprietary interest is determined by the provisions of the partnership agreement, but in default of such provision each partner has an equal share. In the present case under the deed Mr Gill and Mr Sandhu had (as would otherwise have been implied by law) equal proprietary interests in the assets of the partnership. The rights attaching to the proprietary interests of the partners are severely qualified by the rights of all partners regarding the use and application of the assets and their proceeds of sale arising from the partnership relationship now contained in the Act.

[12] On the dissolution of a partnership (in default of agreement to the contrary) the partners have not only the right, but the duty, to realise the partnership properly and for the purpose of that realisation to carry on the business if it is necessary so to do: see *Re Bourne* [1906] 2 Ch 427 at 430 Vaughan Williams LJ. The part of the Act headed 'Dissolution of Partnership, and its consequences' embraces ss 32–44. Section 39 of the Act provides that on dissolution of a partnership every partner is entitled as against the other partners in the firm and all persons claiming through them in respect of their interests as partners to have the affairs of the partnership wound up and in particular to have the property of the partnership applied in payment of the debts and liabilities of the firm and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm. The provisions of s 39 must be read as being subject to any agreement of the partners to the contrary. The parties may agree that on dissolution on the death, retirement or expulsion of an outgoing partner his share shall accrue or be sold to the continuing partners and that in respect of that accrual or sale a price shall be payable to the outgoing partner or his estate. In that situation



a (subject to any agreement between the parties) the amount due from the continuing partners in respect of the outgoing partner's share shall constitute a debt accruing at the date of dissolution. Questions have been raised as to the true construction of s 43 of the Act. In my judgment s 43 merely declares the law to this effect: see *Lindley & Banks on Partnership* (18th edn, 2002) p 579–922 (paras 23–34).

b [13] Section 44 of the Act sets out the rules applicable in default of any agreement to the contrary for the distribution of the assets on final settlement of accounts between the partners. The first rule provides for payment of losses. This rule has no application in this case. The second rule provides that the assets of the firm shall be applied in the following manner and order:

c '1 In paying the debts and liabilities of the firm to persons who are not partners therein:

2 In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3 In paying to each partner rateably what is due from the firm to him in respect of capital:

d 4 The ultimate residue if any, shall be divided among the partners in the proportion in which profits are divisible.'

[14] The Act however recognises that winding up and discontinuance of business may not immediately follow winding up. No provision is required when the continuation of business is by agreement of the partners for the benefit of the partnership. The partnership business in such circumstances is to be treated as continuing. Where there is no such agreement, there is a limit upon the entitlement of either partner to continue the partnership business.

f [15] Section 38 of the Act authorises for partners to carry on the business of the partnership after dissolution so far as this may be necessary for the beneficial winding up of the partnership and for the completion of unfinished transactions, but not otherwise. A continuing partner who carries on the business after dissolution otherwise than for this limited purpose without the consent of the outgoing partner does so without the authority of the partnership and accordingly he carries on the business on his own account and he may be held liable to account to the outgoing partner.

g [16] The position in equity prior to the Act was that the continuing partner in such a situation was liable to account as a fiduciary to the outgoing partner in respect of his unauthorised use for his own benefit of the assets of the partnership. In *Willett v Blanford* (1842) 1 Hare 253, 66 ER 1027 Wigram V-C held that the quantum of the entitlement of the outgoing partner in respect of the profits made by the continuing partner must be determined by reference to what is right and equitable between the parties in all the circumstances and in particular the extent that the profits are attributable to use of the outgoing partner's share of the partnership assets. In subsequent cases there was no strict uniformity in approach to what was right and equitable in all the circumstances and cases arose when it was held right and equitable to divide the profits between the parties in accordance with their contributions to the capital of the partnership: see eg *Yates v Finn* (1880) 13 Ch D 839. This approach can on occasion be seen reflected in other authorities and the textbooks: see *Pollock's Digest of the Law of Partnership* (11th edn, 1920) p 140. But the law in this regard was firmly established very much as stated by Wigram V-C in *Manley v Sartori* [1927] 1 Ch 157, [1926] All ER Rep 661 and by Parliament in s 42 of the Act.

[17] In *Manley's* case, the death of a partner dissolved a partnership, but the surviving partners continued the partnership business on their own account. The question arose as to the entitlement of the personal representatives of the deceased partner to a share of the profits earned between the death of the partner and the winding up. Romer J said ([1927] 1 Ch 157 at 162–166, [1926] All ER Rep 661 at 661–663):

‘Where ... the surviving partners, instead of realizing the assets and distributing the proceeds amongst the parties in accordance with their rights and interests, choose to carry on the business and make profits by virtue of the employment of any of the partnership assets, then, subject no doubt to making a proper allowance to the surviving partners for their trouble in so carrying on the business, such profits belong to all the persons interested in the partnership assets by means of which the profits have been earned in accordance with their rights and interests in those assets; that is to say, proportionately to their interests in those assets. That has been laid down in numerous cases and is affirmed by s. 42 of the Partnership Act of 1890... [The] profits ... were not divisible between the parties in accordance with their rights and interests in profits earned while the partnership was a going concern... Now the rights of the deceased partner or his legal personal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance-sheet of the partnership as drawn up at the date of his death... [as] was pointed out by Wigram V-C in *Willett v. Blanford*, it does not necessarily follow that because the surviving partners have been carrying on the business the profits or the whole of the profits are attributable to the use of the partnership assets... it may well be that in a particular case profits have been earned by the surviving partner, not by reason of the use of any asset of the partnership, but purely and solely by reason of the exercise of skill and diligence by the surviving partner; or it may appear that the profits have been wholly or partly earned not by reason of the use of the assets of the partnership, but by reason of the fact that the surviving partner himself provided further assets and further capital by means of which the profit has been earned. Those profits, so far as earned by sources outside the partnership assets, are not profits in which the executors of the deceased partner could be entitled to any share... where surviving partners continue to carry on the business, prima facie they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are prima facie entitled to a share of the profits proportionate to his share in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilization of the partnership assets.’

[18] The law as stated by Romer J was reaffirmed, albeit obiter, by Nourse LJ in his judgment in *Popat v Shonchhatra* [1997] 3 All ER 800 at 806, [1997] 1 WLR 1367 at 1373–4 with which the other members of the Court of Appeal agreed and by the Privy Council in *Pathirana v Pathirana* [1967] 1 AC 233 at 240–1, [1966] 3 WLR 666 at 671–672. The words in s 42 ‘share of partnership assets’ means the outgoing partner’s share in the proprietary ownership of assets belonging to the

a partnership. This construction is confirmed by the fact that, where in the Act reference is intended to be made to a partner's interest in 'net assets' or the surplus of the partnership assets after satisfying the partnership liabilities, this is expressly stated: see s 41(a).

b [19] The only authority to the contrary cited to me (other than *Yates's* case) is the decision of Judge Behrens in *Taylor's* case. In that case the learned judge held that: (1) s 42(1) of the Act provided that the outgoing partner was entitled in the alternative to a share of the profits attributable to the use of the outgoing partner's share of the partnership assets and to interest at the rate of 5% p a on the amount of his partnership assets; (2) in case of both alternatives the term 'partnership assets' meant the same thing; (3) there is implicit in the option to take interest a requirement for a valuation of the share of the outgoing partner c 'by reference to section 39 and 44 of the Act'; (4) in case of exercise of the option to take a share of profits a like valuation must also implicitly be required of the outgoing partner's share; and (5) since (as a result of misappropriations of partnership assets by the outgoing partner) at the date of dissolution of the partnership the value of his share in the partnership was nil, he was not entitled d to any share of the profits subsequently earned by the continuing partner. He expressed the view that this result accorded with the judgment of Romer J in *Manley's* case and he discounted the obiter view expressed by Nourse LJ in *Popat's* case as inconsistent with that of Romer J.

e [20] In my respectful judgment, the reasoning of the learned judge was flawed for (amongst others) the following reasons: (1) the fact that in case of exercise of the option to take interest a valuation is implicitly required (of the outgoing partner's share of the partnership assets) does not mean that a valuation of any kind is required if the option is exercised to take a share of the profits; (2) the subject matter of the inquiry as to use and the profits attributable to use by the continuing partner is the use of the assets of the partnership and the outgoing partner's entitlement is to a share of the attributable profits f reflecting his share in the ownership of those assets at the date of dissolution. Neither the value of his share in the partnership nor the sum which may be payable by the outgoing partner to the continuing partner is relevant; (3) the view expressed by the judge is not supported by the judgment of Romer J. Indeed it is inconsistent with that judgment as well as the observations to the g same effect of Nourse LJ.

h [21] I need only refer briefly to one other authority, namely the decision of Stringer J in *De Renzy v De Renzy* [1924] 43 NZLR 1065. In that case two brothers were partners in a business. One died and the other, wrongly believing himself entitled to do so under an agreement to purchase his brother's share, made a payment to his brother's estate of the purchase price for that share which he thought to be due and thereafter treated the business as his own. The judge held that there was no such agreement to purchase and that the deceased brother's estate was entitled to the profits attributable to the share of the deceased brother in the partnership assets, but that the size of the share was to be reduced by the reason of the payment made. I find some difficulty seeing j how or why the size of the share was reduced by the payment: I would have thought that the payment should rather be treated merely as on account of the sum found to be due. Whether or not that is correct, all that matters for the purposes of this action is that the judgment of Stringer J expressly reaffirms the general principle that the outgoing partner is entitled to the profits attributable to his share of the partnership assets.

## DECISION

[22] In my judgment the decision of the master was plainly correct as to Mr Sandhu's entitlement to a half share of profits. It is in the circumstances common ground that he was also correct in ordering the interim payment. I accordingly dismiss the appeal.

*Appeal dismissed.*

Celia Fox Barrister.



# R (on the application of D) v Camberwell Green Youth Court

## R (on the application of the Director of Public Prosecutions) v Camberwell Green Youth Court

[2005] UKHL 4

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD RODGER OF EARLSFERRY,  
BARONESS HALE OF RICHMOND AND LORD BROWN OF EATON-UNDER-HEYWOOD

22, 24 NOVEMBER 2004, 27 JANUARY 2005

*Criminal evidence – Witness – Child witness – Child witness in need of special protection – Special measures direction for evidence to be given by way of video recording or live television link compulsory in relation to child witness in need of special protection – Whether compulsory special measures direction compatible with right to a fair trial – Human Rights Act 1998, Sch 1, Pt I, art 6 – Youth Justice and Criminal Evidence Act 1999, s 21(5).*

In two linked cases issues arose as to the compatibility with the right of an accused person to a fair trial, as guaranteed by art 6<sup>a</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), of the provisions of s 21(5)<sup>b</sup> of the Youth Justice and Criminal Evidence Act 1999, the effect of which was that the court had to give a 'special measures direction' in relation to a witness under 17 years of age 'in need of special protection' which provided for video recorded evidence-in-chief to be given by that witness and for any evidence not given by a video recording, whether in-chief or otherwise, to be given by a live television link. A child witness was in need of special protection if the offence to which the proceedings related was a sexual offence, kidnapping, false imprisonment or child abduction, cruelty to a child or any offence which involved assault or injury. The Divisional Court held that there was nothing in art 6 of the convention which prohibited a vulnerable witness from giving evidence in a different room from the accused, and that a live link or a video recording could not infringe the right to examine witnesses guaranteed by art 6(3)(d). On appeal, the House of Lords considered: (i) the exclusion by s 21(5) of the 1999 Act of individualised consideration in each case; (ii) the procedural requirement of a fair trial under art 6 of the convention; and, in relation to child defendants, the principle, also derived from art 6, of 'equality of arms'.

**Held** – The provisions of s 21(5) of the 1999 Act were compliant with art 6 of the convention in so far as they prevented individualised consideration of the necessity for a special measures direction at the stage at which the direction was made. Nothing in the special measures provisions was inconsistent with the

a Article 6, so far as material, is set out at [47], below

b Section 21, so far as material, is set out at [22], below

principles as to admissibility of evidence enunciated by the European Court of Human Rights. All the evidence was produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused could see and hear it all. The accused had every opportunity to challenge and question the witnesses against him at the trial itself. While a face-to-face confrontation was missing, that was not something guaranteed by the convention. The court also had the opportunity to scrutinise the video-recorded interview at the outset and exclude all or part of it. At trial, it had the fallback of allowing the witness to give evidence in the courtroom or to expand upon the video recording if the interests of justice so required. Viewing the case law of the Court of Human Rights in the light of the traditions of the domestic legal system could not mean that Parliament was not entitled to modify or adapt it to meet modern conditions, provided that those adaptations complied with the essential requirements of art 6. In the instant case, the modification was simply the use of modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and to challenge all the evidence against him. Parliament having decided that that was justified, the domestic legal system was entitled to adopt the general practice without the need to show special justification in every case. With regard to equality of arms, the court had wide and flexible inherent powers to ensure that the accused received a fair trial, was not at a substantial disadvantage because the 1999 Act scheme did not apply to him, and could give his best quality evidence (see [1]–[3], [45], [46], [49], [51], [53], [59], [63], [64], [70], [71], below).

*R v H* [2003] All ER (D) 436 (Mar) and *Kostovski v Netherlands* (1990) 12 EHRR 434 considered.

## Notes

For special measures directions and special provisions relating to child witnesses, see Supp to 11(2) *Halsbury's Laws* (4th edn) (reissue) para 1169A.4, 5.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 706.

For the Youth Justice and Criminal Evidence Act 1999, s 21, see *Halsbury's Statutes* (4th edn) (2002 reissue) 563.

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*California v Green* (1970) 399 US 149, US SC.

*Coy v Iowa* (1988) 487 US 1012, US SC.

*Crawford v Washington* (2004) 541 US 36, US SC.

*Delcourt v Belgium* (1970) 1 EHRR 355, [1970] ECHR 2689/65, ECt HR.

*Doorson v Netherlands* (1996) 22 EHRR 330, [1996] ECHR 20524/92, ECt HR.

*Hols v Netherlands* App no 25206/94 (19 October 1996, unreported), E Com HR.

*Kostovski v Netherlands* (1990) 12 EHRR 434, [1989] ECHR 11454/85, ECt HR.

*R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] All ER (D) 590 (Mar), DC.

*R (on the application of DPP) v Redbridge Youth Court, R (on the application of L) v Bicester Youth Court* [2001] EWHC Admin 209, [2001] 4 All ER 411, [2001] 1 WLR 2403.

*R v H* [2003] EWCA Crim 1208, [2003] All ER (D) 436 (Mar), (2003) Times, 15 April.

*R v Smellie* (1919) 14 Cr App R 128, CCA.

R v X (1990) 91 Cr App R 36, CA.

a SN v Sweden [2002] ECHR 34209/96, ECt HR.

Unterpertinger v Austria (1991) 13 EHRR 175, [1986] ECHR 9120/80, ECt HR.

V v UK (2000) 30 EHRR 121, [1999] ECHR 24888/94, ECt HR.

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Barbera v Spain (1989) 11 EHRR 360, [1988] ECHR 10588/83, ECt HR.

Birutis v Lithuania [2002] ECHR 47698/99, ECt HR.

c Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

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Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

Campbell v UK (1985) 7 EHRR 165, [1984] ECHR 7819/77, ECt HR.

d Delta v France (1993) 16 EHRR 574, [1990] ECHR 11444/85, ECt HR.

Edwards v UK (1993) 15 EHRR 417, [1992] ECHR 13071/87, ECt HR.

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Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 2 AC 557, [2004] 3 WLR 113.

e Klink v Regional Court Magistrate NO [1996] 3 LRC 667, SA SC.

Maryland v Craig (1990) 497 US 836, US SC.

Matthews v Morris [1981] Crim LR 495.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

f PS v Germany (2003) 36 EHRR 61, [2001] ECHR 33900/96, ECt HR.

R (on the application of Pretty) v DPP [2001] UKHL 61, [2002] 1 All ER 1, [2002] 1 AC 800, [2001] 3 WLR 1598.

R v A [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.

R v B (G) [1990] 2 SCR 30, Can SC.

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g R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

R v Governor of Lewes Prison, ex p Doyle [1917] 2 KB 254, [1916–17] All ER Rep Ext 1218.

R v Greenwood [1993] Crim LR 770, CA.

h R v L (DO), A-G of Canada intervening [1994] 2 LRC 204, Can SC.

R v Lambert [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206.

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R v Malvern Justices, ex p Evans, R v Evesham Justices, ex p McDonagh [1988] 1 All ER 371, DC.

j R v McAndrew-Bingham [1999] 1 WLR 1897, CA.

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*Schenk v Switzerland* (1988) 13 EHRR 242, [1988] ECHR 10862/84, ECt HR.

*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.

*Stanford v UK* [1994] ECHR 16757/90, [1994] TLR 130, ECt HR.

*Trivedi v UK* [1997] EHRLR 521, E Com HR. b

*X v UK* (1993) 15 EHRR CD 113, E Com HR.

## Appeals

### *R (on the application of D) v Camberwell Green Youth Court* c

D, a minor, the defendant in certain criminal proceedings in the Camberwell Green Youth Court, appealed by his mother and litigation friend, with leave of the Appeal Committee of the House of Lords given on 16 June 2003, from the decision of the Divisional Court (Rose LJ and Henriques J) on 4 February 2003 ([2003] EWHC 227 (Admin), [2003] All ER (D) 32 (Feb)) dismissing his application for judicial review of the decision of the justices on 23 October 2003 to make a special measures direction under the Youth Justice and Criminal Evidence Act 1999. The Divisional Court certified that a point of law of general public importance, set out at [18], below, was involved in its decision. The Secretary of State for the Home Department and the Director of Public Prosecutions appeared as interested parties. The facts are set out in the opinion of Baroness Hale of Richmond. d

### *R (on the application of the Director of Public Prosecutions) v Camberwell Green Youth Court* e

G, a minor, the defendant in certain criminal proceedings in the Camberwell Green Youth Court wherein the Director of Public Prosecutions was the prosecutor, appealed by his litigation friend, with leave of the Appeal Committee of the House of Lords given on 16 June 2003, from the decision of the Divisional Court (Rose LJ and Henriques J) on 4 February 2003 ([2003] EWHC 227 (Admin), [2003] All ER (D) 32 (Feb)) on an application for judicial review made by the Director of Public Prosecutions quashing the decision of District Judge Black on 11 October 2002 refusing the application of the Crown Prosecution Service for special measures under the Youth Justice and Criminal Evidence Act 1999. The Divisional Court certified that a point of law of general public importance, set out at [18], below, was involved in its decision. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the opinion of Baroness Hale of Richmond. f

*Keir Starmer QC, Quincy Whitaker and Stephen Simblet* (instructed by *Kaim Todner*) for D. g

*George Carter-Stephenson QC and Mark Hardie* (instructed by *GT Stewart*) for G.

*Jonathan Laidlaw, Mark Heywood and Louis Mably* (instructed by the Crown Prosecution Service Casework Directorate) for the prosecution. h

*David Perry* (instructed by the *Treasury Solicitor*) for the Secretary of State. j



a Their Lordships took time for consideration.

27 January 2005. The following opinions were delivered.

**LORD NICHOLLS OF BIRKENHEAD.**

b [1] I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss these appeals.

**LORD HOFFMANN.**

c [2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would dismiss these appeals.

**LORD RODGER OF EARLSFERRY.**

d [3] My Lords, I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I agree with them and would accordingly answer the certified questions as Lady Hale proposes and dismiss the appeals.

e [4] The provisions of s 21 of the Youth Justice and Criminal Evidence Act 1999 have the effect that, save in exceptional circumstances, the evidence of witnesses under 17 years of age in relation, inter alia, to sexual offences and crimes involving violence must be given by a live television link and, where available, by a suitable video recording. (For the sake of brevity, I shall refer to these particular measures as 'special measures'.)

f [5] As can be seen from s 16(5), the theory underlying these provisions is that the use of the special measures will maximise the quality of the children's evidence in terms of its completeness, coherence and accuracy. To put the point another way, the measures will enable the children to give the best evidence of which they are capable. Both formulations assume that the children are truthful and intend to give accurate evidence. The special measures will then help them to do so by reducing any strain caused either by the formal atmosphere of the court room or by the presence of the accused. Making the special measures standard for the trial of certain kinds of offences has the additional advantage of allowing these potential witnesses and their parents to be reassured, at an early stage, that they will be able to give their evidence in this way.

g  
h  
j [6] In an ideal world only honest and reliable witnesses would be called to give evidence in court. Relatively few crimes are committed, however, in front of disinterested, sober, upright members of the public. Therefore, in many trials, especially for crimes of violence, both the prosecution and the defence have to rely on witnesses who are anything but honest and reliable. For example, where the case arises out of a fight between rival gangs of 16-year-old youths, the prosecution witnesses will tend to be members of the defeated gang and their equally young supporters. Very often, whether out of misplaced loyalty or as a result of threats, some, at least, of these witnesses will give deliberately false evidence that is designed to conceal the actual course of events in order to throw the blame on to their opponents, the defendants. The

defence witnesses will come from the victorious side and will often have precisely the opposite agenda. In practice, even although under 17 years of age, many witnesses of this kind are only too little affected by the formality of the trial proceedings or by any judicial sanctions which might be imposed for their failure to speak up or for their perjury. And, if they feel threatened, it is not by the mere presence of the defendant(s) in the dock, but by the prospect of being beaten up later if they deviate from the party line. The unenviable task of the jury in such cases is to assess the witnesses and to try to pick out those parts of their evidence that are truthful and reliable. The jury's task is unlikely to be made any less difficult if the use of special measures does indeed have its presumed effect and so makes it that much easier for the dishonest witnesses to give their untruthful account in the most complete and coherent way of which they are capable.

[7] Different people may therefore take different views about the wisdom of applying special measures, in the specified cases, across the board to all witnesses who are under 17 years of age. As Lady Hale has explained, however, there is a considerable body of expert opinion which supports the view that, except in special circumstances, the evidence of such witnesses should indeed be taken in that way in all trials for sexual offences or offences involving violence. Recently, in the Vulnerable Witnesses (Scotland) Act 2004, the Scottish Parliament has followed that path and made provision for a system of special measures for taking the evidence of witnesses under 16 years of age in certain cases, but has also prescribed a general rule that in such cases witnesses under 12 years of age should give their evidence away from the court building. Similarly, the 1999 Act gives effect to Parliament's judgment that the benefits to justice from applying special measures to truthful young witnesses outweigh any risks to justice from applying them to untruthful or unreliable young witnesses. That judgment must be respected. I would therefore reject Mr Carter-Stephenson QC's argument that a court, which has to make a special measures direction by virtue of s 21(3), can immediately discharge or vary that direction under s 20(2)(b) on the view that, having regard to the nature of the case or the age of the defendant, it would not be in the interests of justice to make such a direction. That interpretation of s 20(2)(b) would frustrate the policy of the legislation. Section 20(2)(b) should be interpreted, rather, as catering for the (unusual) situation where, between the making of the direction and the trial, some particular circumstance emerges which would make it impossible or inappropriate to proceed on the basis of the direction. Sections 24(3) and 27(7) give the court powers to deal with any problems which may emerge at the trial.

[8] Mr Starmer QC submitted that art 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), gives the defendant in a criminal trial a right to confront his accusers, to look them in the eye while they are giving their evidence. That right might have to yield if, in any given case, it could be shown that the child witness would not be able to give his or her evidence satisfactorily in open court in the presence of the defendant. But s 21(5), which excluded any such individualised consideration, made the system incompatible with art 6(3)(d). Mr Carter-Stephenson adopted this submission.

[9] According to the popular image, in a British criminal trial witnesses give evidence before a robed judge and a jury and they are examined and

a cross-examined by bewigged counsel for the Crown and for the defence. Inevitably, that image is over-simplified. The vast majority of trials take place before magistrates; the representatives of both sides may be solicitors rather than counsel and, in exceptional cases, in England—but not in Scotland—even trials for serious offences may proceed in the absence of the accused. Where children are involved, in the Crown Court wigs and gowns are discarded and various other steps are taken to make the proceedings less formal. In the youth court the proceedings are always relatively informal, being tailored to the requirements of the children who appear there. Historically, also, the popular image does not tell the whole story. For centuries, in England the parties in a criminal trial usually had no professional representation. The prosecutor and his witnesses would put their side of the story and the accused would try to discredit it. In that world, cross-examination and formal rules of evidence were unknown: they are the products of the adversarial form of trial that emerged when, in the course of the eighteenth and early nineteenth centuries, it became common for counsel to be instructed. Since the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today's norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances. The special measures in these cases are indeed examples of modifications which have been made possible by advances in technology.

e [10] It is nevertheless fair to say that under the systems of criminal procedure used in Britain today it is usual for witnesses to give their evidence in open court in the presence of the accused. That form of trial is often contrasted with a continental form of criminal proceedings where judges rather than juries determine guilt, on the basis of their free appreciation of a file of evidence compiled by an investigating judge, and where, if witnesses are questioned at trial, the questions are put by the judge rather than by the prosecution and defence lawyers. Again, the counter-image is over-simplified, since the continental systems vary considerably from country to country and within countries. It is, however, sufficiently accurate to make one anticipate that the introduction of art 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.

g [11] An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of art 6(3)(d) has been on the procedures of continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge. For instance, in *Unterpertinger v Austria* (1991) 13 EHRR 175 the defendant was convicted of causing actual bodily harm, mainly on the basis of statements which his wife and daughter had given to the police. His wife and daughter took advantage of their right not to give evidence at his trial and so could not be cross-examined on their statements. In these circumstances the European Court of Human Rights held that there had been a breach of art 6(3)(d) since the defendant had not had an opportunity, at any stage in the earlier proceedings, to question the persons whose statements were read out at the hearing. Similarly, in *Kostovski v Netherlands* (1990) 12 EHRR 434 the court found that there had been a violation of art 6(3)(d) where a Dutch court treated the statements of anonymous witnesses, who had been examined in the absence of the accused and his representatives, as sufficient proof of guilt

of armed robbery. The court (at 447–448 (para 41)) explained its approach in this way:

‘In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.’

In *van Mechelen v Netherlands* (1997) 2 BHRC 486 a Dutch court had convicted the applicants of attempted manslaughter and robbery on the basis of statements made, before their trial, by anonymous police officers, none of whom gave evidence before the regional court or the investigating judge. The Court of Appeal referred the case to the investigating judge who arranged hearings in which he, a registrar and the anonymous witnesses were in one room, while the applicants, their lawyers and the Advocate General were in another room. The two rooms were connected by a sound link only. By a majority, the European Court held (at 503–504 (para 59)) that there had been a breach of art 6(3)(d) since the defence were not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability. It had not been explained to the court’s satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered. It seems clear, however, that, if the two rooms had been connected by a video link, which had allowed the applicants and their representatives to observe the demeanour of the witnesses under questioning, this would have gone a long way, at the very least, to meeting the requirements of art 6(3)(d).

[12] By its very nature, the normal trial procedure in this country ensures that an accused can challenge and question the witnesses against him. That is one of its perceived virtues. And one of the aims of the sixth amendment to the United States Constitution, which guarantees the defendant in a criminal trial the right ‘to be confronted with the witnesses against him’, is indeed to make sure that the witnesses will be subject to cross-examination. Therefore, where the witness is available for cross-examination at trial, the sixth amendment places no restraint on the use of any pre-trial statement which he may have made. So, in *California v Green* (1970) 399 US 149, the Supreme Court held that there was no violation of the sixth amendment when the defendant was convicted of supplying marijuana on the basis of pre-trial statements of a witness who gave evidence at the trial and who was subject to full and effective cross-examination. The court expressly reaffirmed this ruling in *Crawford v Washington* (2004) 541 US 36 per Scalia J (slip opinion, at p 24, footnote 9). This approach differs in one particular respect from the one adopted by the European Court of Human Rights in *Kostovski v Netherlands* (1990) 12 EHRR 434 at 447–448 (para 41) quoted above. The critical element for the European Court



a is that the defence should have an adequate and proper opportunity to challenge and question a witness on his statement at some stage. The requirements of the convention are satisfied even if that opportunity is afforded before trial. The sixth amendment is somewhat stricter, however, since it requires that the witness should be available for cross-examination at the trial. That is, of course, what happens under the 1999 Act.

b [13] Mr Starmer drew on another important strand in the case law on the sixth amendment as support for his argument that the normal form of trial in Britain is also designed to give effect to a right of any defendant to be confronted with the witnesses against him and to look them in the eye while they are giving evidence. That right was valuable because, human nature being  
c what it is, witnesses were likely to feel differently if they had to repeat their story looking at the man whom they would harm greatly by distorting or mistaking the facts. This line of thought is expounded in the opinion of Scalia J, writing for the Supreme Court, in *Coy v Iowa* (1988) 487 US 1012 at 1016–1020. More recently, in *Crawford v Washington* Scalia J, again giving the opinion of the court, went into the historical background to the sixth amendment. On that  
d basis he held (slip opinion, p 14) that the principal evil against which it was directed ‘was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused’. Hence it was aimed at an accuser who made a formal statement to government officers. Doubtless, therefore, it would cover a child witness who gave evidence in a memorandum  
e video recording.

[14] It is for the people of the United States, and not for your Lordships, to debate the virtues of the sixth amendment in today’s world. It overlaps, to some extent, with art 6(3)(d) of the convention as interpreted by the European Court. But, as interpreted by the Supreme Court, the sixth amendment appears  
f to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that requirement. But, whatever its merits, this line of thought never gave rise to a corresponding requirement in English law. That is amply demonstrated by the very brevity of the decision of the Court of Criminal Appeal in *R v Smellie* (1919) 14 Cr App R 128, holding that  
g a judge could remove the accused from the sight of a witness whom his presence might intimidate.

[15] Nor has art 6(3)(d) of the convention been interpreted as guaranteeing the accused a right to be in the same room as the witness giving evidence. What matters, as *Kostovski’s* case shows, is that the defence should have a proper  
h opportunity to challenge and question the witnesses against the accused. The decision of the European Commission of Human Rights in *Hols v Netherlands* App no 25206/94 (19 October 1996, unreported) and the judgment of the court in *SN v Sweden* [2002] ECHR 34209/96 confirm that these requirements can be satisfied even where, for good reason, the accused is not physically present at  
j the questioning. Here the good reason is to further the interests of justice by adopting a system that will assist truthful child witnesses to give their evidence to the best of their ability. The introduction of art 6(3)(d) into English domestic law has therefore not altered the position in this regard. The 1999 Act satisfies the requirements of art 6(3)(d). Mr Starmer’s first challenge to its provisions must therefore be rejected.

[16] The other submission advanced by Mr Starmer and adopted by Mr Carter-Stephenson was that, by requiring the evidence of child witnesses to be given by video recording and/or video link, while not affording a similar facility to child defendants, the provisions of the 1999 Act violated these defendants' art 6(1) convention right to equality of arms. As a general rule, however, a provision that is designed to allow truthful witnesses for both sides to give their evidence to the best of their ability cannot make a trial unfair, simply because there is no corresponding provision designed to allow a truthful defendant to give his evidence to the best of his ability. The facts that the defendant does not need to give evidence, and that he has a legal representative to assist him if he chooses to do so, have hitherto been regarded as adequate arguments against the need to make such provision for child defendants in England and Wales. Certain practical difficulties have also been prayed in aid of this stance. It is worth noticing, however, that, when the Vulnerable Witnesses (Scotland) Act 2004 comes into force, under s 271F(2)–(8) of the Criminal Procedure (Scotland) Act 1995 children who give evidence as accused persons will, for the most part, be treated in the same way as other children who are witnesses. So there are no insuperable difficulties in the way of taking some such step.

[17] The fact remains, however, that the 1999 Act does not treat child defendants in this way. But, equally, it does not affect any power of the court, in the exercise of its inherent jurisdiction, to make an order, or to give leave, of any description in relation to such defendants who are witnesses: s 19(6), read along with s 17(1). It would be inappropriate for the House in this case to determine the scope of any such power to ensure a fair trial where, for example, a child defendant's ability to give evidence satisfactorily was impaired because of the behaviour of a co-defendant, or of a witness or of their associates or of the members of their families. (Cf s 271F(1)(b) to be inserted into the Criminal Procedure (Scotland) Act 1995.) Only if this power should prove to be inadequate in any given case might the defendant's trial be rendered unfair, with the result that there would be a breach of art 6(1).

#### BARONESS HALE OF RICHMOND.

[18] My Lords, the issue before us is whether the new scheme providing for how child witnesses are to give their evidence in criminal cases is compatible with the right of the defendant to a fair trial under art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), in particular when that defendant is also a child. The question certified for us by the Divisional Court ([2003] EWHC 227 (Admin), [2003] All ER (D) 32 (Feb)) was this:

'Are the provisions of s 21(5) of the Youth Justice and Criminal Evidence Act 1999 compliant with art 6 of the European Convention on Human Rights in so far as they prevent individualised consideration of the necessity for a special measures direction at the stage at which the direction is made?'

[19] It is necessary, therefore, to explain how s 21(5) fits into the scheme for 'Special Measures Directions in Case of Vulnerable and Intimidated Witnesses', set up by Ch I of Pt II to the Youth Justice and Criminal Evidence Act 1999. This followed from *Speaking Up for Justice: Report of the Interdepartmental Working*

a Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (Home Office, June 1998). This in turn followed a Council of Europe Recommendation No R(97)13, *Intimidation of Witnesses and the Rights of the Defence*, adopted on 10 September 1997. The new scheme built upon and expanded earlier tentative steps taken both by the common law and statute to enable children to give evidence in criminal trials: removing the accused from the sight though not the hearing of a witness (*R v Smellie* (1919) 14 Cr App R 128); setting up screens to prevent the witness seeing or being seen from the dock (*R v X* (1990) 91 Cr App R 36); allowing a child to give evidence by live television link (Criminal Justice Act 1988, s 32); and admitting a video recorded interview as the child's evidence in chief (Criminal Justice Act 1988, s 32A, inserted by the Criminal Justice Act 1991, s 54). The aim of the special measures is to assist vulnerable or intimidated witnesses who might otherwise be unwilling to come forward at all or unable to give the best evidence of which they are capable.

#### THE LEGISLATION

d [20] Section 16(1)(a) provides that all children under 17 at the time of the directions hearing are eligible for assistance. Section 16(1)(b) and (2) deal with mentally or physically disordered or disabled witnesses and s 17 deals with witnesses whose evidence is likely to be affected by fear or distress. Under s 18(1)(a), seven special measures are potentially available to help children and disabled witnesses: screens to prevent them seeing the accused (s 23); giving evidence by means of a live television link (s 24); giving evidence in private (s 25); removing wigs or gowns (s 26); admitting a video-recorded interview as their evidence in chief (s 27); admitting a video recording of cross-examination and re-examination (s 28—but this has not been brought into force); examination through an intermediary (s 29); and devices to aid the communication of questions and answers to and by a disabled witness (s 30). All except the last two are available to help witnesses who are in fear or distress (see s 18(1)(b)). None of these measures is available unless the Secretary of State has notified the court that arrangements are in place locally for implementing them (see s 18(2), (3)).

g [21] All witnesses, whether for the prosecution or defence, may be eligible for assistance except for the accused (see ss 16(1) and 17(1)). Any party may make an application for a special measures direction or the court may raise the issue of its own motion (s 19(1)). For most witnesses, the court has first to determine whether the witness is eligible, then whether any of the special measures would be 'likely to improve the quality' of her evidence, and if it would, which measures to direct (s 19(2)).

h [22] For child witnesses, however, there is a special regime applying to two of the special measures, video-recorded interviews and live link. If the witness is a child, the court must first have regard to the principles set out in s 21(3)–(7). If these require either or both of these special measures to be applied, the court must assume that they will be likely to maximise the quality of the child's evidence (see s 21(2)). Section 21(3)–(5) read as follows (s 21(6) and (7) deal with video-recorded cross-examination):

j '(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—(a) it must provide for any relevant

recording to be admitted under section 27 (video recorded evidence in chief); and (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24. a

(4) The primary rule is subject to the following limitations—(a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 18(2)) of the special measure in question in relation to the witness; (b) the requirement contained in subsection (3)(a) also has effect subject to section 27(2); and (c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason). b  
c

(5) However, subsection (4)(c) does not apply in relation to a child witness in need of special protection.'

[23] A child witness is 'in need of special protection' if the offence to which the proceedings relate is a sexual offence under various listed statutes, kidnapping, false imprisonment or child abduction, cruelty to a child, or any offence 'which involves an assault on, or injury or threat of injury to, any person' (see s 35(3)). d

[24] Thus the presumption is that all child witnesses give their evidence-in-chief by means of a video-recorded interview (which has been conducted for that purpose, see s 21(1)(c)), if there is one. The court does, however, have a discretion to refuse to admit the video or part of it under s 27(2). This reads: e

'A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this section if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.' f

[25] It is common ground that this discretion can be exercised at the preliminary hearing where special measures are first considered. The Home Office and other interested departments have published guidance on how these interviews are to be conducted: see *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children* (2001) ch 2, revising and expanding upon the earlier *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses in Criminal Proceedings* (1992). These interviews are not conducted in the same way as an ordinary examination-in-chief. Every attempt is made to put the child at her ease and to enable her to speak freely about what has happened. Hence, there may be criticisms of the way in which the interview was conducted or it may contain inadmissible or prejudicial material which should be excluded. In considering whether any part of a recording should not be admitted, the court has to consider whether any prejudice to the accused is outweighed by the desirability of showing the whole, or substantially the whole of the interview (s 27(3)). In reality, the defence may be more than willing for an unsatisfactory interview to be admitted. g  
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- a [26] The presumption also is that all child witnesses will give the rest or the whole of their evidence by live link, if it is available (s 21(4)(a)). This is not subject to a discretion comparable to that in s 27(2). This is not surprising, as the only difference between giving evidence by live link and giving evidence in the normal way is that the witness is not physically present in the courtroom. She can still be seen and heard, often at closer range than in many courtrooms.
- b The definition of live link is in s 24(8):

'In this Chapter "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 23(2)(a) to (c).'

- c [27] The 'persons specified' are the judge or justices (or both) and the jury (if there is one); legal representatives acting in the proceedings; and any interpreter or other person appointed to assist the witness. They do not include the accused (for the unfortunate reason that the list is taken from that referring to the use of screens, the whole purpose of which is to prevent the witness seeing and being seen by the accused). But this is not an exclusive definition. If the accused is in the courtroom, the court would and normally should, in the exercise of its power to ensure a fair trial, arrange matters so that he can see the witness too.

- d [28] In cases where the child is *not* 'in need of special protection', that is where the offences do *not* involve sex, kidnapping, cruelty or violence, the court may also disapply the rule in favour of video recording and live link, if it is satisfied that it 'would not be likely to maximise the quality of the [child's] evidence' (s 21(4)(c)). In cases where the child is in need of special protection, however, the court has no power to disapply the rule for that reason (s 21(5)).
- e The irrebuttable presumption is that in all proceedings for offences of a sexual or violent nature, giving evidence in this way is likely to enable the child to give her best quality evidence.

- f [29] All of this will be considered at the preliminary hearing when special measures are first raised (unless it is uncontested, in which case a hearing may be dispensed with, s 20(6)). Once made, a direction is intended to be binding until the proceedings are completed. This was a crucial feature of the scheme recommended in *Speaking Up for Justice*, para 2.2:

- h 'The Working Group proposes a scheme which would involve the identification of a vulnerable or intimidated witness and their needs at an early stage in the police investigation. This would enable decisions to be taken on appropriate methods of interview and investigation and ensure that there is appropriate pre-trial preparation. The prosecution and defence would be able to apply to the court for special measures to be made available to assist the witness during the trial. Decisions on the measures to be used would be made by the court at a pre-trial hearing and this would be binding so as to ensure that the witness knows in advance of the trial what assistance s/he will be receiving, including the way in which they will be giving their evidence.'
- j

[30] Hence s 20(1) provides:

'Subject to subsection (2) and section 21(8), a special measures direction has binding effect from the time it is made until the proceedings for the purpose of which it is made are either—(a) determined (by acquittal, conviction or otherwise), or (b) abandoned, in relation to the accused or (if there is more than one) in relation to each of the accused.'

[31] Section 21(8) does not (yet) apply to this case. It provides that a special measures direction for a child witness ceases automatically once the child reaches 17, unless she has already begun to give evidence or the direction has provided for the admission of a video-recording.

[32] Section 20(2), however, gives power to discharge or vary the direction in certain circumstances:

'The court may discharge or vary (or further vary) a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either—(a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or (b) of its own motion.'

[33] It would be irrational for a court to make a special measures direction which it was bound to make because of the rules applying to child witnesses and then immediately to vary or discharge it in the interests of justice. Section 20(2) must be contemplating a time after the special measures direction has been made, perhaps at the trial or perhaps at some intermediate stage. It is unlikely to arise much, if at all, in relation to the two special measures with which we are concerned, because both may be disappplied by the trial judge or magistrates in the interests of justice.

[34] Thus, once a live link direction has been given, s 24(2) provides that the witness cannot give evidence in any other way without the permission of the court. But s 24(3) provides:

'The court may give permission for the purposes of subsection (2) if it appears to the court to be in the interests of justice to do so, and may do so either—(a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or (b) of its own motion.'

[35] Again, this must contemplate a time after the live link direction has been made. Usually it will be at the trial, for example where the machinery is not working properly or where the child is sliding down so as to be invisible to the camera. Another possibility might be where the child was positively anxious to give evidence in the courtroom and the court considered that it would be contrary to the interests of justice to require her to use the live link.

[36] Where a video recording is admitted under s 27, the witness may not give evidence-in-chief in any other way on any matter which has been adequately dealt with in the recording or without the permission of the court on any matter dealt with (but less than adequately) in that testimony (s 27(5)(b)). The court may give that permission in the same circumstances as those set out in s 24(3) for live link (s 27(7)).

[37] But such departures from the primary rules are clearly intended to be exceptional. The earlier powers in ss 32 and 32A of the Criminal Justice Act 1988 were exceptions to the normal practice of giving evidence in the courtroom, for which in the case of live link an individual case had to be made each time (see R

a (on the application of DPP) v Redbridge Youth Court, R (on the application of L) v Bicester Youth Court [2001] EWHC Admin 209 at [17], [2001] 3 FCR 615 at [17], [2001] 4 All ER 411). By contrast, the 1999 Act provides that the normal procedure for taking the evidence of child witnesses is to be by video recording and live link.

b [38] The benefits of this are many. Mr Carter-Stephenson, on behalf of the appellant G, acknowledges that a video-recorded interview is likely to be the best evidence that a child can give. It can take place close to the events in question when the recollection is fresh in the child's mind. It is done in an informal setting where every effort is made to make the child feel comfortable and able to speak freely. It is conducted by professionals who are specially trained in questioning children, first to establish that they understand the importance of telling the truth and then to elicit their story as fully as possible in language the child understands but without suggestion or leading questions. c But this is obviously not appropriate where the child herself might be charged with an offence; she should be interviewed under the Police and Criminal Evidence Act 1984 in the usual way.

d [39] Whether the direction is for a video recording or only for live link, the child and everyone else knows the position from an early stage. The child can be reassured that she will not have to go into the court room. This is not only reassuring for the witness, but may encourage other child witnesses to come forward or reduce their parents' reluctance to allow them to do so. It is also carries no implicit disparagement of the accused. If all child witnesses give their evidence in this way, there is no suggestion that this is an exceptional case in which the child requires special protection from the accused. e

THESE PROCEEDINGS

f [40] In the cases before us the making of a special measures direction was opposed at the outset. In the case of D (and in the associated cases of R and N), justices in the youth court ordered that the evidence of child witnesses then aged 13 or 14 be given by live link in prosecutions for robbery of child defendants then aged 14, 16 and 15 respectively. The justices were advised by their clerks that the effect of s 21(5) (see [28], above) was that they had no discretion. The accused applied for judicial review.

g [41] In the case of G (and of I and AE associated with it) district judges in the youth court declined to make special measures directions in respect of witnesses then aged 12, 16 and 15 in prosecutions for robbery or assault of child defendants then aged 14, 16 and 15. The special measures in question were live link and, in the case of G, a video-recorded interview of the witness O, who was h 11 at the time of the events giving rise to the charge. According to the written reasons later given by District Judge Black, the directions were refused because of the inequality of arms between the prosecution and the defence where both the prosecution witnesses and the accused were children, but the accused children did not qualify for special measures. The Director of Public j Prosecutions applied for judicial review.

[42] A Divisional Court consisting of Rose LJ and Henriques J held that there was nothing in art 6 which prohibited a vulnerable witness from giving evidence in a different room from the accused, nor could a live link or a video recording infringe the right to examine witnesses guaranteed by art 6(3)(d). Accordingly they dismissed the applications of D, R and N and allowed the

applications of the Director of Public Prosecutions in the cases of G, I and AE. They certified the question of law set out at [18], above.

[43] There were three strands in the arguments presented by the appellants: first the limited power to disapply the primary rule in the interests of justice; second, the procedural requirements of a fair trial under art 6 of the European Convention on Human Rights; and third the 'equality of arms' principle also derived from art 6.

#### DISAPPLYING THE PRIMARY RULE

[44] First, Mr Starmer on behalf of D conceded that it was permissible for there to be a statutory presumption in favour of these special measures for child witnesses. His concern was with the limited opportunities for displacing them in the interests of justice. He accepted, indeed it was crucial to his argument, that the power to vary or discharge a special measures direction in s 20(2) could not be used at the time when the direction was made. Further, as a party could only apply for a variation or discharge if there had been a change in the circumstances, he argued that the court could only vary or discharge the direction if there had been such a change. The power in s 24(3) to permit a witness to give evidence other than by live link is in the same terms. Hence, he argued, the court was unable to disapply the primary rule if there was a risk of injustice which was apparent at the outset.

[45] It is clear that, by enacting the primary rule and limiting the circumstances in which it may be disapplied, Parliament did not mean to allow defendants to challenge the use of a video recording or live link simply because it is a departure from the normal procedure in criminal trials. There is no question, as there was for live link applications under the old law, of the court striking a balance between the 'right of the defendant to have a hearing in accordance with the norm' and 'the interests not only of the child witness but also of justice, to ensure that the witness will be able to give evidence and give evidence unaffected by the stress of appearing in court itself' (see the *Redbridge* case [2001] 3 FCR 615 at [17]). Parliament has decided what is to be the norm when child witnesses give evidence. Hence there will have to be a special reason for departing from it. The fact that there is no particular reason to think that this particular child will be upset, traumatised or intimidated by giving evidence in court does not make it unjust for her to give it by live link and video if there is one (cf the *Redbridge* case [2001] 3 FCR 615 at [16]).

[46] It is very difficult, and counsel found it difficult, to think of reasons which might make a live link or the admission of a recording unjust which were unrelated either to the quality of the equipment on the day, to the content and quality of the video recording, or the unavailability of the recorded witness for cross-examination (express power to exclude the video recording in these circumstances is preserved by s 27(4)). He gave the example of an assault charge in which the defence was self-defence, where it might be important to see the witness in person and gain an impression of how threatening he could be, especially when angry. This is exactly the sort of question which should be considered only at the trial and not at any preliminary hearing. Only then will the court be able to judge whether there is a real risk of injustice if the fact finders are not allowed to see the witness in the flesh. Even if there is, there are several ways of counteracting it, for example by bringing the witness into the courtroom after he has given his evidence. But there is nothing in s 20(2) or,



a more to the point, in s 24(3) to prevent the judge or magistrates trying the case considering the matter and taking whatever action is needed to secure a fair trial on the day. The object of requiring a change in circumstances before a party may apply is simply to avoid repeated attempts to revisit the issue. The court is there to see justice done on the day. But the court must always start from the statutory presumption that there is nothing intrinsically unfair in children giving their evidence in this way.

THE PROCEDURAL REQUIREMENTS OF ARTICLE 6

[47] Second, therefore, it is argued that this approach is contrary to the defendant's right to a fair trial guaranteed by art 6 of the European Convention on Human Rights. The relevant parts read as follows:

c '(1) In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...

d (3) Everyone charged with a criminal offence has the following minimum rights ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.'

e [48] The European Court of Human Rights has considered this in a series of cases dealing with anonymous prosecution witnesses. It has enunciated the basic principles time and again, most conveniently in *Kostovski v Netherlands* (1990) 12 EHRR 434 at 447-448:

'39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them ...

f 41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.

g As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.'

h [49] It is difficult to see anything in the provisions of the 1999 Act with which we are concerned which is inconsistent with these principles. All the evidence is produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused can see and hear it all. The accused has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is a face to face confrontation, but the appellants accept that the convention does not guarantee a right to face-to-face confrontation. This case is completely different from the case of anonymous witnesses. Even then the Strasbourg Court has accepted that exceptions may be made, provided that sufficient steps are taken to counterbalance the handicaps under which the defence laboured

and a conviction is not based solely or decisively on anonymous statements (see *Doorson v Netherlands* (1996) 22 EHRR 330 at 350 (para 72); *van Mechelen v Netherlands* (1997) 25 EHRR 647 at 673 (paras 54, 55); *Visser v Netherlands* [2002] ECHR 26668/95 (para 43). a

[50] Our attention has been drawn to only two cases in which measures similar to those in question here were considered. One was a live link transmission where both counsel were in the room with the witness while the judge and accused remained in the courtroom. The application was declared inadmissible (see *Hols v Netherlands* App no 25206/94 (19 October 1996, unreported)). Another was a video-recording of an interview conducted by a police officer with the child complainant, and an audio-recording of a second interview conducted by the same police officer, putting questions which he had been asked by the accused's counsel to put. Despite the fact that counsel had had no opportunity to question the child directly, no violation of art 6(3)(d) was found (see *SN v Sweden* [2002] ECHR 34209/96). The court reiterated 'that evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the convention should be treated with extreme care'; but it was satisfied (at para 53) that the national court had done just that. b  
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[51] The measures with which we are concerned do give the accused the opportunity of challenging the witness directly at the time when the trial is taking place. The court also has the opportunity to scrutinise the video-recorded interview at the outset and exclude all or part of it. At the trial, it has the fallback of allowing the witness to give evidence in the court room or to expand upon the video recording if the interests of justice require this. There is nothing in the case law cited to suggest that this procedure violates the rights of the accused under art 6. e

[52] Mr Starmer stressed that the Strasbourg case law should be seen in the light of the traditions of our domestic legal system. The nature of criminal proceedings in each contracting state affects the European Court's approach to the basic principle that 'all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument.' In our system the starting point is that all the evidence is given literally in the court room in front of the accused. Thus any departure should be shown to be necessary. f

[53] However, this cannot mean that the Strasbourg Court would regard our domestic legal system as so set in stone that Parliament is not entitled to modify or adapt it to meet modern conditions, provided that those adaptations comply with the essential requirements of art 6. In this case, the modification is simply the use of modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and to challenge all the evidence against him. There are excellent policy reasons for doing this. Parliament having decided that this is justified, the domestic legal system is entitled to adopt the general practice without the need to show special justification in every case. g  
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#### EQUALITY OF ARMS

[54] Thirdly, the appellants argue that it is unfair to the child defendants in these cases if they are denied the same opportunity to give their evidence under the conditions which are now presumed to produce the best evidence from

a other child witnesses. This was the argument which impressed the district judges in the cases of G, I and AE. The scheme of the 1999 Act has attracted academic criticism in this respect. Thus, Professor Birch, in her commentary on the *Redbridge* case [2001] Crim LR 473 at 477:

b 'It is really something of a farce that in proceedings concerning, say, a fight between gangs of boys in which one "side" ends up in the dock and the other in the witness box, only the latter are deemed to benefit from the five-link. Perhaps, then, the real prejudice identified in these cases is not that the court or accused is deprived of witnessing demeanour at first hand, but that the accused is deprived of the chance to compete on even terms, and the court of the chance of supervising an equal contest.'

c [55] To similar effect is Laura Hoyano 'Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' [2001] Crim LR 948 at 968:

d 'If we value the presumption of innocence and the premise that the search for truth demands that witnesses give their best evidence and are fairly tested in cross-examination, then the case for withholding special measures from children accused of crimes must be made, not assumed.'

e [56] Mr Carter-Stephenson was concerned that we should understand the realities of life in the youth court. The child defendants appearing there are often amongst the most disadvantaged and the least able to give a good account of themselves. They lack the support and guidance of responsible parents. They lack the support of the local social services authority. They lack basic educational and literacy skills. They lack emotional and social maturity. They often have the experience of violence or other abuse within the home.

f Increasing numbers are being committed for trial in the Crown Court where these disadvantages will be even more disabling.

g [57] These are very real problems. But the answer to them cannot be to deprive the court of the best evidence available from other child witnesses merely because the 1999 Act scheme does not apply to the accused. That would be to have the worst of all possible worlds. Rather, the question is what, if anything, the court needs to do to ensure that the defendant is not at a substantial disadvantage compared with the prosecution and any other defendants (see *Delcourt v Belgium* (1970) 1 EHRR 355, para 28). That can only be judged on a case-by-case basis at trial and on appeal.

h [58] The defendant is excluded from the statutory scheme because it is clearly inappropriate to apply the whole scheme to him. There are obvious difficulties about admitting a video-recorded interview as his evidence-in-chief, referred to by the Court of Appeal in *R v H* [2003] EWCA Crim 1208 at [23], [24], [2003] All ER (D) 436 (Mar) at [23], [24]. Who would conduct it and how? What safeguards against repeated interviews could there be given, that it would not be

j made available to the other side before the trial? There are also obvious difficulties about applying binding advance presumptions about how his evidence is to be given, if indeed it is to be given at all, when the defence is ordinarily free to make such decisions in the light of events as they unfold. Further, the special measures designed to shield a vulnerable or intimidated witness from the accused would not normally be applicable to a defendant witness.

[59] But the Court of Appeal also made it clear in *R v H* that the court has wide and flexible inherent powers to ensure that the accused receives a fair trial, and this includes a fair opportunity of giving the best evidence he can. In that case the defendant had learning and communication difficulties. The court could allow him the equivalent of an interpreter to assist with communication, a detailed written statement could be read to the jury so that they knew what he wanted to say, and he might even be asked leading questions based upon that document, all in an attempt to enable him to give a proper and coherent account.

[60] The Strasbourg Court has also held, in *V v UK* (2000) 30 EHRR 121 at 179 (para 86) that 'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings'.

[61] The environment and procedures in the youth court are already designed with this in mind, although no doubt there will be a need to do more in some cases. The procedures in the Crown Court have also been modified to meet the needs of child defendants following the case of *V v UK*, and again more may need to be done in some cases.

[62] Section 19(6) of the 1999 Act expressly provides that: 'Nothing in this Chapter is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)—(a) in relation to a witness who is not an eligible witness ...'

[63] Clearly, therefore, if there are steps which the court can take in the exercise of its inherent powers to assist the defendant to give his best quality evidence, the 1999 Act does not exclude this. However, in *R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] All ER (D) 590 (Mar), the Administrative Court held that there was no inherent power to allow a defendant to give evidence by live link, on the ground that Parliament had sought since 1988 to provide exclusively for the circumstances in which live link might be used in a criminal trial. With respect, while it is true that s 32 of the 1988 Act did not contain an express saving for any inherent power the court might have to assist the accused, s 19(6) makes it clear that the 1999 Act does not purport to make exclusive provision for any of the special measures it prescribes. The point does not arise for decision in this case, and so it would be unwise to express an opinion upon it. It is in any event better taken on an appeal against conviction in which the defendant argues that he was not given a proper opportunity to defend himself. For the reasons given earlier, the situations of defendants and other witnesses are so different that it would only very rarely be necessary for a defendant to give evidence by live link, but the case of a younger child defendant who was too scared to give evidence in the presence of her co-accused might be an example. I would therefore prefer to reserve my position on whether the Waltham Forest case was correctly decided. It cannot in any event affect the result of this case. The fact that the accused may need assistance to give his best evidence cannot justify excluding the best evidence of others.

[64] I would therefore answer the certified question in the affirmative and dismiss these appeals.



**LORD BROWN OF EATON-UNDER-HEYWOOD.**

- a** [65] My Lords, the Youth Justice and Criminal Evidence Act 1999 deals differently with three categories of witnesses eligible for assistance by way of the special measures provided for in ss 24 and 27, provisions respectively for live link evidence and video-recorded evidence-in-chief. One category is witnesses aged 17 or more with regard to whom there are no presumptions
- b** either way. In their case the court must determine whether these special measures would be 'likely to maximise' (s 19(2)(b)(i)) the 'quality [of their evidence] in terms of completeness, coherence and accuracy' (s 16(5)) having regard to all the circumstances of the case including in particular whether it 'might tend to inhibit such evidence being effectively tested' (s 19(3)(b)).
- c** [66] The second category is child witnesses (witnesses under 17) not deemed to be 'in need of special protection', ie child witnesses in proceedings which do not involve offences of sex or violence. As to these there is a presumption that these two special measures will be 'likely to maximise' the quality of their evidence (s 21(2)) but the presumption is rebuttable: it is open to a party to seek to satisfy the court to the contrary (s 21(4)(c)).
- d** [67] The third category is child witnesses deemed to be in need of protection (who may, of course, be witnesses for the prosecution or for the defence and who may or may not themselves be the victims of the alleged offences of sex or violence). For these witnesses the presumption that these two special measures will be likely to maximise the quality of their evidence is irrebuttable. In their
- e** case s 21(5) disapplies s 21(4)(c) which itself in category two cases disapplies the primary rule that these two special measures must always be directed in the case of child witnesses. It is, of course, this third category of witnesses with which this appeal is directly concerned.
- f** [68] Although I share Baroness Hale of Richmond view that there will be very few cases when it will be disadvantageous to the defendant for a child witness to give evidence by way of video recording and/or live link, it seems to be that just occasionally this will be so. Indeed, to my mind this is implicit in the legislation. Why otherwise is provision made in s 21(4)(c) for the possibility of satisfying the court that the quality of the child witness's evidence will not be likely to be maximised by these measures, perhaps because they 'might tend
- g** to inhibit such evidence being effectively tested'? It by no means follows, however, that the legislation is in any way defective or incompatible with art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).
- h** [69] If in a particular category three case the mandatory special measures direction for live link evidence were to be regarded at the trial as having created a real risk of injustice to the defendant, the court has ample power under s 20(2) to discharge the direction, alternatively, under s 24(3), notwithstanding the direction, to allow the witness to give evidence in open court. (If the risk of
- j** injustice were perceived in a video recording case, of course, the court would probably not have made the direction in the first place: such an order would not in those circumstances be mandatory (see ss 21(4)(b) and 27(2)). The number of cases, however, in which the court will conclude that a live link order, mandatorily made at the initial direction stage, would create injustice for the defendant, will be exceedingly small. I reject the appellant's argument that, because the court will be exercising its discretion and reaching a judgment for

the first time at trial, the assurance which the witness seeks is, on this approach to the legislation, delayed by the mandatory requirement to make the direction at the earlier stage. The initial lack of absolute certainty implicit in the statutory scheme is more than compensated for by the near certainty that the mandatory direction will in fact continue to operate at trial. a

[70] Nor am I in the least persuaded that this statutory scheme is in any way inconsistent with the requirements of art 6. The hearing does not cease to be 'public' merely because a witness's evidence may be given by live link and/or in part by video recording. Nor is it necessary to justify such measures in each individual case. Parliament was perfectly entitled to conclude that the interests of justice generally would be better served by introducing an almost invariable rule such as will not merely in the vast majority of cases maximise the quality of child witnesses' evidence but will also encourage their full co-operation with the criminal justice system, than by retaining the maximum opportunity for face to face confrontation with child witnesses at trial. b

[71] For these reasons and those more particularly given by my noble and learned friends Lord Rodger of Earlsferry and Lady Hale with which I fully agree I too would answer Yes to the certified question and would dismiss these appeals. c  
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*Appeals dismissed.*

Dilys Tausz Barrister.

# Milne v Express Newspapers Ltd

[2004] EWCA Civ 664

COURT OF APPEAL, CIVIL DIVISION

MAY, TUCKEY AND LAWS LJJ

26 APRIL, 27 MAY 2004

*Libel and slander – Offer of amends – Refusal of offer of amends giving rise to defence unless defendant having ‘reason to believe’ that statement complained of was false – Meaning of ‘reason to believe’ – Defamation Act 1996, s 4(3).*

The claimant brought an action for libel against the defendant newspaper publisher. The defendant made an unqualified offer to make amends under the Defamation Act 1996, which the claimant rejected. Under s 4<sup>a</sup> of the 1996 Act the defendant thus had a statutory defence to the libel proceedings, which it duly pleaded. In his reply, the claimant sought to rely on s 4(3), which provided that there was no such defence if the person by whom the offer of amends was made knew or had ‘reason to believe’, inter alia, that the statement complained of was false. The defendant successfully applied to the judge to strike out that part of the reply which relied on s 4(3), on the basis that the matters relied on were insufficient in law to rebut the defence (the first judgment) and the claimant applied for permission to amend his reply. The judge applied the same criteria he had articulated in the first judgment, refused the claimant permission to amend the particulars of the reply, and ordered that judgment should be entered for the defendant in the action. The claimant applied for permission to appeal, challenging the judge’s construction of s 4(3). The claimant contended that the judge had misconstrued s 4(3) as importing a wholly subjective recklessness or ‘bad faith’ test of the kind required for the proof of malice in defamation, i.e. a lack of belief in the truth or a reckless indifference as to the truth or falsity of the words complained of, and that a proper construction did not extend to import bad faith, malice, or recklessness, although he accepted that the relevant words in the statute did not import negligence or constructive knowledge.

**Held** – ‘Reason to believe’ in the 1996 Act did not apply to anything short of recklessness. If a claimant established malice on the part of a person who published a defamatory statement, he had the basis for a claim of aggravated, and possibly exemplary, damages. Malice apart, compensation could be fully assessed and awarded under the statutory provisions which applied where an offer to make amends was accepted. There would be little point therefore in relying on s 4(3), unless the requirement there was to establish malice. Moreover, in the context of s 4(3) there was no distinct possible meaning of the words ‘had reason to believe’ lying between recklessness on the one hand and constructive or imputed knowledge based on negligence on the other. Accordingly, the first judgment had contained a correct construction of s 4(3) of the 1996 Act. Furthermore, there would be no proper basis for a jury to conclude from the proposed amended particulars that the journalist in question had been recklessly indifferent to the truth of the relevant defamatory statement which he had

<sup>a</sup> Section 4, so far as material, is set out at [15], below

published. The applications for permission to appeal would therefore be allowed in part but the appeal would be dismissed (see [27], [36], [49], [52], [59], below).

Decision of Eady J [2003] 1 All ER 482 affirmed.

## Notes

For failure to accept an offer to make amends, see 28 *Halsbury's Laws* (4th edn reissue) para 163.

For the Defamation Act 1996, s 4, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue), 50.

## Cases referred to in judgment

*Abu v MGN Ltd* [2002] EWHC 2345 (QB), [2003] 2 All ER 864, [2003] 1 WLR 2201.

*Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL.

*Horrocks v Lowe* [1974] 1 All ER 662, [1975] AC 135, [1974] 2 WLR 282, HL.

*Rigg v Associated Newspapers Ltd* [2003] EWHC 710 (QB), [2004] EMLR 52.

*Swain v Puri* [1996] PIQR P442, CA.

## Applications for permission to appeal and appeals

The claimant, Andrew Milne, applied for permission to appeal, with appeals to follow if granted, against decisions of Eady J in the claimant's defamation action against the defendants, Express Newspapers Ltd, (i) on 29 November 2002 ([2002] EWHC 2564 (QB), [2003] 1 All ER 482) striking out part of the claimant's reply; and (ii) on 10 July 2003 ([2003] EWHC 1843 (QB), [2003] All ER (D) 172 (Jul)) refusing permission for the claimant to amend his reply. The facts are set out in the judgment.

*Richard Parkes QC* and *William Bennett* (instructed by *Andrew Milne & Co*) for the claimant.

*Geoffrey Shaw QC* and *Caroline Addy* (instructed by *Davenport Lyons*) for the defendants.

*Cur adv vult*

27 May 2004. The following judgment of the court was delivered.

MAY LJ.

## INTRODUCTION

[1] This is the judgment of the court on two applications by the claimant, Andrew Milne, for permission to appeal against judgments of Eady J of 29 November 2002 ([2002] EWHC 2564 (QB)) and 10 July 2003 ([2003] EWHC 1843 (QB)) in Mr Milne's defamation action against Express Newspapers. Brooke LJ considered the applications on paper. He adjourned them for consideration by the full court with the appeals to follow if the court grants permission.

[2] The defendants say that the first application needs a very long extension of time. The claimant says that the judge informally extended time for appealing against his first decision until after he had made his second decision. This is not supported by the transcript of what was said at the conclusion of the first hearing. In our view, however, any formal need for an extension of time should not prevent us from examining the merits of the first application.



a [3] Eady J's first judgment is an important one. It is reported at [2003] 1 All ER 482, [2003] 1 WLR 927 and is the leading case which considers s 4(3) of the Defamation Act 1996. These applications are the first opportunity for this court to consider the statutory provisions, introduced by ss 2–4 of the 1996 Act, as to offers to make amends by a person who has published a statement alleged to be defamatory.

b THE PUBLICATION

c [4] The proceedings concern an article in the Sunday Express of 25 March 2001. There was at the time political controversy relating to Mr Keith Vaz, a member of Parliament and Minister for Europe, and Mr Zaiwalla, the senior partner of a firm of solicitors, Zaiwalla & Co. There had been an inquiry and report by Dame Elizabeth Filkin, the Parliamentary Commissioner for Standards. The claimant was a former salaried partner of Zaiwalla & Co. He had given evidence to the Filkin inquiry.

d [5] The Sunday Express article was written by Tim Shipman as 'political correspondent'. It had the headline, 'PM told sleaze report is not worth the paper it's printed on'. The words of the article of which the claimant complained, following the headline, were:

e "Tony Blair had a face-to-face meeting with the Asian lawyer at the centre of the Keith Vaz sleaze scandal. He met City solicitor Sarosh Zaiwalla after Mr Vaz, Minister for Europe, was condemned by a watchdog for recommending him for a peerage. At the meeting Mr Zaiwalla, whose company paid Vaz two sums totalling £450, told the Prime Minister that key evidence had been ignored by the inquiry, and the subsequent report by the parliamentary sleaze buster Dame Elizabeth Filkin was "not worth the paper it was printed on". His intervention may have helped to solidify Mr Blair's resolve to back Mr Vaz and allow him to travel to this weekend's European summit in Stockholm with Foreign Secretary Robin Cook. Mr Zaiwalla also told the Sunday Express that Mr Vaz told him last year that he had previously recommended Dame Elizabeth's first husband for a peerage. David Filkin was made a Life Peer in 1999. Mr Zaiwalla, who runs an international law firm in London's Chancery Lane, spoke to the Prime Minister for more than five minutes at a Labour gala dinner on March 15. He took Mr Blair aside at the Hilton Hotel bash and impressed on him the view that the evidence against Mr Vaz proffered by one of his former employees was tainted. Mr Zaiwalla, whose firm of solicitors once hired Mr Blair when he was a junior barrister, said: "I wanted to set the record straight. He did not say much, but he listened to what I had to say". A leading figure in London's Asian community, Mr Zaiwalla said he "can't vouch" for whether Mr Blair agreed with him. But he added: "He has to listen to everybody. Mr Blair acted for my firm in 1983. He was a very competent barrister. I hope he has respect for me and respects my integrity." Mr Vaz was first investigated last February after Andrew Milne, a former salaried partner at Zaiwalla & Co, alleged £2,000 had been given to him by Mr Zaiwalla. The Filkin inquiry found that Mr Vaz failed to declare two payments totalling £450 from the company. Dame Elizabeth had to drop an investigation into eight other charges after Mr Vaz refused to answer further questions. But Mr Zaiwalla said he believes that the minister's only fault is that he is "overly enthusiastic" to help people ...'

[6] A subsequent paragraph of the article stated that a Downing Street spokeswoman had said on the previous evening that there were over 500 people at the dinner and the Prime Minister had no conversations of substance with anyone. a

[7] The judge said that unusually there was no dispute between the parties as to the natural and ordinary meaning to be attributed to the passages in the article complained of. Both sides accepted that they convey the meaning that 'the claimant is reasonably suspected of giving false evidence to the Filkin inquiry'. b

#### THE OFFER TO MAKE AMENDS

[8] By a letter dated 13 May 2002, the defendants by their solicitors made an unqualified offer to make amends under s 2 of the 1996 Act. In a separate second letter, they made proposals to implement the offer. The claimant wrote rejecting the offer and giving reasons for doing so. There was correspondence in which the defendants' solicitors suggested to him that he may have misunderstood the effect of the statutory procedure. He maintained his rejection of the offer. The defendants accordingly had a statutory defence to the claim under s 4 of the 1996 Act which they duly pleaded. In his reply, the claimant sought to rebut this defence by relying on s 4(3) of the 1996 Act. He gave particulars of the facts on which he relied. c  
d

#### THE APPLICATIONS TO THE JUDGE AND COURT OF APPEAL

[9] By application notice dated 19 September 2002, the defendants applied to strike out the three paragraphs of the reply which relied on s 4(3). They contended that the matters relied on in those paragraphs were insufficient in law to rebut the defence. This was the application which the judge decided in favour of the defendants on 29 November 2002. He ordered that the three paragraphs of the reply should be struck out under CPR 3.4. He also ordered that judgment should be entered for the defendants unless the claimant applied within 14 days for permission to amend his reply. The claimant did so apply by application notice dated 19 December 2002. The defendants opposed this application, contending that the proposed second version of the pleading still failed to measure up to the requirements of s 4(3) of the 1996 Act. On 10 July 2003, the judge upheld the defendants' contentions, refused the claimant permission to amend his reply and ordered that judgment should be entered for the defendants in the action. He ordered the claimant to pay the defendants' costs of the action and of the application. e  
f  
g

[10] The claimant applied for permission to appeal against the judge's decisions and orders of 29 November 2002 and 10 July 2003. The claimant's contentions which survived as submissions advanced orally by Mr Richard Parkes QC on behalf of the claimant at the hearing before this court were: (a) that the judge's construction in his first judgment of s 4(3) of the 1996 Act was to an extent erroneous; and that upon a correct construction he should have permitted the claimant to amend his reply in the terms considered on 10 July 2003. (b) Alternatively, even if the judge's construction of s 4(3) was correct, he should have permitted the claimant to amend his reply in the terms proposed. h  
j

[11] We use the expression 'to an extent' in [10] (a), because the claimant's original grounds of appeal and skeleton arguments, drafted on his behalf before Mr Parkes was instructed, contended for a construction of s 4(3) much further removed from that adopted by the judge than the construction advanced by Mr Parkes.

a [12] The claimant through Mr Parkes does not now contend that the paragraphs of the reply which the judge ordered to be struck out in his first judgment should be reinstated. This appeal is limited to the contention that the particulars which the judge rejected on 10 July 2003 should have been permitted. There is therefore in form no surviving appeal against the order which the judge made on 29 November 2002. His construction of s 4(3) and his reasoning in support of that construction is challenged. The judge carried that construction and reasoning through into his decision on 10 July 2003 and the claimant is entitled to challenge this in advancing his second application. There is therefore nothing left of the first application nor any surviving basis for extending time to make it. We therefore refuse the application to extend time and the first application for permission to appeal, which is dismissed.

c

SECTIONS 2–4 OF THE DEFAMATION ACT 1996

[13] Section 2 of the 1996 Act provides that a person who has published a statement alleged to be defamatory may offer to make amends under the section. The offer may be in relation to the defamatory statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys. The defendants’ offer in the present case was unqualified. An offer to make amends is an offer to make and publish a suitable correction and a sufficient apology, and to pay such compensation and costs as may be agreed or determined. An offer to make amends may not be made after a person has served a defence in defamation proceedings brought against him in respect of the publication in question.

[14] Section 3 provides that, if an offer to make amends is accepted, the party accepting the offer may not bring or continue defamation proceedings against the person making the offer in respect of the publication, but he is entitled to enforce the offer. The parties can agree the steps to be taken. If they do not agree, the party who made the offer may take such steps as he thinks appropriate. He may make the correction and apology by a statement in open court in terms approved by the court. He may give an undertaking to the court as to the manner of publication. If the parties do not agree the amount to be paid by way of compensation, it is to be determined by the court on the same principles as damages in defamation proceedings. Proceedings under the section are to be heard and determined without a jury. The court is to take account of any steps taken in fulfilment of the offer, including the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances: and the court may reduce or increase the amount of compensation accordingly. Thus, if in an ordinary case a claimant in defamation proceedings accepts an offer to make amends, he becomes entitled either by agreement or by determination of the court to full proper compensation for the defamatory publication. The defendant has capitulated at an early stage and before serving a defence on all issues except the amount of damages, if this is not agreed. The claimant can bring or continue the proceedings to determine the compensation. It is to be expected that most sensible claimants will accept unqualified offers to make amends. The main purpose of the statutory provisions is plain. It is to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial.

j [15] Section 4 of the 1996 Act applies if an offer to make amends under s 2 is not accepted. The fact that the offer was made is a defence to the defamation

proceedings. A qualified offer is only a defence in respect of the meaning to which the offer related. Section 4(3) however provides:

‘There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of—(a) referred to the aggrieved party or was likely to be understood as referring to him, and (b) was both false and defamatory of that party; but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case.’

The person who made the offer does not have to rely on it by way of defence. If he does, he may not rely on any other defence. The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

[16] Eady J’s first judgment and this application concern the proper construction of the words, ‘or had reason to believe that the statement complained of ... was ... false’. The claimant does not contend that the defendants knew that the statement complained of was false. He does, however, wish to be permitted by amending his reply to contend that the defendants, in the person of Mr Shipman, ‘had reason to believe’ that the statement complained of was false.

#### THE DEFAMATION ACT 1952 AND THE NEILL COMMITTEE

[17] Sections 2–4 of the 1996 Act derive from recommendations of Sir Brian Neill’s Committee on Practice and Procedure in Defamation (the Neill committee) in their report of July 1991. Eady J, then in practice at the Bar, was a member of the committee. He explained in his first judgment that he was the draftsman of the relevant passages in the report and that he had meetings with the parliamentary draftsman and Sir Brian Neill when the Bill was going through its various stages. He warned himself that he must take scrupulous care to set aside any personal preconceptions and also the subjective intentions of those who conceived the defence. He had to ensure that he approached the matter in accordance with the usual principles of statutory construction. That might be an unusual mental exercise to have to perform, but he did not find it difficult. There has been no suggestion that the judge’s membership of the committee in any way disabled him from making the decisions which the claimant now wishes to challenge.

[18] The Neill committee report noted that s 4 of the Defamation Act 1952 provided for a form of offer of amends. This was available to a person who claimed that the words alleged to be defamatory were published by him ‘innocently’. An offer of amends under the section was to be understood as an offer to publish a suitable correction and a sufficient apology and to take reasonably practicable steps to notify persons to whom a publication had been distributed that the words were alleged to be defamatory of the aggrieved party. If the offer was accepted and duly performed, no proceedings for libel or slander might be taken or continued against the person making the offer in respect of the publication. If the offer was not accepted, it was to be a defence to prove in libel or slander proceedings against the person making the offer—

‘that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.’ (See s 4(1)(b) of the 1952 Act.)



a An offer of amends under the 1952 Act had to be accompanied by an affidavit specifying the facts relied on to show that the words in question were published innocently. No evidence other than evidence of facts specified in the affidavit was admissible on behalf of the person making the offer for the purposes of the defence which depended on it. Section 4(5) of the 1952 Act provided:

b 'For the purposes of this section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to another person if and only if the following conditions are satisfied, that is to say—(a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or (b) that the words  
c were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person; and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection to the publisher shall be construed as including a reference  
d to any servant or agent of his who was concerned with the contents of the publication.'

[19] Section 4 of the 1952 Act put such a heavy burden on defendants that it was never used. In retrospect, the reasons are obvious. They are explained in paras VII 3–10 of the Neill report, parts of which are quoted in the judge's first  
e judgment in the present case.

[20] The Neill committee's conclusions are in their paras VII 11 and following, parts of which are reproduced in the judge's judgment. The committee considered it to be desirable to have some more streamlined defence available where a defendant had behaved fairly and reasonably after the tort had  
f been committed. There was a need to discourage a small minority of plaintiffs who wished to proceed to trial for purely financial motives, rather than being motivated by a desire for vindication. It was impossible to produce a perfect solution, but a streamlining of the procedure with certain changes could redress the balance between the parties by removing some of the hurdles presently  
g confronting defendants. The committee considered that the basic procedural structure could be retained including the provision for setting out the defendant's case by way of affidavit. In para VII 14, they said:

'We have in mind the following proposals for change: (i) We would remove the obligation on the defendant to prove the absence of malice on  
h the part of the author. (ii) We think that the time limit should be changed, so as to permit the defendants to avail themselves of the defence if the offer is made prior to, or at the time of, serving the defence. This would provide a reasonable period in which to carry out the necessary enquiries, and would make it less unfairly onerous to make the affidavit exhaustive. It would also  
j encourage plaintiffs not to dally in issuing a writ and serving a statement of claim. (iii) As to "innocence", we think the defence should be available to defendants unless the plaintiff is able to plead and prove that the relevant defendant knew or was reckless as to the following matters:—(a) that the words referred to the plaintiff or would be likely to be understood as referring to some identifiable person; (b) that they were defamatory; and (c) that they were false. We would use the same definition of "recklessness"

in this context as that of Lord Diplock in *Horrocks v Lowe* ([1974] 1 All ER 662, [1975] AC 135), namely a genuine indifference as to truth or falsity ...'

[21] The committee considered that the presumption of guilt on the part of defendants, inherent in the structure of s 4 of the 1952 Act, was unacceptable. They could not see why a guilty state of mind should be presumed against the defendants. It seemed to them to be contrary to principle, and it lay uncomfortably with the general principle in defamation, whereby it is for the plaintiff to prove malice in that minority of cases where state of mind becomes relevant. In para VII 16, they said:

'Where a "guilty" state of mind, in the more stringent sense, can be demonstrated we think it right that the defence should not be available. Otherwise, the offer of amends would be too readily at hand to aid the cynical exploitation of personal reputation.'

[22] The committee considered whether an offer of amends should generally be accompanied by a willingness to pay damages, acknowledging that this was a difficult point. They concluded after careful consideration that it would be unsatisfactory for defendants to have a defence based on their reasonable behaviour after publication which would leave the plaintiff with no compensation at all. The committee concluded that it would be reasonable for a defendant to include within an offer of amends an expression of his willingness to pay such general or special damages as might be fixed by a judge sitting in open court. The judge would clearly take into account such mitigating factors as the defendant's willingness to restore the plaintiff's reputation fully and promptly. The proposal would deprive some plaintiffs of their present right to a jury trial. But it would represent a considerable advance on the structure under the 1952 Act which permitted no damages at all. For defendants, there would be the advantage that they would avoid the costs of preparation for trial and of the hearing itself, and the lottery of assessment by a jury. The committee thought that this was a practical compromise which was fair to both sides. It would also achieve a relatively quick and cheap vindication and discourage unreasonably high demands for damages. This corresponded with the then recommendation of Hoffmann J for what subsequently became the provisions for summary disposal of defamation claims in ss 8–11 of the 1996 Act.

[23] The committee's summary of its conclusions was (pp 201–202):

'8. Section 4 of the Defamation Act 1952 should be repealed and a new "offer of amends" defence enacted for the purpose of enabling defendants, where they recognise that the plaintiff has been defamed, to curtail proceedings by making such an offer, which would now have to include the expression of a willingness to pay damages to be assessed by a Judge.

9. In order for the new "offer of amends" defence to succeed, it should not be necessary for the defendants to prove "innocence" or lack of negligence, and the defence could only be defeated in circumstances where the plaintiff could show the defendant to have published the words either knowing them to be false and defamatory or recklessly, in the sense of being genuinely indifferent to those matters.'

[24] The committee had made clear, by its reference to *Horrocks v Lowe* [1974] 1 All ER 662, [1975] AC 135, that its reference to recklessness was to the concept defined by Lord Diplock in that case. Lord Diplock had referred ([1974] 1 All ER

a 662 at 669, [1975] AC 135 at 149) to 'express malice' as a term of art descriptive of a dominant and improper motive on the part of a defendant who claimed that he had published a defamatory statement on a privileged occasion. This was malice in the popular sense of a desire to injure the person who is defamed which, if it is the dominant motive for the defamatory publication, destroys the privilege. In exceptional cases, a person may be under a duty to pass on, without indorsing, b defamatory reports made by some other person. But:

'Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". If he publishes untrue defamatory material c recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege d may be availed by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their e training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest," ie a positive f belief that the conclusions they have reached are true. The law demands no more.' (See [1974] 1 All ER 662 at 669, [1975] AC 135 at 150.)

[25] In July 1995, the Lord Chancellor's Department issued a consultation paper on a draft Bill to reform defamation law and practice. The consultation g paper explained the recommendations of the Neill committee in relation to offers to make amends. The text of the paper retained the word 'recklessly' in relation to provisions which in changed form became s 4(3) of the 1996 Act. The draft Bill was in terms which would have enabled a person who had published a statement alleged to be defamatory to make an offer of amends 'if he claims that he did not do so intentionally'. It was to be presumed until the contrary was shown that a h person publishing a defamatory statement did so unintentionally. The person was to be regarded as publishing the defamatory statement intentionally if he knew that the statement referred to the party aggrieved or was likely to be understood as referring to him and that it was both false and defamatory of that party, 'or if he was reckless as to those matters'. The requirement for a defendant j making an offer of amends to support it by making an affidavit, whose retention from the 1952 Act the Neill committee had recommended, did not find its way into the draft Bill.

[26] Changes were made to the draft Bill before it was enacted as the 1996 Act. We have already referred to its relevant terms and set out s 4(3). The word 'reckless' was not retained. Instead s 4(3) uses the expression 'knew or had reason to believe' that the statement complained of was, among other things, false.

Mr Parkes invites us to suppose that this change shows a parliamentary intention to moderate in favour of claimants the Neill committee recommendation as to recklessness. He points to the compensating omission of the recommended requirement for defendants to make an affidavit. We do not consider that this difference of expression between the draft Bill and the statute by itself carries any implication of parliamentary intention. The court's task nevertheless remains to construe the words of the statute.

#### THE JUDGE'S FIRST JUDGMENT

[27] As will be seen, this court considers that Eady J's construction of s 4(3) of the 1996 Act in his first judgment was entirely correct for the reasons which he gave. It is necessary to summarise his reasons in this judgment in order to address Mr Parkes's more limited submission. We shall do so briefly without intending to detract from or modify the judge's judgment, which may be referred to in full.

[28] Mr Geoffrey Shaw QC's first submission to the judge was that, although the draftsman did not adopt the language of Lord Diplock by incorporating into the statute the phrase 'genuine indifference as to truth or falsity' (nor adopt the committee's reference to recklessness), what the draftsman was doing was simply implementing the committee's recommendation. There was no indication either in the parliamentary debates or in the context of the statute itself that he was intending to introduce a different or lower test.

[29] Mr Shaw referred to a passage in the speech of Lord Kilbrandon in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 876, [1972] AC 1027 at 1133 in which, in the context of exemplary damages, he equates a publisher who 'either knows that, or does not care whether, his material is libellous' with a publisher who 'knows, or has reason to believe' that the act of publication will subject him to compensatory damages.

[30] Mr Shaw had developed in the alternative a more limited submission of law. Whether or not 'reason to believe' was to be equated with 'recklessness' in Lord Diplock's sense, it was clear that the 1996 Act was contemplating an investigation into facts actually known by the defendant. It was not permissible to investigate what knowledge he might have acquired or even knowledge he ought to have acquired. Mr Shaw supported this submission with reference to s 1(3) of the Occupiers' Liability Act 1984 and the decision of this court in *Swain v Puri* [1996] PIQR P442. Section 1(3) of the 1984 Act imposes on an occupier of premises a duty to trespassers if 'he knows or has reasonable grounds to believe' that the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger. In *Swain's* case, the Court of Appeal held that the statutory expression did not include constructive knowledge. It was necessary to establish actual knowledge, including 'shut-eye' knowledge, either of the actual risk or of primary facts which, in the opinion of the court, provided reasonable grounds for believing that the relevant risk existed. Mr Shaw referred to the judgment of Evans LJ (at 448). The judge quoted the relevant passage in [24] of his first judgment.

[31] Mr Shaw had submitted that the three paragraphs of the reply should be struck out because they were directed, not towards what the defendants and Mr Shipman knew, but towards what they reasonably should have known.

[32] Mr James Price QC, then appearing for the claimant, had submitted that it would be inappropriate to strike out these paragraphs and that the allegations needed to be tested in the light of disclosure of documents and the content of witness statements. He was at the time unable to name any relevant person to



a whom he would wish to attribute 'grounds to believe' apart from Mr Shipman, but he hoped to find out more after disclosure. Mr Price had referred to *Gatley on Libel and Slander* (9th edn, 1998) pp 463–464 (para 18.7). The editors had suggested that whether or not failure to take steps to check a story amounted to 'reason to believe' that it was false was likely to be a question which turned on the facts. It was suggested that you cannot determine the merits of a defence  
b under s 4 of the 1996 Act until the facts have been established. The judge said that if this approach were adopted, hardly anyone would rely on the new defence. The judge considered that Mr Price's submissions tended to suggest that he was applying too low a threshold. Some of his submissions came very close to equating 'grounds to believe' with 'grounds to suspect'; and the statute was not concerned with reason to 'doubt', but with reason to believe positively  
c that the published words were false. It was submitted that the Filkin report itself showed 'cogent reasons for doubting' Mr Zaiwalla's self-serving allegation against the claimant. If members of the Sunday Express staff did not know the content of the Filkin report, this would be cogent evidence in support of the claimant's case. That was because there was quite enough material known to them 'to cause alarm bells to ring'. The judge regarded these submissions as  
d applying the wrong test.

[33] In [28] of his first judgment, the judge had said, in relation to the submission that the claimant's allegations needed to be tested in the light of disclosure of documents and the contents of witness statements:

e 'It is necessary to remember, however, that the legislature intended that those who make offers of amends should only be deprived of the defence in the event of bad faith or (if it is different) if they had positive grounds to believe the falsity of what they asserted. That is a serious matter and it cannot, as a matter of general principle, be permitted to enter a pleading on a purely formulaic basis in the hope that something further may be "fished"  
f up in the course of disclosure.'

[34] In making his ruling, the judge said (at [36]):

g 'Parliament intended that a defendant whose offer of amends is turned down should have a statutory defence for that very reason—save in exceptional circumstances. I use the word "exceptional" advisedly. Of course, it is not to be found in the statute. On the other hand the formulation of the Neill committee and of the legislature was obviously reflecting Lord Diplock's analysis of "malice". It could hardly be denied that findings of malice are exceptional. Those exceptional circumstances could not arise  
h simply in cases where a journalist or editor could be criticised for not taking further steps to research or check an article prior to publication. It is not a defence based on the absence of negligence (as it could have been).'

[35] The judge said (at [38]) that the approach of the 1952 Act was discarded because it was not effective. If the new defence were also rendered unavailable  
j because an argument could be raised to the effect that greater care might have been taken, the new regime would also fall into disuse. This would be so 'if the defence were lost because some relevant person knew of some information giving grounds to *suspect* the information *might* be false'. He said (at [40]) that if claimants were able to challenge a s 4 defence routinely in the absence of bad faith, the whole offer of amends regime would be rendered ineffective. A court construing Parliament's intention should strive to give the section an

interpretation which would make it workable rather than useless. It was questionable whether it was necessary to construe the defence in such a way that would penalise journalists who got their facts wrong but acted in good faith. The judge then said (at [41]):

‘The answer to such a question is surely obvious. The main purpose of the statutory regime is to provide an exit route for journalists who have made a mistake and are willing to put their hands up and make amends. In the absence of agreement, the offer of amends also signifies a willingness to place oneself in the hands of the court for assessing the appropriate steps to be taken by way of vindication and compensation. It would thus make no sense at all to interpret the wording to mean that journalists would be deprived of the defence if they had been negligent—or behaved in such a way that a jury might perceive them to have been negligent. It would be self-defeating. It was only intended to shut out those who have acted in bad faith; that is to say, where a defendant knows that what he is alleging is untrue (not, of course, suggested as applying in this case) or where he has reason to believe that the words are false. What this means is that he has chosen to ignore or shut his mind to information which should have led him to believe (not merely suspect) that the allegation is false.’

[36] Then (at [44]) the judge said:

‘I am quite satisfied that “reasonable grounds to believe” is not to be equated with either “reasonable grounds to suspect” or with constructive knowledge. Of course, it is right to say that the use of the phrase imports an objective element. In this context, as in *Swain v Puri* [1996] PIQR P442, what is required first is to demonstrate that the identifiable individual responsible for the article knew of a relevant fact or facts. The objective test then comes into play when the court decides, in applying the s 4 defence provisions, whether such knowledge provided reasonable grounds to believe positively that the words complained of were false. Here there is nothing of the kind.’

There is a minor slip in this paragraph of the judge’s judgment. The statutory words in s 4(3) are not that the defendant had ‘reasonable grounds to believe’ but that he had ‘reason to believe’. The first of these expressions is that used in s 1(3)(b) of the 1984 Act. In our view, the expression in s 4(3) of the 1996 Act, which is the expression used by Lord Kilbrandon in the passage from *Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1927 to which we have referred, more strongly favours the judge’s conclusion in the present case. The expression used also more strongly favours Mr Shaw’s first submission, that Parliament intended to implement without modification the recommendation of the Neill committee. Where a journalist does not know that what he publishes is false, he might arguably have ‘reasonable grounds to believe’ that it was false if he ought reasonably so to have believed from what he did know. As we explain below, ‘reason to believe’, in our judgment, does not in this statute apply to anything short of recklessness.

[37] The judge examined the particulars then relied on, concluding that they fell woefully short of undermining the s 4 defence. He said that the whole exercise seemed designed to achieve the claimant’s strategy of having his compensation assessed by a jury rather than by a judge under the s 3 procedure. The reason the claimant turned down the offer in the first place was, not because

a he had any genuine evidence of bad faith on Mr Shipman's part, but simply because he did not think he had been offered enough money.

#### THE JUDGE'S SECOND DECISION

b [38] As we have said, following the first judgment, the claimant applied for permission to amend his reply. The proposed amendments were in substitution for the paragraphs which the judge's first order had struck out. The application was made on the basis that the judge's construction of s 4(3) in his first judgment was correct. The judge applied the same criteria as he had articulated in his first judgment. He concluded (at [21] of his second judgment) that—

c 'this second attempt to muster a case of bad faith against the defendant, or "recklessness" (in the sense explained in the previous judgment at [15]–[20]), does not meet the rigorous criteria which must always be applied to such an allegation ...'

He refused permission to amend and refused permission to appeal.

#### d GROUND OF APPEAL

e [39] The claimant applied for permission to appeal against both judgments. The original grounds of appeal, with a skeleton argument in support extending to 71 paragraphs, contended that the judge's construction of s 4(3) of the 1996 Act in his first judgment was wrong. The grounds of appeal contended that, in order to establish that the defendants 'had reason to believe' that the defamatory publication was false, the claimant had to prove: (a) that the journalist had actual or constructive knowledge which a reasonable person in the position of the journalist at the time of publication would have had if he had made such inquiries as were reasonably expected of him; and (b) that this knowledge would have caused him to have reason to believe that the words complained of were false.

f [40] We understand that Mr Parkes was instructed shortly before the hearing of these applications. He prepared a short supplemental skeleton argument to inform the court that the claimant would not seek to argue that s 4(3) of the 1996 Act imports a negligence test or a requirement that the claimant should prove constructive knowledge. He would seek to argue the applications in a narrower way. The main submission was that the judge wrongly assimilated the words of s 4(3) with the recommendations of the Neill committee. In consequence he decided that s 4(3) imports a concept of bad faith in the sense of malice, that is to say a lack of belief in the truth, or a reckless indifference to the truth or falsity of the publication. It was accepted that s 4(3) requires the court to focus on what the journalist actually knew, rather than on what he ought to have known had he made further inquiries. However, the words 'reason to believe' require the court to ask itself whether, in the light of that knowledge, the journalist had reason to believe that the words were false. That is an objective question which must entitle the court to take into account the full range of the journalist's knowledge. In particular the court has to consider what information the journalist had and whether it was credible, and whether he shut his eyes to matters which were obvious and which must have led to the conclusion that the statement complained of was false. It was submitted that the judge's construction placed a barrier in the way of claimants which was too high. It needed to be restated in workable terms.

j [41] This supplemental skeleton was a substantial and, if we may say so, last minute, retreat from the position taken in the original grounds of appeal. The

court required Mr Parkes to formulate written amended grounds of appeal, which he did over the short adjournment. The proposed amended grounds of appeal are confined to the contention that the judge misconstrued s 4(3) of the 1996 Act as importing a wholly subjective recklessness or 'bad faith' test of the kind required for the proof of malice in defamation, that is to say lack of belief in the truth or a reckless indifference as to the truth or falsity of the words complained of. He ought to have confined his construction to a partly subjective and partly objective test, such as he expressed in [44] of his judgment, which we have quoted. That test requires an assessment of whether the facts gave rise to reasonable grounds for the belief. 'Reason to believe' embraces knowledge of facts from which a reasonable man would arrive at the relevant belief.

#### SUBMISSIONS

[42] It is difficult, to say the least, to submit that the judge's construction of s 4(3) was wrong, but at the same time to point to a considered paragraph in the judge's own judgment as expressing the correct construction. However that may be, the essence of Mr Parkes' submission was that the judge's judgment read as a whole construes the relevant words as importing bad faith, malice or recklessness; whereas a proper construction would not go quite that far. The defence is not available if the court or jury judges that, upon facts known to the journalist, he had reason to believe that his defamatory publication was false. That formulation does not construe the critical words in the statute: it simply reuses them. However, we understand the submission to be that, however the words are construed, they do not extend to import bad faith, malice or recklessness. The difficulty with the submission is that it is accepted that the words do not import negligence or constructive knowledge either, and the submission needs an intermediate construction.

[43] Mr Shaw accepted that he had advanced alternative submissions before the judge. His first submission was that the statute had adopted the Neill committee recommendations. His second submission was that explained by the judge in [21]–[24] of his judgment, which included reference to s 1(3)(b) of the 1984 Act and the judgment of Evans LJ in *Swain's* case. We have already observed that that section contains the words 'reasonable grounds to believe' not 'reason to believe'. There is the further distinction that turning a blind eye to known facts relating to dangers for trespassers might possibly be termed recklessness, but scarcely malice or bad faith.

[44] Mr Parkes made a number of general points. He accepted that Parliament must have intended to shift the balance to enable defendants in defamation proceedings to make effective offers of amends. But the intention must also have been to retain a claimant's right to a jury trial in appropriate circumstances. Claimants may wish to expose bad conduct of newspapers in the more public forum of a jury trial. Vindication from a jury is likely to be better publicised than a relatively low-key determination of compensation by a judge alone. Parliament cannot have intended that the defence based upon a rejected offer of amends should be unanswerable. The judge's construction effectively makes it so. The offer has to be made before a defence has been served. There is no deadline for its acceptance or rejection, but this obviously has to be done quickly. It would be rare for a claimant to have knowledge of the subjective state of mind of those responsible for a newspaper article. He may not even know who the author was. Other than in exceptional circumstances, there will be no opportunity of obtaining disclosure of documents (see *Rigg v Associated*



a *Newspapers Ltd* [2003] EWHC 710 (QB) at [25], [2004] EMLR 52 at [25]). A construction importing malice sets the hurdle for claimants too high. It would be a charter for irresponsibility by newspapers. They could publish irresponsible defamatory statements in the knowledge that they could, if necessary, make an offer of amends and, in Mr Parkes's words, 'get out cheaply in all cases'.

b [45] We see the general force of a number of these submissions, but do not accept all of them. We see the main parliamentary intention as promoting machinery to enable defamation proceedings to be compromised at an early stage without the expense of a jury trial. If there is no issue as to the defamatory meaning of the statement published, an offer to make amends tenders to the claimant appropriate vindication and proper compensation. The defendant does not get out cheaply. If compensation is not agreed, it is determined by the court on the same principles as damages in defamation proceedings. As Eady J said in *Abu v MGN Ltd* [2002] EWHC 2345 (QB) at [22], [2003] 2 All ER 864 at [22], [2003] 1 WLR 2201, the procedure is not to be confused with summary disposal under ss 8–10 of the 1996 Act. There is no artificial cap on the level of compensation. He went on to say:

d 'Even very serious allegations may fall to be dealt with under this regime, but the claimant has in practical terms been deprived by the legislature of jury trial, once an offer has been made under s 2 (save where he can prove bad faith). There should be thus nothing in any sense "rough and ready" about the assessment of a claimant's reputation under the offer of amends procedure. It would clearly be inappropriate to deprive either party of a proper analysis of his case. Naturally, due regard to case management considerations will generally ensure that time and money is not wasted, but proportionality does not always mean that corners need to be cut. In the case of grave allegations, where the defendant has recognised that he has made a serious error, it may be that justice requires that significant time and money be spent in arriving at the right answer.'

[46] It is obviously correct that Parliament intended to and did shift the balance in favour of the making of offers to make amends. This is not perhaps to say that the balance is shifted in favour of defendants, since claimants also benefit. Since the offer tenders appropriate vindication and proper compensation, it is not surprising that s 4(3) of the 1996 Act sets a high hurdle and places the burden of surmounting it squarely on the claimant. We are not persuaded that the judge's construction, if it is correct, places the hurdle insurmountably high. There may be cases where a claimant can establish that a defendant knew that his defamatory publication was false. It may also be possible to establish that he 'had reason to believe' that it was false in the sense of the judge's construction. We do not consider that a mechanism which offers appropriate vindication and proper compensation is a recipe for irresponsible journalism. Further, the legislation does not apply only to journalists.

j DISCUSSION AND DECISION

[47] The question remains whether the judge's construction was correct. We are not persuaded by Mr Parkes's submission that there is a proper distinction to be drawn between [44] of the judge's first judgment and the rest of it; nor that [44] gives a correct construction, but the rest of the judgment goes too far. There is no doubt but that the judge decided that s 4(3) of the 1996 Act was to be construed as an unmodified implementation of the recommendations of the Neill

committee and that the words 'had reason to believe that the statement complained of ... was ... false' import the concept of recklessness from Lord Diplock's judgment in *Horrocks v Lowe*. This may be seen from his references to malice or bad faith in [36], [40] and [41] of his first judgment. It is put beyond doubt by [21] of his second judgment, in which he said:

'I have come to the conclusion that this second attempt to muster a case of bad faith against the defendant, or "recklessness" (in the sense explained in the previous judgment at [15]–[20]), does not meet the rigorous criteria which must always be applied to such an allegation ...'

Paragraphs [15]–[20] of the first judgment were those in which the judge summarised Mr Shaw's first submission.

[48] There is no indication that Parliament intended to do other than implement the recommendations of the Neill committee. We find no such indication in the change of wording between the draft Bill and the statute. The words in the statute correspond with those of Lord Kilbrandon in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 876, [1972] AC 1027 at 1133 that the publisher does not care whether the material is libellous.

[49] There is, in our judgment, a powerful reason why the words in question should be construed as importing recklessness in Lord Diplock's sense. If a claimant establishes malice on the part of a person who publishes a defamatory statement, he has the basis for a claim of aggravated, and possibly exemplary, damages. Mr Parkes accepted that, malice apart, compensation can be fully assessed and awarded under s 3(5) of the 1996 Act. There would be little point therefore in relying on s 4(3), unless the requirement there was to establish malice. Recognising that some claimants might prefer a jury trial cannot alone have been the parliamentary purpose.

[50] Although Mr Shaw advanced and the judge summarised an alternative lesser submission, sufficient for Mr Shaw's purposes at the first hearing, we do not consider that, in the context of s 4(3) of the 1996 Act, there is a distinct possible meaning of the words 'had reason to believe' lying between recklessness on the one hand and constructive or imputed knowledge based on negligence on the other. Mr Shaw drew our attention to other statutes in which the expression had or has 'reason to believe' is or was used. These were s 1(3) of the Law Reform (Miscellaneous Provisions) Act 1949 (now repealed); s 22 of the Copyright, Designs and Patents Act 1988; s 143(3) of the Road Traffic Act 1988; s 3 of the Sludge (Use in Agriculture) Regulations 1989, SI 1989/1263; and para 12(2) of the Genetically Modified Organisms (Northern Ireland) Order 1991, SI 1991/1714. We accept Mr Shaw's general submission with particular reference to the 1996 Act that the phrase 'knew or had reason to believe' requires an inquiry into what facts were in a person's head, not into what facts ought to have been in his head. Mr Parkes rightly disclaims the second of these, but seeks to find room for a state of mind objectively deduced from facts known to the defendants which is neither actual knowledge nor reckless indifference to the truth. We do not think that there is such an intermediate state of mind in the context of a defamatory publication. In that context, shutting your eyes to an obvious truth is the same as reckless indifference to that truth. Move away from that, and you immediately arrive at constructive knowledge.

[51] In our judgment, therefore, Eady J's first judgment contains a correct construction of s 4(3) of the 1996 Act for the reasons which he gave. There is no difference to be found between [44] of his judgment and the rest, although [44]

a needs to be amended to use the words 'reason to believe', as in the statute, instead of 'reasonable grounds to believe'.

[52] In formal terms, we give permission to amend the grounds of appeal for the second application in the terms presented in writing by Mr Parkes. We give permission to appeal on those grounds, but dismiss the appeal for the reasons that we have given: see [53]–[59] below for other proposed grounds of appeal.

b THE SECOND APPLICATION

[53] There remains the application for permission to appeal against the judge's refusal of permission to amend the reply. Section 4(3) of the 1996 Act is concerned with the defendant's knowledge in relation to the defamatory statement complained of. The parties were agreed that the natural and ordinary meaning of the passages complained of was that 'the claimant is reasonably suspected of giving false evidence to the Filkin inquiry'. It is not contended that Mr Shipman knew that this statement was false. As the judge said at [10] of his first judgment:

d 'In the context of this case, it must follow that the proposition of which the claimant hopes to persuade a jury is that the relevant person or persons "had reason to believe that it was false to say that there were reasonable grounds to suspect the claimant of giving false evidence to the Filkin inquiry". This is a tortuous proposition and debating that issue, whether before a judge or a jury, would be somewhat reminiscent of medieval disputations about angels on pinheads.'

[54] The core of the proposed amended particulars was as follows. The basis of the findings of the Filkin inquiry that Mr Vaz was guilty of a serious misdemeanour were the documented and admitted facts (1) that Mr Vaz had recommended Mr Zaiwalla for an honour; (2) that Zaiwalla & Co made two payments totalling £450 to Mr Vaz; and (3) that Mr Vaz had not declared these payments. Mr Shipman must have known these facts for reasons which are set out. These facts alone provided reason to believe that the core of what Mr Zaiwalla alleged to Mr Shipman or other reporters who interviewed Mr Zaiwalla could not be true. The core of what Mr Zaiwalla alleged was that the report, in particular its conclusions concerning Mr Vaz, was not worth the paper it was printed on, because the inquiry ignored unspecified key evidence and because for unspecified reasons evidence proffered against Mr Vaz by the claimant was tainted. The particulars contain further facts or contentions from which it is asserted that they provided reason to believe that Mr Zaiwalla's allegations to Mr Shipman or other reporters were false.

[55] The judge in his second judgment summarised the proposed amendment in rather greater detail than we have. He said (at [14]):

j 'Mr Shaw QC, for the defendant, emphasises ... that the issue is not whether there was reason to believe that Mr Zaiwalla's allegations were false, but whether there was reason to believe that "the statement complained of" in its agreed defamatory meaning was false; in other words, grounds to believe that there were no reasonable grounds to suspect Mr Milne of having given false evidence. That is a much higher test and, in my judgment, these particulars fall well short of passing it. It would require the claimant to plead and prove that Mr Shipman had reason to believe that

Mr Zaiwalla had made the whole thing up and that his statement should, without further ado, be wholly discounted ...'

[56] The judge recorded a submission on behalf of the claimant that the proposed amendment at least contained pleadable facts from which a non-perverse jury could infer grounds to believe that the defamatory words were false. He also recorded a submission of Mr Shaw that Mr Zaiwalla's allegations might give rise to grounds to suspect in the different context of a proposed plea of justification. Of this the judge said (at [19]):

'That is, however, a distraction in the present case/context. The defendant is not attempting to justify. Here, the court is rather concerned with whether grounds can be inferred from the pleaded facts for the journalist positively to believe that Mr Zaiwalla was a liar, such that his allegations should have been discounted altogether. As I ruled in the earlier judgment, that is a very high test and was intended by the legislature to be so. I have no doubt that some of the facts pleaded (assuming them to be correct, as I must) would give rise to a degree of puzzlement and, indeed, to suspicion that somebody was not telling the truth. Moreover, Mr Zaiwalla would be a candidate. Nevertheless, that is far from saying that the journalist was acting in bad faith in giving Mr Zaiwalla a platform to state his side of the story or shutting his eyes to the obvious ...'

[57] The judge then recorded a further, somewhat dialectical, submission of Mr Shaw that, since the only source of the agreed defamatory meaning that there were reasonable grounds to suspect the claimant of giving false evidence to the inquiry was the statement of Mr Zaiwalla himself, it must be common ground that the fact that Mr Zaiwalla had made the statement gave rise to reasonable grounds for suspicion in the mind of a fair-minded reader about the claimant's evidence.

[58] Mr Parkes submits that the only relevant findings of the Filkin inquiry was based on documented and undisputed facts. He accepted that the claimant would have to establish what the judge had referred to as the tortuous proposition, but the first stage was to show that what Mr Zaiwalla had said was untrue. Mr Shipman must have known the three core facts. He must therefore have known that Mr Zaiwalla's assertion that the report was not worth the paper it was written on was untrue. Mr Parkes accepts that the article did not tell the reader what evidence of the claimant was suspected of being tainted, but Mr Zaiwalla's assertions were so obviously untrue that Mr Shipman must have had reason to believe that the relevant defamatory statement about the claimant was also false.

[59] In our judgment, Mr Parkes's attempt to elevate the proposed amended particulars to a case under s 4(3) of the 1996 Act fit to go to a jury fails for the reasons given by the judge. The central submission relies on far too brittle a chain of inferred or imputed reasoning on the part of Mr Shipman. The assertion that the conclusion of the Filkin inquiry was not worth the paper it was written on may perhaps have been obviously wrong. But that was not the defamatory statement complained of. It was not, we think, necessarily even to be inferred that it was or may have been false to say that there were reasonable grounds to suspect the claimant of giving false evidence to the Filkin inquiry from the fact that Mr Zaiwalla had challenged its conclusions on plainly unsustainable grounds. But even an inference of this kind would be insufficient for the purpose



- a* of s 4(3). The brittle chain of argument breaks completely when what is required, is not an inference, but reckless indifference to the truth. In agreement with the judge, we consider that there would be no proper basis for a jury to conclude from these particulars that Mr Shipman was recklessly indifferent to the truth of the relevant defamatory statement which he published. The judge was correct to refuse the claimant permission to amend. The second application for permission
- b* to appeal is refused in so far as it goes beyond the amended grounds of appeal for which we gave permission in [52] of this judgment.

*Application for permission to appeal from the first judgment refused. Application for permission to appeal from the second judgment allowed in part. Appeal dismissed.*

Kate O'Hanlon Barrister.

# Nail v News Group Newspapers Ltd and others a

## Nail v Jones and another

[2004] EWCA Civ 1708 b

COURT OF APPEAL, CIVIL DIVISION

AULD, MAY AND GAGE LJJ

10 NOVEMBER, 20 DECEMBER 2004

*Libel and slander – Damages – Offer to make amends – Compensation determined on same principles as damages in defamation proceedings – Effect of offer to make amends on damages – Defamation Act 1996, s 3(5).* c

The claimant, a well-known actor and performer, brought actions for libel against a newspaper publisher, its editor, and a journalist in relation to an article published in the newspaper, and against the author and publisher of a book. In each action, there were unqualified offers to make amends under the Defamation Act 1996, which were accepted. After negotiation, agreed apologies were published, and the matters came before a judge to assess compensation under s 3(5)<sup>a</sup> of the 1996 Act which provided that if the parties did not agree on the amount to be paid by way of compensation, it was to be determined by the court ‘on the same principles as damages in defamation proceedings’. The court was to take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and could reduce or increase the amount of compensation accordingly. The judge considered that the adoption of the conciliatory process provided by the offer of amends regime had a major deflationary effect upon the appropriate level of compensation. In the action relating to the newspaper article he therefore assessed a figure for compensation and then reduced it by 50% and in the other action he made a modest award. The claimant appealed contending that there was no principle on which damages were awarded in defamation proceedings which gave a discount for adopting the statutory policy behind offers to make amends, and that he should not receive discounted compensation which penalised him for being conciliatory. d  
e  
f  
g

**Held** – As compensation under s 3(5) of the 1996 Act was to be determined on the same principles as damages in defamation proceedings those principles included the principle that conduct of the defendant after publication could aggravate or mitigate the damage and therefore the award. While each determination of compensation under s 3(5) would depend on its own facts, if an unqualified offer to make amends were made and accepted and an agreed apology published, as in the instant cases, there was bound to be substantial mitigation. The defendant had capitulated at an early stage without pleading any defence, had offered to make and publish a suitable correction and apology and had offered to pay proper h  
j

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a Section 3, so far as material, is set out at [6], below

- a compensation and costs. The claimant knew that his reputation had been repaired to the full extent that that was possible, and was relieved from the anxiety and costs risk of contested proceedings. The judge had, accordingly, made no error of principle in his assessment of the appropriate compensation. He had given proper and full consideration to all relevant factors and had reached a balanced conclusion. The appeals would therefore be dismissed (see [40]–[52], below).

- b *Der curiam*. In principle a claimant should not normally be permitted to enlarge significantly pleaded allegations upon which the offer to make amends was made and accepted, nor should a defendant who has made an unqualified offer which has been accepted be permitted to water down significantly the pleaded allegations. Claimants should therefore plead the full substance for which they seek redress; defendants who wish to make amends for significantly less than that full substance should make appropriate qualifications to their offer (see [15], [51], [52], below).

### Notes

- d For offer to make amends, and for basis of the award of damages, see 28 *Halsbury's Laws* (4th edn reissue) paras 160, 248.

For the Defamation Act 1996, s 3, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 48.

### e Cases referred to in judgments

- Abu v MGN Ltd* [2002] EWHC 2345 (QB), [2003] 2 All ER 864, [2003] 1 WLR 2201.  
*Associated Newspapers Ltd v Dingle* [1962] 2 All ER 737, [1964] AC 371, [1962] 3 WLR 229, HL.  
*Cleese v Clark* [2003] EWHC 137 (QB), [2004] EMLR 37.  
 f *Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2004] 1 AC 628, [2003] 3 WLR 1038.  
*Gorman v Mudd* [1992] CA Transcript 1076.  
*Greenaway v Poole* [2003] EWHC 1735 (QB), [2003] All ER (D) 345 (Jul).  
*Horrocks v Lowe* [1974] 1 All ER 662, [1975] AC 135, [1974] 2 WLR 282, HL.  
*Houston v Smith* [1993] CA Transcript 1544.  
 g *John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586, [1996] 3 WLR 593, CA.  
*Kiam v MGN Ltd* [2002] EWCA Civ 43, [2002] 2 All ER 219, [2003] QB 281, [2002] 3 WLR 1036.  
*Kiam v Neill (No 2)* [1996] EMLR 493, CA.  
*Mawdsley v Guardian Newspapers Ltd* [2002] EWHC 1780 (QB).  
 h *Milne v Express Newspapers plc* [2004] EWCA Civ 664, [2005] 1 All ER 1021, [2005] 1 WLR 772.  
*Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442, [1995] ECHR 18139/91, ECt HR.

### j Cases referred to in skeleton arguments

- Australian Consolidated Press Ltd v Uren* [1967] 3 All ER 523, [1969] 1 AC 590, [1967] 3 WLR 1338, PC.  
*Burstein v Times* [2001] 1 WLR 579, CA.  
*Campbell v News Group Newspapers Ltd* [2002] EWCA Civ 1143, [2002] EMLR 966.

*Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL. a

*Davies v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657, [1942] AC 601, HL.

*Fernandes v MGN* (17 October 2002, unreported).

*Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2004] 1 AC 628, [2003] 3 WLR 1038. b

*Grovit v Doctor* (28 October 1993, unreported) [1993] CA Transcript 1298.

*King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2004] EMLR 429.

*Ley v Hamilton* (1935) 153 LT 384, HL.

*Mawdsley v Guardian Newspapers* [2002] EWHC 1780 (QB).

*Nance v British Columbia Electric Rly Co Ltd* [1951] 2 All ER 448, [1951] AC 601, PC. c

*Oyston v Blaker* [1996] 2 All ER 106, [1996] 1 WLR 1326, CA.

*Pearson v Lemaître* (1843) 5 Man & G 700, 134 ER 742.

*Praed v Graham* (1889) 24 QBD 53, CA.

*Rigg v Associated Newspapers Ltd* [2003] EWHC 710 (QB), [2004] EMLR 52.

*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, Aus HC. d

## Appeals

### *Nail v News Group Newspapers Ltd and others*

The claimant Jimmy Nail appealed from the decision of Eady J on 26 March 2004 ([2004] EWHC 647 (QB), [2004] EMLR 362) assessing the amount of compensation to be paid to him by News Group Newspapers Ltd, Rebekah Wade and Jules Stenson under s 3(5) of the Defamation Act 1996 in the sum of £22,500. The facts are set out in the judgment of May LJ. e

### *Nail v Jones and another*

The claimant Jimmy Nail appealed from the decision of Eady J on 26 March 2004 ([2004] EWHC 647 (QB), [2004] EMLR 362) assessing the amount of compensation to be paid to him by Geraint Jones and HarperCollins Publishers Ltd under s 3(5) of the Defamation Act 1996 in the sum of £7,500. The facts are set out in the judgment of May LJ. f

*Hugh Tomlinson QC* and *William Bennett* (instructed by *Schillings*) for Mr Nail.  
*Adrienne Page QC* (instructed by *Farrer & Co*) for the respondents. g

*Cur adv vult* h

20 December 2004. The following judgments were delivered.

**MAY LJ** (giving the first judgment at the invitation of Auld LJ).

## INTRODUCTION j

[1] Sections 2–4 of the Defamation Act 1996 enable a person who has published an allegedly defamatory statement to offer to make amends. If he does so, there are certain statutory consequences. One of these is that, if the offer is accepted by the aggrieved party but the parties do not agree the amount to be paid by way of compensation, the compensation is determined



a by a judge, not a jury (see s 3(5) of the 1996 Act) 'on the same principles as damages in defamation proceedings'.

[2] On 26 March 2004, Eady J determined the compensation to be paid by each of two sets of defendants to Jimmy Nail, the claimant (see [2004] EWHC 647 (QB), [2004] EMLR 362). Mr Nail says that the compensation payments were much too low. He says that the judge misapplied s 3(5). The core issue b in this appeal concerns the extent to which the making of the offer of amends should go in mitigation of the amount of his compensation.

#### SECTIONS 2–4 OF THE DEFAMATION ACT 1996

[3] This is only the second appeal to this court concerning statutory offers to make amends. The first was *Milne v Express Newspapers plc* [2004] EWCA c Civ 664, [2005] 1 All ER 1021, [2005] 1 WLR 772, where the claimant, who had not accepted an offer to make amends, wanted to proceed to a jury trial. To be permitted to do so, he had to seek to establish that the defendants (see s 4(3) of the 1996 Act) 'knew or had reason to believe that the statement complained of ... (b) was both false and defamatory of [him]'. This court, in d upholding the judge, construed these words as importing the concept of recklessness as discussed by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669–670, [1975] AC 135 at 149–150. The claimant was unable to plead facts which were capable of amounting to recklessness. His claim failed, because the fact of an offer to make amends is a defence to defamation proceedings, unless the claimant can successfully rely on s 4(3).

e [4] The judgment of this court in *Milne's* case recounts the statutory background to ss 2–4 of the 1996 Act (see [2005] 1 All ER 1021 at [17]–[26]). It is not necessary to repeat that material in this judgment. In short, s 4 of the Defamation Act 1952 had proved ineffective. The July 1991 report of Sir Brian Neill's Committee on Practice and Procedure in Defamation (the f Neill committee), of which Eady J, then in practice at the Bar, was a member, had recommended legislation to encourage sensible, economic compromise of defamation claims.

[5] This court in *Milne's* case gave an account of ss 2 and 3 of the 1996 Act:

g '[13] Section 2 of the 1996 Act provides that a person who has published a statement alleged to be defamatory may offer to make amends under the section. The offer may be in relation to the defamatory statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys. The defendants' offer in the present case was unqualified. An h offer to make amends is an offer to make and publish a suitable correction and a sufficient apology, and to pay such compensation and costs as may be agreed or determined. An offer to make amends may not be made after a person has served a defence in defamation proceedings brought against him in respect of the publication in question.

j [14] Section 3 provides that, if an offer to make amends is accepted, the party accepting the offer may not bring or continue defamation proceedings against the person making the offer in respect of the publication, but he is entitled to enforce the offer. The parties can agree the steps to be taken. If they do not agree, the party who made the offer may take such steps as he thinks appropriate. He may make the correction and apology by a statement in open court in terms approved

by the court. He may give an undertaking to the court as to the manner of publication. If the parties do not agree the amount to be paid by way of compensation, it is to be determined by the court on the same principles as damages in defamation proceedings. Proceedings under the section are to be heard and determined without a jury. The court is to take account of any steps taken in fulfilment of the offer, including the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances: and the court may reduce or increase the amount of compensation accordingly. Thus, if in an ordinary case a claimant in defamation proceedings accepts an offer to make amends, he becomes entitled either by agreement or by determination of the court to full proper compensation for the defamatory publication. The defendant has capitulated at an early stage and before serving a defence on all issues except the amount of damages, if this is not agreed. The claimant can bring or continue the proceedings to determine the compensation. It is to be expected that most sensible claimants will accept unqualified offers to make amends. The main purpose of the statutory provisions is plain. It is to encourage the sensible compromise of defamation proceedings without the need for an expensive jury trial.'

[6] The critical verbatim words in s 3(5) are:

'If the parties do not agree the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings. The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.'

[7] The Neill committee had expressed the view that a judge fixing compensation under their proposals would clearly take into account such mitigating factors as the defendant's willingness to restore the plaintiff's reputation fully and promptly. They considered that their proposals would achieve a relatively quick and cheap vindication and discourage unreasonably high demands for damages (see *Milne's* case at [22]). This court said (at [45]):

'We see the main parliamentary intention as promoting machinery to enable defamation proceedings to be compromised at an early stage without the expense of a jury trial. If there is no issue as to the defamatory meaning of the statement published, an offer to make amends tenders to the claimant appropriate vindication and proper compensation. The defendant does not get out cheaply. If compensation is not agreed, it is determined by the court on the same principles as damages in defamation proceedings. As Eady J said in *Abu v MGN Ltd* [2002] EWHC 2345 (QB) at [22], [2003] 2 All ER 864 at [22], [2003] 1 WLR 2201, the procedure is not to be confused with summary disposal under ss 8-10 of the 1996 Act. There is no artificial cap on the level of compensation.'

a Eady J had gone on to say in *Abu v MGN Ltd* [2003] 2 All ER 864 at [22] that there should be nothing in any sense 'rough and ready' about the assessment of the claimant's reputation under the offer of amends procedure. It would clearly be inappropriate to deprive either party of a proper analysis of its case. In response to a submission that Parliament cannot have intended that the defence based on a rejected offer of amends should be unanswerable, and, b that if it were, the statutory mechanism would promote irresponsible journalism, this court said ([2005] 1 All ER 1021 at [46]):

c 'It is obviously correct that parliament intended to and did shift the balance in favour of the making of offers to make amends. This is not perhaps to say that the balance is shifted in favour of defendants, since claimants also benefit ... We do not consider that a mechanism which offers appropriate vindication and proper compensation is a recipe for irresponsible journalism. Further, the legislation does not apply only to journalists.'

d THE TWO ACTIONS

[8] In the present case, Eady J was concerned with two actions. The first in time was a claim by Mr Jimmy Nail against News Group Newspapers Ltd, the publishers of the News of the World, complaining of an article published on 19 May 2002 on the newspaper's centre page under the heading 'Auf Wiedersehen Jimmy's Secret Bondage Orgies'. The former editor, Rebekah e Wade, and the journalist who wrote the stories, Jules Stenson, were also joined as defendants. The second action was against Geraint Jones, the author of a book called *Nailed: The Biography of Jimmy Nail*. This was published towards the end of 1998, but the claim form in this action was not issued until 6 May 2003, nor served until 11 August 2003. The publishers of f the book, HarperCollins Publishers Ltd, were also joined as defendants.

[9] In each action, there were offers to make amends, which were accepted. After negotiation, agreed apologies were published. Eady J was concerned only with assessing the appropriate compensation to be paid under s 3(5) of the 1996 Act.

g [10] Mr Nail is a well-known actor who has appeared in a number of television series and films. He has also performed as a singer and musician. He is probably best known for his parts in the television series *Spender* and *Auf Wiedersehen Pet*, to which the News of the World headline alluded.

h [11] The book *Nailed* was published more than five years before Eady J's hearing. The distribution and sale of the large majority of its copies were outside the statutory limitation period for bringing defamation proceedings in the HarperCollins action. Mr Nail had read the book at around the time of its first publication. He found it offensive and full of inaccuracies, but he decided on advice not to sue over its contents, nor to make any complaint at all. The judge accepted this explanation for at least the early period of delay j before proceedings were launched. Contrary to Mr Nail's claim in his witness statement that the book had received no publicity at the time, it was established that its publication had been covered, in some instances with extracts, in four separate daily newspapers. The judge correctly noted that this fact did not go in mitigation of damages (see *Associated Newspapers Ltd v Dingle* [1962] 2 All ER 737, [1964] AC 371).

[12] The News of the World publication on 19 May 2002, timed to coincide with a new series of *Auf Wiedersehen Pet*, was largely based on the contents of the book. The newspaper publishers gave no warning to Mr Nail of the impending publication. This was contrary to the guidance in the Press Complaints Commission Code of Practice, but Eady J believed that it was thought unlikely that Mr Nail would object to the regurgitation of the same stories, when he had not complained about the book. a

[13] I take the defamatory allegations from Eady J's summary ([2004] EMLR 362): b

'[10] It is necessary now to say something about the *News of the World* allegations themselves. Miss Page did not overstate the literary quality of the article or make any claim to investigative prowess. She described it as "classic tabloid fodder for which readers buy such newspapers". The defamatory words related to events supposed to have happened many years ago. It is no part of the case of any of these Defendants to assert that they were true. That would be quite incompatible with the offer of amends procedure which they have adopted, and they have accepted, without any qualification, that the allegations are defamatory and untrue, as Mr Nail has maintained throughout. c

[11] Unfortunately, I do need to rehearse them to some extent in order to explain my decisions on the appropriate level of compensation. There is no doubt in my view that they have caused considerable distress and embarrassment to Mr Nail, and also to his partner, who provided an unchallenged witness statement for the proceedings, and who sat in court throughout the assessment hearing. d

[12] I will attempt to summarise the allegations under various categories based upon the meanings complained of on the Claimant's behalf. e

[13] First, there is the suggestion to which the headline refers; namely, that he "queued for an orgy with an outrageous sex-mad woman who demanded to be roped to a bedstead". Thus restrained, it seems, she entertained her gentlemen callers *seriatim*. "Nobody appeared to bat an eyelid". Her identity remained in obscurity to the readers of the book. Perhaps the only original contribution of the *News of the World* was to track her down as a "popular" young woman formerly known in the locality as "Randy Mandy". There is then a certain amount of misty eyed reminiscence. One former beau fondly recalls how in those days "We all loved Mandy". f

[14] Whenever she was supposed to be conducting herself in this way, if she ever was, it would appear to have been some time in the early seventies. What matters, however, is that Mr Nail says he simply had nothing whatever to do with her. g

[15] There is another specific incident when it is alleged that "another nude lover" (a brunette) was seen by a housemate to be jammed up against the cold enamel of his kitchen cooker. Miss Page emphasised, however, that from the article this appears to have been entirely consensual. They were both "at it hammer and tongs" in the onlooker's presence. This is based on a less fastidious passage in the book which adds an element of improvisation to the same occasion. It was said that fat from the nearby chip pan was then spontaneously utilised as a h



a makeshift lubricant. The story is recounted third hand as deriving from "one of the lads". I understood Miss Page to suggest that this allegation was barely defamatory at all and more akin to an infringement of privacy. She thought there was nothing particularly unusual about the conduct alleged—save perhaps for the *ambiance*. Indeed, in the book the episode is described as demonstrating the Claimant's "masterly composure and

b dexterity of thought".

[16] There was also another episode described as "loud nookie in a broom closet". Miss Page submits that Mr Nail may be a little over-sensitive, since few people would think the worse of him. It is once more simply a question of location. In these matters, however, location can sometimes be critical.

c [17] There were also more general allegations of indecent exposure and indiscriminate sexual encounters with fans in pubs and clubs.

d [18] I am not sure that I would accept Miss Page's characterisation of such episodes as merely infringements of privacy rather than defamatory. She suggests, I think, that most reasonable readers would not think the worse of the Claimant. It would probably be dismissed as youthful high spirits. I believe nevertheless that a significant number of readers would find the allegations fairly unappetising—even by modern standards. The matter hardly needs to be debated, however, since it is an application for the assessment of damages following the acceptance of an unqualified offer of amends. I must take the allegations, therefore, to be

e false and defamatory. I have no particular difficulty in doing so.

[19] Another more specific charge is that the Claimant "tried to seduce the wife of his rock star pal". This is said to have occurred at a time when he was with his current partner, with whom he has been in a permanent relationship for the last 24 years. It therefore involves disloyalty towards

f not only her but also his friend. That allegation is given a degree of apparent confirmation, so far as readers are concerned, by a photograph of the two people posing together. Again, of course, it is accepted as being quite untrue.

g [20] A different allegation is that Mr Nail once ate a can of dog meat when pressed for cash in Germany. An "old friend" called Stan is quoted as saying, "He was that hungry. Still there's nothing wrong with the stuff. It doesn't kill dogs". That perhaps adds to an overall impression of general coarseness.

h [21] So far, the allegations might be thought, although no doubt distressing and offensive, not to impinge directly on Mr Nail's professional reputation. But the article also went on to allege that "Jimmy became more difficult to work with as his fame grew". He was portrayed as arrogant, rude and inconsiderate to "extras" in the background of a shot. "A man they'd so admired turned out to be a heartless, rude, b\*\*\*d". That is clearly defamatory.

j [22] In a similar vein is the suggestion that, having bought a leather jacket he had worn in the first series of *Auf Wiedersehen Pet*, he then charged a few hundred pounds extra for allowing it to be used in the next series. He is thus portrayed again as arrogant, small-minded and mean. Miss Page suggests that this again is not defamatory and conveys an impression simply of a man with an astute business eye.

[23] Counsel for Mr Nail summed up the impact of the newspaper coverage as follows. "It maps out a life in which he has progressed from being a dog meat eating yob, who engaged in grubby and obscene sexual behaviour, to heartless prima donna." The overall impression is thus far from flattering. a

[24] The book contains some similar suggestions, as I have indicated, but there are other defamatory implications as well. These include the allegation that he shunned his father in the latter years of his life, despite the fact that he suffered from emphysema. There is also an implication that he exploited the untimely death of a long time colleague "in order to extract a tawdry financial advantage for himself". b

[25] Another strand of meaning in the book is that the Claimant, as the Thatcher era dawned, became a property developer "possibly with the help of financiers who would not be found advertising their services in *Yellow Pages*". The implication is clearly (as it is pleaded) that he "... financed his new business by illegal, probably criminal, means". (Another accusation is that he portrayed his origins as more impoverished than was truly the case.)' c  
d

[14] The defendants had made unqualified offers to make amends for both the newspaper article and the book. The court therefore had to take it that the words complained of bore the pleaded meanings. Eady J accepted that exaggerated or distorted meanings should be ignored, but in such circumstances it was to be supposed that a defendant would make a qualified offer of amends. It would seem unfair, said the judge, on a claimant who accepts an unqualified offer to find that the court dismisses his meanings as untenable when it comes to assessing the damages. e

[15] Both parties prepared bodies of evidence seeking respectively to aggravate and to mitigate the compensation. Eady J either ignored or declined to admit most of this. He was right to do so. Speaking generally, there may of course be evidence from both sides relevant to the determination of compensation. But in principle it seems that a claimant should not normally be permitted to enlarge significantly pleaded allegations upon which the offer to make amends was made and accepted, for example by promoting a new case of malice. Nor should a defendant, who has made an unqualified offer which has been accepted, be permitted to water down significantly the pleaded allegations. Claimants should therefore plead the full substance for which they seek redress: defendants who wish to make amends for significantly less than that full substance should make appropriate qualifications to their offer. f  
g  
h

#### EADY J'S JUDGMENT

[16] Eady J accepted that the primary function of financial compensation should be directed to Mr Nail's distress, embarrassment and hurt feelings. But the judge had no difficulty in accepting Mr Nail's evidence about how much the publications had impacted on his own feelings and his family life. The effect had been more serious than would be implied by the somewhat dismissive word 'embarrassment'. Distress or other consequences from passages in the book which were not complained of had to be discounted. j

[17] Any claim for the defamatory content of the book was confined to a mere 119 copies (out of a total of some 4,500) sold or distributed in the

a 12 months before the issue of proceedings in the HarperCollins action. A claim for the defamatory publication of the other copies was statute-barred. On the other hand, the News of the World has sales of approximately 4m and a readership of perhaps double that.

b [18] Eady J said that he must approach the allegations on the basis that they were false and defamatory and that they caused major and continuing distress to Mr Nail, which undermined his family relationships. This was not in the sense of damaging them permanently. But there were intrusion and tensions which would otherwise not have been there. Although the newspaper's allegations did not come quite as a bolt from the blue, since he had read the book several years earlier, Eady J was prepared to accept that the huge publicity which the article attracted would have impinged upon his life c far more than the book. Reading the book in 1998 would hardly have prepared him for the impact of the unannounced tabloid coverage some three-and-a-half years later.

d [19] Eady J then asked what was the correct approach to determining compensation under the offer of amends regime. This was only the second case to come before a judge for determination of compensation. The first was *Cleese v Clark* [2003] EWHC 137 (QB), [2004] EMLR 37, which Eady J had also heard. It was not possible to compare past jury awards which came about in quite different circumstances. There are now very few libel actions to reach trial with a jury. Such awards as are made normally follow a contest on liability. That put a very different complexion on matters. Eady J then said:

e [35] The offer of amends regime provides, as it was supposed to, a process of conciliation. It is fundamentally important that when an offer has been made, and accepted, any claimant knows from that point on that he has effectively "won". He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced.

f [36] Whereas juries used to compensate for the impact of the libel "down to the moment of the verdict", once an offer of amends has been accepted the impact of the libel upon the claimant's feelings will have greatly diminished and, as soon as the apology is published, it is also hoped that reputation will be to a large extent restored. It is naturally true that if a defendant or his lawyers thereafter should behave irresponsibly, or try to drag in material to "justify by the back door", that will be an aggravating factor. On the whole, however, once a defendant has decided to go down this route, it would make sense to adopt a conciliatory approach and work towards genuine compromise over matters such as the terms of an apology or the level of compensation.

j [37] As I observed in *Cleese v Clark* ([2003] EWHC 137 (QB) at [33], [2004] EMLR 37 at [33]): "I am not concerned with hypothesising as to what a particular group of 12 lay persons might have done, on the basis of what other groups of lay persons have done in the past". It is now

appropriate, since the Court of Appeal's decision in [*John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586], to have an eye to personal injury awards with a view to keeping a sense of proportion and remembering the value of money.'

[20] Eady J said that one of the reasons for the Neill committee's recommendations of the new offer of amends procedure was to give media and other defendants a possible exit route when they face the uncertainty and arbitrariness of historic jury awards. It was in an attempt to remedy the difficulties over proportionality and unpredictability that the Court of Appeal suggested the changes of practice in *John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586, in part responding to the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442. In *John's* case, the Court of Appeal held that, in assessing the amount of an award of damages in defamation proceedings, a jury's attention could properly be drawn to awards which had been approved or substituted by the Court of Appeal and to conventional compensatory scales of damages awarded in personal injury actions. This was not as a precise correlation, but as a check on the reasonableness of the proposed award.

[21] Eady J then said:

'[40] Miss Page has indicated, in the course of her submissions, that parties in libel litigation are still feeling their way under the new offer of amends regime and, although it is being increasingly used "after a slow start", this process could well go into reverse if media defendants feel that they are still going to be subject to arbitrary and disproportionate awards; or, to put it another way, if they are not to be given due credit, in financial terms, for using the system and placing themselves in the hands of the court. It was not an *in terrorem* point, and it is entirely fair to make it, because of the public policy objectives underlying the adoption of the statutory scheme by Parliament. If they do not feel confident of getting a "healthy discount" for adopting what is, in effect, a conciliation process, then I suspect (although Miss Page did not put it in this way) that there may be a return to the tactic (sometimes encountered on the part of media defendants in the old days) of using their considerable resources to complicate and prolong litigation with a view to discouraging less wealthy litigants.'

[41] In my judgment, Miss Page is right to press for a "healthy discount" for the reasons I have already indicated. Media defendants who act promptly when confronted with a claim are entitled to be rewarded for making the offer and, correspondingly, the claimant's ordeal will generally be significantly reduced with immediate effect.'

[22] Miss Page had suggested a standard discount, possibly as high as two-thirds. She referred to Morland J's decision in *Mawdsley v Guardian Newspapers Ltd* [2002] EWHC 1780 (QB). Morland J was there concerned with whether the summary judgment procedure under ss 8–10 of the 1996 Act, with its ceiling of £10,000, was appropriate in a case in which a jury after a trial might award £30,000. He decided that it was appropriate. Under that procedure, there was also available a judicial declaration of falsity. In the present case, Eady J was concerned with what was appropriate, necessary and proportionate for compensating Mr Nail in the circumstances in which he



a now found himself. It was dangerous to speak of a discount when there was no comparable starting figure because libel actions vary so much. The conduct of the litigation can also be very important. Eady J then said:

b [46] I think it is more helpful to focus on what I would have been inclined to award for these libels following a trial (i.e. sitting as a judge alone) in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology). This is not a wholly artificial scenario. It might arise in various ways; for example, if there were a trial confined to meaning or qualified privilege (neither of which, at least in theory, adds further injury to the claimant's reputation). I would tend to ask, having regard to the current conventional overall ceiling for damages of £200,000, what the particular libel is worth on that scale of gravity. I would then aim to make a significant reduction to take account not only of any actual apology but also of the very willingness of the defendant to use the offer of amends route. A defendant is in those circumstances effectively laying down his arms, and inviting meaningful negotiation over compensation and restoration of reputation.'

[23] Eady J applied his approach to the facts. In summary, he noted the following. (a) Most of the 4,500 copies of the book were out of bounds for limitation reasons. (b) Without criticising Mr Nail or his lawyers, the judge could not entirely ignore the fact that Mr Nail had not complained about the initial publication of the book. (c) The allegations in the book were serious and offensive, both personally and professionally. (d) There were website apologies. Few readers may have seen them, but there was little else the publishers could do. (e) The newspaper article was very different. Tabloid coverage could be very frightening and disorienting:

f [52] ... The publication of a libel in a tabloid can be an intensely distressing experience, but the great advantage of the offer of amends system is that it does at least tend significantly to mitigate the impact and, to a greater or lesser extent, enable the relevant claimant (to adopt a modish phrase) to "draw a line" under the episode and to make a fresh start.'

(f) The range of damages suggested on behalf of Mr Nail—£70,000 to £100,000—was very high when set against personal injury awards, to which however one must not be too tied. (g) The newspaper article was prominently published. The apology was not as prominent, although it was reasonably eye-catching and published relatively quickly after proceedings were issued. There was nothing unusual about the sequence of events leading to the apology which had a bearing on the level of compensation. (h) There was no attempt to contact Mr Nail before publication, although most of the allegations had already been published in the book without complaint. (i) There was a short-lived indication that the defendant might seek to justify some or all of the allegations. (j) Eady J accepted Mr Nail's explanations for why he was slow in pursuing his remedies. (k) There was nothing in the conduct of the negotiations which justified any element of aggravation in either action.

[24] Eady J assessed compensation for the book publication at £7,500, which he described as a modest but by no means nominal level. His starting point for the newspaper publication would be £45,000, that is to say without taking account of mitigating factors. For those factors, he made a reduction of 50% to reach £22,500. Even after the discount, the judge described this figure as by modern standards still substantial.

#### GROUND OF APPEAL AND SUBMISSIONS

[25] Mr Nail's grounds of appeal contend that Eady J applied a wrong principle that compensation, where there has been an offer to make amends, should be discounted to encourage other defendants to use the offer of amends procedure. Mr Tomlinson QC points to passages in the judgment: that the very adoption of the procedure has a major deflationary effect on the appropriate level of compensation (at [35]); that Miss Page was right to press for a healthy discount for adopting a conciliation process otherwise there may be a return to tactics of the old days and that media defendants are entitled to be rewarded for making the offer (at [41]); where the judge was aiming for a significant reduction to take account, not only of the actual apology, but also of the very willingness of the defendant to use the offer of amends route (at [46]). This, says Mr Tomlinson, is contrary to the very terms of s 3(5), since there is no principle on which damages are awarded in defamation proceedings which gives a discounting benefit for adopting the statutory policy behind offers to make amends. The claimant should receive proper compensation (see *Milne v Express Newspapers plc* [2005] 1 All ER 1021, [2005] 1 WLR 772), not discounted compensation which penalises him for being conciliatory.

[26] The proper purpose of compensation for defamation is, so far as money may, to mend hurt feelings, to restore reputation and to provide vindication. Vindication includes the claimant being able for the future to point to the size of the award to show the world that the defamatory publication was held to be untrue. Mr Tomlinson accepts that an offer to make amends and a prompt agreed apology may properly have a mitigating effect, but the need for proper vindication remains.

[27] Mr Tomlinson submits that Eady J's approach would result in irresponsible journalism. Irresponsible newspapers may be tempted to make defamatory publications confident that, if they are sued, a relatively cheap procedure is available which is likely to result in modest compensation. In *Gleaner Co Ltd v Abrahams* [2003] UKPC 55, [2004] 1 AC 628, [2003] 3 WLR 1038, a decision of the Privy Council on appeal from Jamaica, Lord Hoffmann, giving the opinion of the Board, indicated that there was, or perhaps should be, a deterrent element in the amount of damages in defamation cases. The Jamaican Court of Appeal had reduced a jury's award of damages to an amount which was still well above the contemporary English scale. The Privy Council upheld the Court of Appeal's decision, Lord Hoffmann saying (at [72]) that the Court of Appeal was entitled to take the view that, if their assessment had a chilling effect on the conduct of the kind under consideration, that would be no bad thing. The Board expressed no view on the current practice in England. But Lord Hoffmann said that the English practice of referring juries to awards in personal injury cases was controversial. He discussed the problem (at [49]–[56]). He said (at [53]) that

a awards in an adequate amount may be necessary to deter the media from riding roughshod over the rights of other citizens. As Sedley LJ had said in *Kiam v MGN Ltd* [2002] EWCA Civ 43 at [75], [2002] 2 All ER 219 at [75], [2003] QB 281:

b '... in a great many cases proof of a cold-blooded cost-benefit calculation that it was worth publishing a known libel is not there, and the ineffectiveness of a moderate award in deterring future libels is painfully apparent ... Judges, juries and the public face the conundrum that compensation proportioned to personal injury damages is insufficient to deter, and that deterrent awards make a mockery of the principle of compensation.'

c Lord Hoffmann discussed ([2004] 1 AC 628 at [55]) the need for vindication in libel cases, particularly if the defendant has not apologised and withdrawn the defamatory allegations.

d [28] Mr Tomlinson now accepts the judge's starting point of £45,000 for the newspaper publication. He accepts that an apology can have a mitigating effect, but says that the extent of the mitigation all depends on the facts, which Eady J did not analyse properly. In particular, he did not take into account the actual effect which the apology had on Mr Nail. Mr Nail's evidence, which Eady J accepted, included the complaint that the apology in the newspaper was small and misplaced, and he said that he himself continued to feel ashamed, notwithstanding the apology. In *Cleese v Clark* e [2004] EMLR 37, Eady J had taken into account the claimant's evidence that he was not satisfied with the apology. Eady J did not take proper account of the timing of the apology which was some 14 months after the newspaper publication. Although proceedings were not brought until March 2003, there had been a letter of claim soon after publication. Eady J did not take proper f account—although he referred to it (at [69])—of the reality that most readers are unlikely to analyse or dwell on the contents of an apology.

g [29] In short, Mr Tomlinson submits that the mitigating effect of the apology in this case was very limited indeed. Further, there were aggravating features in a large volume of evidence served by the respondents at a late stage designed to show that Mr Nail had a general bad reputation. £45,000 should have been, not only Eady J's starting amount, but the amount he ended with. If there should have been some reduction, 50% was far too great.

h [30] In contrast with the newspaper article, whose circulation was massive, the relevant publications of the book were few. But for these publications, Eady J was wrong to say that Mr Nail contributed to his own misfortune by not bringing proceedings earlier. He should not have been criticised for not resorting to litigation. He should not have been criticised for not writing a letter of complaint in 1998. There was no point in doing so, if he had reasonably decided not to bring proceedings.

j [31] Eady J did not explain how he reached £7,500, but Mr Tomlinson suggests that he must have given an equivalently wrong healthy discount, and wrongly taken into account the effect of previous publications.

[32] Mr Tomlinson drew our attention to awards in other cases, whose details appear in *Kiam v MGN Ltd* [2002] 2 All ER 219 at [35] in the judgment of Simon Brown LJ. These included *Gorman v Mudd* [1992] CA Transcript 1076, where the publication had only been to 91 people. The Court of Appeal

reduced a large jury award to £50,000. There were, however, features of that case which do not help Mr Tomlinson's submission. A plea of qualified privilege was upheld, but the jury found express malice. There was no apology. Rather, Mrs Gorman had been subjected to unpleasant cross-examination which had increased her sense of humiliation. In *Houston v Smith* [1993] CA Transcript 1544 this court again reduced a jury award to £50,000. The publication was to a very small number of people, but again there had been no apology, a contested trial and a number of aggravating features. Further, Hirst LJ said that, if a prompt apology had been published, the appropriate award would have been a very small fraction of £50,000.

[33] Mr Tomlinson submitted that Eady J's award in the present case was out of line with the award of £45,000 upheld by this court in *Kiam v Neill* (No 2) [1996] EMLR 493. There was an allegation of insolvency against a well-known businessman. An apology in agreed terms was published after three weeks. Miss Page points out that this court was reviewing the award of a jury. She submits that the libel in that case was much graver than in the present, the publication putting the claimant alongside Robert Maxwell. For her part, Miss Page submits that the present award in the newspapers action was in line with Eady J's award in *Cleese's* case [2004] EMLR 37, and with the award of Jack J as judge alone in *Greenaway v Poole* [2003] EWHC 1735 (QB), [2003] All ER (D) 345 (Jul). Jack J awarded £25,000 to each of two claimants for libels published in a newsletter and two election pamphlets making allegations of dishonesty, corruption and misappropriation by the claimants in connection with their roles in local politics.

[34] In the HarperCollins case, Mr Tomlinson again submits that the apology, on their website and in the Bookseller, should be regarded as slight mitigation only. He suggests a starting point in this case of £25,000, reduced, if at all, to no less than £20,000.

#### DISCUSSION AND DECISION

[35] There is no dispute as to the principles on which damages are awarded in defamation proceedings. They were referred to by Bingham MR giving the judgment of the court in *John v MGN Ltd* [1996] 2 All ER 35 at 47-48, [1997] QB 586 at 607-608:

'The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and



a publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although  
b the plaintiff has been referred to as "he", all this of course applies to women just as much as men.'

[36] The second paragraph of s 3(5) of the 1996 Act requires the court determining compensation under that subsection to take account of matters which the court would take account of under the general law.

c [37] It is, in my view, important to bear in mind that determining compensation under s 3(5) of the 1996 Act is to be done by a judge alone. The judge is directing himself, not a jury. The need to give directions to try to avoid maverick or disproportionate awards scarcely arises. The judge is concerned to determine what he considers the proper compensation should be, not to speculate what a putative jury might award. Awards of general  
d damages in personal injury cases are scarcely comparable, but the practice in this jurisdiction at the level of this court is to moderate awards in libel cases so that they are not disproportionately large when set against personal injury awards.

e [38] In the present appeal, it is not necessary to consider in-depth comparisons with personal injury awards or the appropriateness of their use, although Eady J did consider personal injury awards. Mr Tomlinson, as I have said, now accepts that £45,000 was an appropriate starting amount for the newspaper publication. The practical issue is whether there should be any increase in, or reduction from, that amount, and, if a reduction is required, whether 50% was too great. As to the book, a practical approach,  
f in my view, is to consider Eady J's award of £7,500 with proportionate regard to this court's conclusion in the appeal in the claim against the newspaper.

[39] I accept that the court must be careful not to drive down damages in libel cases to a level which publishers might with equanimity be tempted to risk having to pay. The obvious corollary is that the level of damages should  
g not be so disproportionately high that freedom of expression is unduly curtailed. But in cases in which an offer to make amends has been made and accepted, questions of deterrence may not be of any great significance. As the facts of *Gleaner Co Ltd v Abrahams* [2004] 1 AC 628, [2003] 3 WLR 1038 and *Kiam v MGN Ltd* [2002] 2 All ER 219 both illustrate, the possibility of deterrence is more often associated with conduct which might result in  
h aggravated or exemplary damages and with malice. Malice is less likely to be in play where there has been an accepted offer to make amends. A defendant against whom malice is alleged is less likely to make an unqualified offer to make amends. A claimant who wishes to establish malice, in the face of an offer which does not accept malice (as in *Milne v Express Newspapers plc* [2005]  
j 1 All ER 1021, [2005] 1 WLR 772), would have to reject the offer and assume the burden of establishing the matters required by s 4(3) of the 1996 Act. More generally, an offer to make amends and its acceptance are in their nature conciliatory and there is no policy which needs to deter conciliation.

[40] I accept Mr Tomlinson's submission as to the proper (and obvious) construction of the first sentence of s 3(5) of the 1996 Act. Compensation

under the subsection is to be determined 'on the same principles as damages in defamation proceedings'. As this court said in *Milne's* case, the claimant is entitled to proper compensation. a

[41] One principle on which damages are awarded in defamation proceedings is that they are assessed as at the point of assessment. Of necessity, they are not in fact assessed at the date of publication, nor are they notionally assessed then. A further consequent principle is that conduct of the defendant after the publication may aggravate or mitigate the damage and therefore the award. Each case depends on its own facts and this will apply to the determination of compensation under s 3(5). That said, if an early unqualified offer to make amends is made and accepted and an agreed apology is published, as in the present cases, there is bound to be substantial mitigation. The defendant has capitulated at an early stage without pleading any defence, has offered to make and publish a suitable correction and apology (and has in fact done so in agreed terms in the present cases) and has offered to pay proper compensation and costs, these to be determined by the court if they are not agreed (see ss 2(4), 3(5) and 3(6)). The claimant knows that his reputation has been repaired to the full extent that that is possible. He is vindicated. He is relieved from the anxiety and costs risk of contested proceedings. His feelings must of necessity be assuaged, although they may still remain bruised (and he is still entitled to say so, if that is so). He can point to the agreed apology to show the world that the defamation is accepted to have been untrue and unjustified. There may be cases in which some of these features are absent, or in which their impact may be slight. An example could be if the defendant had offered and published a correction and apology, which the claimant had not agreed and which the court found to be unsuitable and insufficient (see s 3(5), second sentence). There may also be aggravating features, although the use of the procedure would generally suggest that there is unlikely to be significant aggravation after the making of the offer to make amends. 'A healthy discount' may be a more colourful phrase than 'substantial mitigation', but they mean the same thing. b  
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[42] Paragraph [40] of Eady J's judgment was in large part reciting a submission of Miss Page. The judge (at [41]) said that Miss Page was right to press for a healthy discount 'for the reasons I have already indicated'. These reasons, as I read the judgment, were those at [35] and [36], in which the judge gave his version of the same mitigating features to which I have referred. The adoption of the procedure will have what the judge referred to as a major deflationary effect upon the appropriate level of compensation because adopting the procedure is bound to result in substantial mitigation. I do think that the judge's use (at [41]) of the word 'rewarded' is superficially open to misinterpretation. But there is no distinction in substance between a reduction in compensation on account of the substantial mitigation bound to result from the use of the procedure and a 'reward' for using the procedure, provided that the mitigating factors are not brought into play twice. I do not consider that these paragraphs taken as a whole indicate such an error of principle. Nor do I consider that the judge's use of the word 'also' in the penultimate sentence of [46] indicates that he was making an erroneous double discount as a reward for using the procedure. The first part of the sentence refers to a reduction to take account of any actual apology. But an apology is by no means the only mitigating feature likely to be derived from g  
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a the use of the procedure, as I have indicated. There was 'also' the 'very willingness of the defendant to use the offer of amends route', which includes, for instance, the willingness to pay proper compensation and costs, and to subject these to judicial determination if they are not agreed.

[43] I do not therefore consider that Eady J made, as Mr Tomlinson contends, an illegitimate discount in his determinations. In the News of the World action, he assessed the effect of what he correctly regarded as substantial mitigation at 50%. The question whether he was wrong to reduce his starting figure by as much as 50% raises no further point of principle.

[44] It is important to recognise the assumptions which Eady J made in reaching his starting point and the notional point in time at which he took it. Miss Page was correct to emphasise this; correct also, I think, to suggest that Mr Tomlinson's submissions sometimes strayed from those assumptions and that notional point in time. Eady J spelled out these matters (at [46]). He took as his starting point the end of a trial in which there had been no significant aggravation (such as a plea of justification) and no significant mitigation (such as an apology), for example if there were a trial confined to meaning or qualified privilege. Importantly, therefore, the judge's notional claimant had to carry the proceedings with their attendant costs risks to the end of a trial. There was no apology, no mitigation. By contrast, the making and acceptance of an offer of amends with an agreed apology results in substantial mitigation having the features which I have indicated.

[45] I turn to Mr Tomlinson's particular submissions. First, Eady J was correct in my view to say that there were no aggravating features. Both parties came to court with additional documents. The defendant's documents were in part brought to answer documents which the claimant might seek to introduce. In the result, the judge correctly took account of neither side's documents. I should perhaps also add that a defendant who takes a judicial determination of compensation to the conclusion of a contested hearing does not by that fact alone aggravate the damage. Mr Tomlinson did not submit that this should be seen as an aggravation. The defendant is simply exercising the statutory right to have compensation determined by the court when, for whatever reason, it cannot be agreed. This is in contrast with some defendants who unsuccessfully contest full libel proceedings with, for instance, a plea of justification.

[46] Second, I do not consider that the apology in the News of the World case can properly be regarded as late. Its terms were the subject of negotiation and the apology was published within a reasonable time of the issue of proceedings. Third, Eady J did take account of the position and prominence of the published apology and its likely impact. Fourth, I agree that Mr Nail's evidence that his feelings were not assuaged was relevant, but this cannot neutralise the objectively necessary personal improvements for the claimant which the use of the procedure in this case must have brought about. Eady J's judgment, taken as a whole, shows quite clearly that he had well in mind the 'major and continuing distress to Mr Nail' to which he referred at [33].

[47] In these circumstances, the question is whether Eady J's determination of £22,500 for the News of the World publication was wrong to the extent that this court should interfere to increase it. I do not consider that it was. The judge made no error of principle. He gave proper and full

consideration to all relevant factors and reached a balanced conclusion. The possibility that another judge might have reached a somewhat higher amount does not mean that Eady J's conclusion was wrong. I would reject entirely any idea that there might be a conventional or standard percentage discount when an offer to make amends has been accepted and an agreed apology published. Each case will be different and require individual consideration. But most such cases will, as I have said, exhibit substantial mitigation. This was, in my view, such a case.

[48] As to the appeal in the HarperCollins case, Mr Tomlinson is likely to be correct that Eady J, who must have found equivalent substantial mitigation, went through equivalent thought processes. Mr Tomlinson was also correct in accepting pragmatically that the award in this case should be proportionate to the proper award in the News of the World case. Proceedings were not started until they were, and the claim concerned a small number of relevant publications. Mr Tomlinson's additional submission that the judge was wrong to penalise Mr Nail for not bringing proceedings earlier seems to me to be of little weight. Eady J merely said (at [47]) that he could not ignore it entirely on the issue of compensation.

[49] As with the News of the World publication and for equivalent reasons, in my judgment this court cannot say that Eady J's award of £7,500 was wrong to the extent that this court should interfere with it.

[50] For these reasons I would dismiss this appeal.

**GAGE LJ.**

[51] I agree.

**AULD LJ.**

[52] I also agree.

*Appeals dismissed.*

Kate O'Hanlon Barrister.



**a Ulrich and others v Treasury Solicitor and others**

[2005] EWHC 67 (Ch)

**b** CHANCERY DIVISION

HART J

20, 28 JANUARY 2005

**c** *Charity – Validation by statute – Imperfect trust provision – Trust for employees – Void for perpetuity – No express reference to a charitable purpose – Whether trust validated – Charitable Trusts (Validation) Act 1954, s 1(1).*

**d** A trust was established by deed in 1927 for the benefit of a class consisting of employees (excluding managers) in a company and their widows and children. The trust fund was established at the time of a company restructure and was constituted in the most part by the transfer by shareholders of shares in the company and also by shares belonging to an untraceable owner and related dividends. In 1927 the trust fund had a value of some £3,000 with an immediate class of possible beneficiaries of approximately 30 persons, their wives and children. The trustees held income at their discretion to pay or apply it or any part thereof to or for the benefit of any of the beneficial class. The trust deed declared that nothing in it was to be deemed to constitute a trust for the benefit of any of the beneficiaries or was enforceable by them. It appeared that the income had always been applied for making payments to members of the beneficial class who found themselves in reduced circumstances, rather than for purposes of providing general benefits. In 1995 the trustees were advised that the trusts declared were invalid on grounds of perpetuity and they ceased to make payments. The shareholders who had contributed the initial fund were unidentifiable. The trustees sought the court's determination of the validity of the trust on the bases that it could not be supported as valid unless it were charitable; that it could only have been valid as a charitable trust if its objects had confined it to the relief of poverty amongst members of the class of beneficiaries; and that therefore it could not be supported as a valid charitable trust without resort to the provisions of the Charitable Trusts (Validation) Act 1954 which provided for the charitable effect of an 'imperfect trust provision' defined in s 1(1)<sup>a</sup> of the 1954 Act as meaning any provision declaring the objects for which property was to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which were not charitable.

**j** **Held** – The 1954 Act was not confined in its operation to cases where a charitable purpose had been expressed. Section 1(1) contemplated a provision which satisfied the condition that the property could be used exclusively for charitable purposes consistently with the terms of the provision even though the trust property could nevertheless be used for purposes which were not charitable. It

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<sup>a</sup> Section 1, so far as material, is set out at [15], below

proceeded on the hypothesis, for the purposes of the definition of 'imperfect trust provision' only, that the provision in question was valid, or at least capable of construction, both in respect of the possible charitable and the possible non-charitable objects. It thus asked one to consider, in the case of a (notionally valid) provision which permitted both charitable and non-charitable applications of property, whether the whole 'could' be applied for charity. If, upon an examination of the objects of the trust, as expressed by its wording construed against the appropriate factual matrix, no one with a locus to make a complaint could object to an exclusively charitable application, the provision satisfied the condition. In the instant case it was impossible to suppose that the unidentified settlors would have quarrelled with the proposition that the whole fund could be devoted to the relief of poverty amongst the identified class in that the identified class was inherently likely to be exposed to financial hardship; the size of the established fund was not calculated to be of much obvious use other than as a fund to be resorted to in the case of genuine hardship; the only clearly dispositive provision in relation to the fund related to its modest income; that provision was of a potentially perpetual nature; and the draftsman had gone out of his way to negative the suggestion that the objects of the fund should be able to regard themselves as the beneficiaries, however, discretionary, of a private trust. Accordingly, no one could have complained if the trustees had from the outset regarded the trust as being one for the relief of poverty. The trust therefore did permit the application of its income exclusively for charitable purposes even though non-charitable applications could also have been contemplated and it did not fall to be characterised as a purely private discretionary trust. Accordingly the trust was validated by the 1954 Act (see [24], [28], [29], [33]–[35], below).

*Re Wykes' Will Trusts*, *Riddington v Spencer* [1961] 1 All ER 470 followed.

*Re Gillingham Bus Disaster Fund*, *Bowman v Official Solicitor* [1958] 1 All ER 37 not followed.

*Re Saxone Shoe Co Ltd's Trust Deed*, *Re Abbott's Will Trusts*, *Abbott v Pearson* [1962] 2 All ER 904 considered.

## Notes

For dispositions affected by the Charitable Trusts (Validation) Act 1954 and for imperfect trust provisions, see 5(2) *Halsbury's Laws* (4th edn) (2001 reissue) paras 90, 91.

For the Charitable Trusts (Validation) Act 1954, s 1, see 5 *Halsbury's Statutes* (4th edn) (1998 reissue) 888.

## Cases referred to in judgment

*Barber, Walker & Co Ltd v Flint* [1929] 1 KB 256, CA.

*Buxton v Public Trustee* (1962) 41 TC 235.

*Chitty's Will Trust*, *Re, Re Thomas's Will Trusts*, *Ransford (or Ransferd) v Lloyds Bank Ltd* [1969] 3 All ER 1492, [1970] Ch 254, [1969] 3 WLR 643.

*Dingle v Turner* [1972] 1 All ER 878, [1972] AC 601, [1972] 2 WLR 523, HL.

*Edward Curran & Co Ltd v Kays* [1928] 2 KB 469, CA.

*Flavel's Will Trusts*, *Re, Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444.

*France v J Coombes & Co* [1928] 1 KB 457.

*Gibson v South American Stores (Gath & Chaves) Ltd* [1949] 2 All ER 985, [1950] Ch 177, CA.

- a* *Gillingham Bus Disaster Fund, Re, Bowman v Official Solicitor* [1958] 1 All ER 37, [1958] Ch 300; *affd* [1958] 2 All ER 749, [1959] 1 Ch 62, [1958] 3 WLR 325, CA. *Harpur's Will Trust, Re, Haller v A-G* [1960] 3 All ER 237, [1961] 1 Ch 38; *affd* [1961] 3 All ER 588, [1962] 1 Ch 78, [1961] 3 WLR 924, CA.
- McCullough, Re* [1966] NI 73.
- Mead's Trust Deed, Re, Briginshaw v National Society of Operative Printers and Assistants* [1961] 2 All ER 836, [1961] 1 WLR 1244.
- b* *Oakley v Wilson* [1927] 2 KB 279.
- Oppenheim v Tobacco Securities Trust Co Ltd* [1951] 1 All ER 31, [1951] AC 297, HL.
- Saxone Shoe Co Ltd's Trust Deed, Re, Re Abbott's Will Trusts, Abbott v Pearson* [1962] 2 All ER 904, [1962] 1 WLR 943.
- Scarisbrick, Re, Cockshott v Public Trustee* [1951] 1 All ER 822, [1951] Ch 622, CA.
- c* *Vernon (Trustee of Employees fund of William Vernon & Sons Ltd) v IRC* [1956] 3 All ER 14, [1956] 1 WLR 1169, 36 TC 484.
- Wykes' Will Trusts, Re, Riddington v Spencer* [1961] 1 All ER 470, [1961] 1 Ch 229, [1961] 2 WLR 115.
- d* **Case referred to in skeleton arguments**
- Wightwick's Will Trusts, Re, Official Trustees of Charitable Funds v Fielding-Ould* [1950] 1 All ER 689, [1950] Ch 260.

### Claim

- e* The claimants, Bryan George Michael Ulrich, David Ellis Roberts, David Maxwell Warren and Lynne Joyce Armstrong, the trustees of a trust established by deed dated 7 February 1927 (the trust) for the benefit of employees of Hiram Walker (1992) Ltd (the second defendant), and their widows and children, applied by claim form to determine the validity of the trust. The first defendant, the Treasury Solicitor, was joined in order to represent the claim of the Crown to the
- f* trust fund as bona vacantia. The third defendant, the Attorney General, was joined in order to represent the interests of charity. The fourth defendant, John Field, was joined to represent the interests of the beneficiaries under the trust. The facts are set out in the judgment.
- g* *Paul Teverson* (instructed by *Carter Bells*, Kingston upon Thames) for the trustees. *Michael King* (instructed by *Carter Bells*, Kingston upon Thames) for the fourth defendant.
- The first, second, and third defendants did not appear.

*Cur adv vult*

*h*

28 January 2005. The following judgment was delivered.

### HART J.

- j* [1] The claim in the present case raises the question of the validity of a trust purportedly established by a trust deed dated 7 February 1927 for the benefit of employees of a company called Vine Products Company Ltd (described in the deed and in this judgment as 'the Old Company') and the widows and children of employees of a company then called Vine Products Ltd, and now called Hiram Walker (1992) Ltd (described in the deed and in this judgment as 'the New Company').

[2] The deed defined 'Employee of the Old Company' as meaning any person employed by the Old Company on 30 March 1926 and in the employment of the New Company at 7 February 1927 'other than any person directly concerned or engaged in the management of the New Company'. It defined 'Employee of the New Company' as 'any person other than an employee of the Old Company now or at any time hereafter' employed by the New Company, again subject to the exclusion of management.

[3] Clause 2 of the trust deed declared: 'A Fund to be called the Employees' Benefit Fund shall be constituted and established as hereinafter mentioned.' Clause 3 identified the property initially settled (consisting largely of certain shares in the New Company and some cash), and cl 4 contained a wide investment clause which permitted investment in shares in the New Company.

[4] Clauses 5, 6 and 7 contain the operative provisions of the trust and are in the following terms:

'5. The Trustees shall hold the said fund upon the trusts following that is to say

(a) Upon trust as to the income thereof at their discretion to pay the whole or any part thereof to such employees of the Old Company or their widows and children as the Trustees shall think fit or at such discretion as aforesaid to apply the same or any part thereof to or for the benefit of any of such persons in such manner as the Trustees shall think fit and

(b) Upon trust as to the residue (if any) of such income and after the death of all persons who might be entitled to benefit under sub-clause (a) hereof as to the whole of such income at their discretion to pay the whole or any part thereof to such employees of the New Company or their widows and children as the Trustees shall think fit or at such discretion as aforesaid to apply the same or any part thereof to or for the benefit of any such persons in such manner as the Trustees shall think fit

6. IT IS HEREBY DECLARED that if at any time the income of the said fund shall be insufficient to enable the Trustees to pay or apply all moneys which they shall have determined or shall determine to pay or apply hereunder the Trustees shall be entitled at any time and from time to time to sell and convert into money such part of the investments for the time being representing the capital of the said fund as will produce the amount by which such income is insufficient and apply the moneys received on such sale and conversion as though the same were income of the said fund

7. IT IS HEREBY FURTHER DECLARED that the Trustees may at any time and from time to time sell and convert into money such part of the investments for the time being representing the capital of the said fund as they shall think fit and apply the moneys received on such sale or conversion in such manner as they shall think fit in accordance with the trusts hereinbefore declared concerning the income of the said fund and may in particular apply any of such moneys in the purchase of a Government Annuity or an Annuity from an Insurance Office in the



- a name and for the benefit of such person or persons eligible to benefit hereunder as the Trustees shall think fit'.

[5] The only other provision which it is necessary to note is cl 9 which reads as follows:

- b 'NOTHING herein contained shall be deemed to constitute a trust for the benefit of any one or more of the employees of the Old Company or of the employees of the New Company or his or their widows or children and enforceable by him or them and the Trustees shall not be bound to apply the said fund or any part thereof to or for the benefit of any such employee or his widow or children'.

- c [6] The recitals to the trust deed give some, but not much, indication of the origins and purposes of the trust. By an agreement dated 15 March 1926 the New Company had agreed to buy the assets and undertaking of the Old Company (which went into voluntary winding up on the same day) for a consideration which included £480,477 to be satisfied as to £180,484 in cash and as to £299,993 by the allotment to the liquidator of the Old Company of 299,993 £1 fully paid shares in the New Company. After reciting the desire to create a fund for the benefit of the employees of the two companies and their wives and children, the recitals then recorded the existence of a block of 30 shares in the Old Company, registered as owned by the Bank of Athens but which had been disposed of by the Bank of Athens to an untraceable donee who had never sought to be registered and had never claimed declared dividends. The Bank of Athens made no claim to the shares or the dividends. Part 1 of the Second Schedule to the deed set out the shares in the New Company and the cash distributions to which the holder of that block of shares in the Old Company was entitled together with the unclaimed dividends. The whole consisted of 13 £1 preference shares and 78 £1 ordinary shares in the New Company, and cash of about £97.

[7] The recitals then state that the holders of certain shares in the Old Company, entitled to 2,960 £1 shares in the New Company, had authorised the liquidator to transfer them to the trustees 'with a view to the creation of the Fund'. These shares are described in Pt 2 of the Second Schedule.

- g [8] From the foregoing it is possible to deduce that the value of the trust fund at its inception had a value of some £3,148. There is little evidence as to how large was the class of employees of the Old Company or of the New Company at the inception of the trust, but it is thought that there were probably no more than about 30 employees at that time. Nothing is known about the motives of those shareholders who contributed the 2,960 shares in the New Company. Indeed the state of the New Company's records is such that those shareholders cannot, it appears, now be identified.

- h [9] A fund of £3,000 in 1927 might, I would guess (in the absence of any material before me) be expected to produce an income (at 4%) of £120 pa. That figure has to be set in the context of 1927 monetary values. At that time many weekly wages would appear to have been in the range of between £1 and £2 per week: see, e.g. s 8(3)(i) of the Workmen's Compensation Act 1925. Contemporary law reports show a 'manager' in the boot and shoe industry as being entitled to a minimum wage of £4 per week (although the plaintiff in *France v J Coombes & Co* [1928] 1 KB 457 had only been paid £2 18s); a machine operator in South Wales might have been earning over £2 per week (see

*Edward Curran & Co Ltd v Kays* [1928] 2 KB 469), as also would a collier (see *Barber, Walker & Co Ltd v Flint* [1929] 1 KB 256 showing a collier's wages in 1927 to be £2 14s as compared with the nearly £4 per week which would have been commanded in 1919). A modest cottage in Woking could be rented for 2s 6d a week: see *Oakley v Wilson* [1927] 2 KB 279. a

[10] Those illustrative examples enable me to say with a reasonable degree of confidence that the income generated by the fund was modest even in 1927 terms when viewed in the context of an immediate class of possible beneficiaries consisting of perhaps 30 persons and their wives and children. That supports the suggestion that the fund may have been conceived of as a fund the income of which was designed to be resorted to for the purposes of making one off, or continuing, payments to members of the class who, for one reason or another, found themselves in reduced circumstances, rather than for the purposes of providing general benefits to employees and/or their families. b  
c

[11] So far as the evidence goes the income of the fund has indeed always been applied for such 'hardship' purposes. That has certainly been the policy of the present trustees, of whom the earliest to be appointed was Mr Ulrich the first claimant (who was appointed as a trustee in 1973 and who had been employed by the New Company since 1940). d

[12] In 1995 one of the trustees, who was married to a solicitor, had his attention drawn by her to the possibility that the trusts declared by the trust deed were invalid on grounds of perpetuity. Advice was thereafter sought from counsel who confirmed the fear. The trustees have thereafter ceased to make payments. For reasons which are unclear on the evidence, steps were not taken until last year to bring the matter before the court. The fund is currently valued at some £600,000. e

[13] The present claim is brought by the trustees, who have been represented before me by Mr Paul Teverson. The first defendant, the Treasury Solicitor, was joined in order to represent the claim (if any) of the Crown to the fund as bona vacantia, but makes no such claim and has not been represented before me, taking the view that if the trusts are void those entitled to the funds are the original shareholders or their estates. The second defendant is the New Company, which has also not been represented before me and which makes no claim to the fund. The third defendant, the Attorney General, has been joined to represent the interests of charity, but he too has declined the opportunity of being represented before, or advancing any argument to, the court. The fourth defendant has been joined to represent the interests of the beneficiaries under the trust deed and has been represented before me by Mr Michael King. The class of persons interested to argue that the trusts are invalid, ie the shareholders who contributed the initial fund, cannot be identified and no person has been appointed to represent their interests. That was a decision taken by those advising the trustees in the (admirable) interests of economy. It has meant that no counsel has appeared before me whose sole task it has been to seek to persuade me that the trusts are invalid. Mr Teverson, however, has been careful to put before me all the authorities and arguments relevant to that question, for which I am grateful. f  
g  
h  
j

[14] It is common ground that the trust cannot be supported as a valid trust unless it is charitable: it is plainly perpetual. It is also common ground that

- a it cannot be supported as a valid charitable trust without resort to the provisions of the Charitable Trusts (Validation) Act 1954: it could only have been valid as a charitable trust if its objects had confined it to the relief of poverty amongst members of the class of beneficiaries (see *Gibson v South American Stores (Gath & Chaves) Ltd* [1949] 2 All ER 985, [1950] Ch 177, approved in *Dingle v Turner* [1972] 1 All ER 878, [1972] AC 601).
- b [15] The purpose of the 1954 Act was, as appears, from its long title, to restrict to charitable objects certain instruments taking effect before 16 December 1952 which provided 'for property to be held or applied for objects partly but not exclusively charitable'. The significance of 16 December 1952 is that it was the date of the publication of the Nathan Committee's report. The relevant provisions are contained in ss 1(1), (2), and
- c 2(1) which are in the following terms:

**'1 Validation and modification of imperfect trust instruments**

- d (1) In this Act, "imperfect trust provision" means any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

- e (2) Subject to the following provisions of this Act, any imperfect trust provision contained in an instrument taking effect before the sixteenth day of December, nineteen hundred and fifty-two, shall have, and be deemed to have had, effect in relation to any disposition or covenant to which this Act applies—

(a) as respects the period before the commencement of this Act, as if the whole of the declared objects were charitable; and

- f (b) as respects the period after that commencement as if the provision had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes ...

**2 Dispositions and covenants to which the Act applies**

- g (1) Subject to the next following subsection, this Act applies to any disposition of property to be held or applied for objects declared by an imperfect trust provision, and to any covenant to make such a disposition, where apart from this Act the disposition or covenant is invalid under the law of England and Wales, but would be valid if the objects were exclusively charitable.'

- h [16] This provision has been the subject of some judicial controversy. In *Re Gillingham Bus Disaster Fund*, *Bowman v Official Solicitor* [1958] 1 All ER 37, [1958] Ch 300, Harman J (as he then was) had to consider a trust provision which required funds to be applied partly for purposes which were conceded not to be charitable and partly for purposes ('other worthy causes') which
- j were not necessarily charitable. If the two objects were seen as part of the same disposition, then plainly this was not a trust under which the property could be used for exclusively charitable purposes. The Attorney General, arguing in favour of the application of the 1954 Act and represented by Mr Denys Buckley, sought to overcome the difficulty by an argument, based on s 2(3) of the 1954 Act, that there was more than one disposition for the

purposes of the 1954 Act, and that the disposition so far as it related to 'other worthy causes' was capable of being validated by the 1954 Act. Harman J rejected both arguments. In the course of doing so he said ([1958] 1 All ER 37 at 40, [1958] Ch 300 at 306):

'This is a very far-reaching submission. If it be right, a bequest "for such objects as my trustees think fit" will be validated although nothing whatever about charity is mentioned in the will. The vaguer the words are, the better they will do. In my judgment, the Act was not intended to produce any such result. It was, as the long title shows, intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague.'

[17] In the Court of Appeal, a majority (Lord Evershed MR and Romer LJ) rejected the s 2(3) argument, but declined to decide the wider question. In doing so both expressed sympathy for the view taken by Harman J: see [1959] 1 Ch 62 at 75, 77, [1958] 2 All ER 749 at 755, 756. Omerod LJ dissented on both points, holding in relation to the second point that the language of the section was clear and unambiguous, and that it was impermissible to constrain it by reference to the language contained in the long title (see [1959] 1 Ch 62 at 80, [1958] 2 All ER 749 at 758).

[18] The next reported case in which the 1954 Act fell to be considered was *Re Harpur's Will Trust, Haller v A-G* [1960] 3 All ER 237, [1961] 1 Ch 38, where Cross J had to consider a bequest to trustees to divide between a variety of institutions some of which might and others might not have been charitable. He held that the 1954 Act did not apply at all to such a gift, saying that he might have had more sympathy for the contrary argument—

'if I knew what the Act was intended to achieve ... The Act leaves the law untouched for the future but, for some reason which I do not pretend to understand, validates retrospectively a limited number of dispositions which had already failed. I do not know on what principle these particular dispositions were selected for favourable treatment, and I see no reason for construing this Act liberally' (see [1960] 3 All ER 237 at 243, [1961] 1 Ch 38 at 48-49).

[19] That case also proceeded to the Court of Appeal, where in due course Cross J's decision was upheld: see [1961] 3 All ER 588, [1962] 1 Ch 78. In the intervening period the point came before the court at first instance in two further cases. In the first, *Re Wykes' Will Trusts, Riddington v Spencer* [1961] 1 All ER 470, [1961] Ch 229, a testator had made a bequest to the directors of a company 'to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of past, present and future employees of the company'. After a careful review of the authorities Buckley J, analysing Harman J's view in *Gillingham* as being an obiter dictum rather than an alternative ground of decision, regarded himself as free to prefer the view of Omerod LJ, saying ([1961] 1 All ER 470 at 477-478, [1961] 1 Ch 229 at 244-245):

'The intention of the legislature, like the intention of a testator, is primarily to be ascertained by reading the language employed, and it is



- a not for this court to corset that intention, if it be clearly expressed, into  
some shape which accords better with the fashion of professional legal  
thought than the natural meaning of the language employed. More  
particularly, I think, this must be so when one is concerned with a  
definition section, where one must presume that Parliament would  
b be specially precise and careful in its choice of language. The language  
of s 1(1) of the Act of 1954 is, in my view, clear and unambiguous.  
Construed in its natural sense it produces no absurdity or hardship.  
There appears to me to be no reason for thinking that, so construed, its  
effect exceeds what Parliament may reasonably be expected to have  
intended. I can discern no justification for declining to allow the language  
its full and natural effect. For these reasons, with respect to HARMAN, J.,  
c I cannot agree with his view of the subsection as expressed in *Re*  
*Gillingham Bus Disaster Fund* ... which I think puts an unjustifiable gloss  
upon the language of the statute. I return, therefore, to the language of  
s. 1(1) of the Act and inquire whether the will of the testator (which in  
this case both effects the relevant disposition and is the instrument which  
d in cl. 9 (c) contains the "imperfect trust provision" if there be one)  
describes the objects for which this share of residue is to be held or  
applied in such a way that consistently therewith the property could be  
used exclusively for charitable purposes, notwithstanding that  
admittedly it could be used for purposes which are not charitable. If the  
answer is affirmative, cl. 9 (c) by definition constitutes an "imperfect trust  
e provision." For the reasons indicated at the beginning of this judgment,  
I think the answer must be affirmative, with the consequence that, in my  
judgment, the Act applies in the present case ... I might also add that, just  
as in *Re Gillingham Bus Disaster Fund* LORD EVERSHED, M.R., discerned in  
the phrase "worthy causes" a notion of charity, so in the reference to a  
benevolent or welfare fund and to welfare purposes in the present case a  
f notion or flavour of charity may be discerned. Members of the Bar are  
well acquainted with a charity in the name of which the word  
"benevolent" is prominent, and the Family Welfare Association is a very  
well-known charity which includes the word "welfare" in its name. I  
prefer, however, not to base my decision in any way upon this  
g consideration, but upon the grounds which I have earlier elaborated.'

- [20] In *Re Mead's Trust Deed, Briginshaw v National Society of Operative*  
*Printers and Assistants* [1961] 2 All ER 836, [1961] 1 WLR 1244 a trade union  
had established a memorial home intended to be a sanatorium for  
consumptive members, a convalescent home for members and a home for  
h aged members of the union unable to support themselves and their wives.  
The restriction of the objects by reference to union membership meant that  
the trust fell foul of the rule in *Oppenheim v Tobacco Securities Trust Co Ltd*  
[1951] 1 All ER 31, [1951] AC 297, except in so far as it was for relief of grounds  
of poverty. Cross J accepted the argument that the trustees were entitled  
j under the trusts of the deed to restrict admission to poor members of the  
society, an acceptance which is somewhat surprising in the light of his  
observation ([1961] 2 All ER 836 at 842, [1961] 1 WLR 1244 at 1251) that such  
a restriction would 'almost certainly [have been] contrary to the intentions of  
those who provided most of the money.' However, on that footing he was  
able without difficulty to hold that the 1954 Act applied to validate the trust.

Since one of the declared objects was exclusively charitable, the case did not raise the question of whether Buckley J's refusal in *Wykes' Will Trusts* to follow the view of Harman J in *Gillingham* was correct. a

[21] Nor did the point fall to be decided by the Court of Appeal (Lord Evershed MR, Harman LJ and Donovan LJ) in *Re Harpur's Will Trust, Haller v A-G* [1961] 3 All ER 588, [1962] 1 Ch 78. They affirmed the decision of Cross J at first instance, essentially on the ground that that the 1954 Act did not apply to gifts to institutions as opposed to gifts for objects. Harman LJ observed ([1961] 3 All ER 588 at 595, [1962] 1 Ch 78 at 95): b

‘It has been my misfortune on a previous occasion in the *Re Gillingham Bus Disaster Fund* ... to have to wrestle with the terms of this statute, and I confess to having been floored by them on that occasion and this. Whether I was right then or wrong, as BUCKLEY J., whose argument as counsel did not then prevail with me, but who has as a judge reasserted it recently in *Re Wykes' Will Trusts* ... and thus affected to overrule me, does not, I think, arise for decision now. The fact remains that the terms of the statute are most difficult.’ c

[22] The point did, however, arise in the following year in *Re Saxone Shoe Co Ltd's Trust Deed, Re Abbott's Will Trusts, Abbott v Pearson* [1962] 2 All ER 904, [1962] 1 WLR 943. In that case a company had in 1914 established, by the settlement of £100, a trust whose objects were all or any one or more of— d

‘(a) The provision of pensions allowances or donations for or to employees or former employees or allowances or donations for ... or to dependants ... (b) The provision and equipment of recreation grounds for employees or dependants ... (d) The provision and equipment of dwelling-houses for employees or dependants ... (g) Any other purpose whatsoever which the directors shall in their discretion consider to be for the benefit of the employees or dependants.’ e

The employees were defined as including every class of employee from board director down, and the directors of the company for the time being were the managing trustees of the trust. The duration of the trust was carefully confined to a valid royal lives perpetuity period. The £100 was invested in War Loan which, together with accumulated income, had a value in 1962 of £300. In 1929 a former director died, and by his will (made in 1924) declared certain trusts of income in favour of the trust during the lifetime of his widow (which was in practice accumulated by the trustees), and on her death left his shareholding in the company to the trust wishing it to be known ‘as The Frank Abbott Memorial Fund in memory of my dear brother who had ever at heart the welfare of the employees’. By the time of the widow's death in 1956 this bequest was worth some £150,000. f

[23] Cross J held (applying the law as it then stood) that the trust was invalid ab initio on grounds of uncertainty in the class of beneficiaries. It was, however, argued that the 1954 Act had the effect of turning the trust into a valid trust for the relief of poverty among such members of the class of beneficiaries as might from time to time be poor persons. As to this Cross J observed that: g

‘It is evident that this would turn this trust into something totally different from anything which the company or the testator can be h

a supposed to have envisaged; but the Act is a very odd one, and it is no answer to an argument founded on it that it produces a result which is surprising or even absurd.'

b [24] He went on to point out that *Wykes' Will Trusts* had decided both (1) that the 1954 Act can apply to a trust to promote purposes which contain no reference to charity but under which the fund can be applied for charitable purposes, and (2) that the 1954 Act can apply where, having regard to the nature of the class, only a trust to relieve poverty was a possible valid charitable disposition. However, he also pointed out that the 1954 Act self-evidently—

c 'It applies only to trusts to promote purposes as opposed to trusts for the benefit of individuals. Take an ordinary discretionary trust under which income and capital can be applied in any way that the trustees think fit for the benefit of all or any of a class of beneficiaries, and suppose that it is void either as infringing the rule against perpetuities or because the class of beneficiaries is too wide to be ascertained. It may well happen  
d that some of the beneficiaries are "poor persons", and in so far as the trustees choose to make payments to them they may be said to be relieving poverty. Yet I cannot conceive that this Act validates such trusts by limiting the class of beneficiaries to those who may from time [to time] be poor' (see [1962] 2 All ER 904 at 915, [1962] 1 WLR 943 at 957).

e [25] Developing this theme ([1962] 2 All ER 904 at 916, [1962] 1 WLR 943 at 958-959), he said that the difficulty was to distinguish between—

f 'a trust to promote some purposes—say "welfare purposes"—among some class which is not a section of the public and a trust to pay or apply the fund for the benefit of such members of the class as the trustees think fit. Is the trust in question a private discretionary trust or is it a trust for the promotion of quasi-charitable purposes? The distinction is very fine, and, like the distinction between trusts and powers with which I have already dealt, would not be appreciated by a layman. Assuming,  
g however, that the distinction must be drawn, I think the trust in cl 6 is in truth only a private discretionary trust. It is true that the word "purpose" appears in it, but after specifying several purposes for which the fund might be applied, the clause ends with the words "any other purpose whatsoever which the directors in their discretion consider to be for the benefit of the employees or dependants." What therefore the clause  
h really says is that the directors are to apply the capital and income for the benefit of the class in question in any way they think fit, though the company has suggested certain modes of application which the directors may think fit to choose. In such a phrase as "welfare purposes" there is at least some flavour of charity which may justify me in saying that the testator was seeking to benefit the public through the relief of a limited  
j class. Here there is nothing of that kind, and if such a trust as this is validated by the Act, I do not see why one should stop short of turning any invalid private trust into a trust for the relief of such beneficiaries as may from time to time be poor.'

He held therefore that the trust was not validated by the 1954 Act.

[26] Mr King sought to persuade me that the decision in *Saxone* could be explained as having been very much a creature of the time at which it was decided, in particular as having been influenced by the climate of doubt which then existed as to whether trusts for the relief of poverty amongst a class defined by reference to employment by a particular company were entitled to the benefit of the anomalous treatment of 'poor relations' trusts. He referred me to the distinction which had been drawn in *Re Scarisbrick, Cockshott v Public Trustee* [1951] 1 All ER 822, [1951] Ch 622, and the observations of Lord Cross of Chelsea on it in *Dingle v Turner* [1972] 1 All ER 878 at 883, 888, [1972] AC 601 at 617, 623. It appears to me, however, that these references serve to emphasise, rather than to detract from, the importance in a given case of distinguishing between a potentially charitable trust and a trust established as a private trust. The difficulty lies in identifying the criterion by which the distinction is to be made where the beneficiaries of a trust are defined by reference to their poverty. On the uncertainty point, however, *Saxone* was indeed a creature of its time. Had the trust not failed for uncertainty there was no reason not to have regarded it as a private trust.

[27] I was referred in argument to other cases where the 1954 Act had been considered: *Vernon (Trustee of Employees fund of William Vernon & Sons Ltd) v IRC* [1956] 3 All ER 14, [1956] 1 WLR 1169, *Buxton v Public Trustee* (1962) 41 TC 235, *Re McCullough* [1966] NILR 73 (concerned with the similar but not identical wording of s 24 of the Charities (Northern Ireland) Act 1964), *Re Flavel's Will Trusts, Coleman v Flavel* [1969] 2 All ER 232, [1969] 1 WLR 444 and *Re Chitty's Will Trust, Re Thomas's Will Trusts, Ransford (or Ransferd) v Lloyds Bank Ltd* [1969] 3 All ER 1492, [1970] Ch 254, as well as to the text of the sixteenth edition of Underhill and Hayton's *Law Relating to Trusts and Trustees* (2003), pp 107-110. In addition, following conclusion of the argument, I took the opportunity to consult the third edition of Picarda's *Law and Practice relating to Charities* (1999), always a valuable resource, where at pp 236-238 there is a useful review of the authorities and, in particular, observations as to what Buckley J did not decide in *Wykes*.

[28] On that state of the authorities I am, as a matter of precedent, free to prefer (as I do) the view of Buckley J in *Wykes* to that of Harman J in *Gillingham* that the 1954 Act is not confined in its operation to cases where a charitable purpose has been expressed. I agree with Buckley J (and Ormerod LJ in the Court of Appeal in *Gillingham*) that so to confine it imposes a gloss on the wording of s 1(1), that resort to the long title is impermissible to justify that gloss, and (with Buckley J) that even if such resort be had it does not provide a clear answer to the point. I further agree with Buckley J that giving s 1(1) its full and natural meaning leads to no mischief or absurdity.

[29] In my judgment the key to the construction of the two sections is to be found for present purposes in that part of the definition in s 1(1) of 'imperfect trust provision' which focuses on the question whether 'consistently with the terms of the provision, the property could be used exclusively for charitable purposes'. The subsection is contemplating a provision which satisfies this condition even though the trust property 'could nevertheless be used for purposes which are not charitable'. It also proceeds on the hypothesis, for the purposes of the definition only, that the provision in question is valid (or at least capable of construction) both in respect of the possible charitable and the possible non-charitable objects. It thus asks one



- a to consider, in the case of a (notionally valid) provision which permits both charitable *and* non-charitable applications of property, whether the whole 'could' be applied for charity. Another way of putting that question is to ask whether anyone would have a legitimate complaint if the whole were applied for charity. The obvious candidates for making such complaint would be either the founder or those interested in the non-charitable application (again assuming a notional locus to make such complaint).
- b If, upon an examination of the objects of the trust, as expressed by its wording construed against the appropriate factual matrix, the answer to that question is that no-one could object to an exclusively charitable application, the provision satisfies the condition. So construed, the 1954 Act is incapable of producing (pace Cross J in *Re Mead* [1961] 2 All ER 836, [1961] 1 WLR 1244) an absurd result: the provision is incapable of taking effect in a way which would flout either the intention of the settlor or the legitimate expectations of those interested under the non-charitable objects. Provided that the 1954 Act took care (as it did) to protect in an appropriate way the interests of those entitled on the hypothesis of invalidity, Parliament was not in my judgment guilty of the irrationality of which those who affected to be perplexed by its provisions have accused it.

- [30] An approach on the above lines has no difficulty in drawing a line between *Wykes* on the one hand and *Saxone* on the other. In *Wykes*, as Cross J pointed out in *Mead*, the settlor would no doubt not have objected to a confinement of the objects to relief of poverty. By contrast the company in *Saxone* (and it was not competent to Mr Abbott as testator to change the position) most certainly could have protested at such a confinement, as could the wide class of employees intended under the *Saxone* trust deed to be objects of its bounty. The *Saxone* trusts were plainly intended to have a wider potential application than merely to relieve poverty amongst the identified class as a charitable object: that is manifest from the width and nature of the class of the employees, the wide variety of types of application contemplated, the identity of the trustees and, last but not least, the express attempt to confine the duration of the trust to a valid perpetuity period (an exercise wholly unnecessary if the founder had contemplated, and therefore provided, that the whole might be devoted to exclusively charitable purposes). The consequence of applying the 1954 Act to the *Saxone* gift might indeed have been to flout the intentions of the company as settlor. On the approach I prefer, that was itself a sufficient reason for holding the 1954 Act not to apply.

- [31] I have to concede that this approach would probably have led me to adopt a different approach to the question raised in *Mead* from that which commended itself to Cross J in that case. But that is because, had I had to decide that case, I would have questioned the premise adopted that the trusts of the deed in that case did allow an exclusively charitable (ie poverty relieving) application of the whole of the funds. It seems to me that a strong argument could have been made that such an application would have involved the trustees in an impermissible surrender of the full width of the fiduciary discretions purportedly vested in them by the deed. That is largely because of the elaboration in the deed of particularised non-charitable objects which the trustees would have been bound from time to time at least to consider, and which the deed in fact appeared to place on a level of parity with, if not indeed priority to, the charitable object.

[32] If that approach is correct, then it may indeed be the case, as Harman J said in *Gillingham*, that 'the vaguer the words are, the better they will do'. I do not, however, share his horror of such a proposition in the context of an Act designed to cure past imperfection, and enacted against the background of a case which (as Harman LJ himself recorded in *Harpur* [1961] 3 All ER 588 at 594–595, [1962] 1 Ch 78 at 95) had resulted in executors having their private fortunes impounded and an ensuing suicide. As Lowry J observed in *McCullough* ([1966] NILR 73 at 81):

'... it would be strange if an Act, the purpose of which is to avert the consequences of not using the traditionally necessary words, must fail of its effect unless some new magic formula has been employed ...'

[33] In the present case the words are indeed vague. 'Benefit' is a word of very wide signification in the case of a trust. The words employed by the liquidator of the Old Company in settling on altruistic trusts property which did not belong to him and which, in part at least, consisted of property to which no one laid claim give little clue as to the manner in which it was contemplated that the trust property might be employed, save that the purchase of annuities was in certain circumstances contemplated (see cl 7) and that it was contemplated that capital might be called upon if income was insufficient to meet a commitment by the trustees (see cl 6). The construction of both these clauses is not free from difficulty, cl 7 in particular being a provision of a most unusual kind. A number of features make it impossible for me to suppose that the unidentified settlors would have quarrelled with the proposition that the whole fund could be devoted to the relief of poverty amongst the identified class. First, the identified class excluded anyone identified by their connection with management. It also included (in my judgment) ex-employees, whatever the reason (injury, age, or what we would now call dismissal for redundancy) for the termination of the employment. It was therefore a class of beneficiaries which, in the socio-economic conditions (falling wages and rising unemployment) prevailing in 1926–27, was inherently likely to be exposed to financial hardship. Secondly, the size of the established fund was not calculated to be of much obvious use except as a fund to be resorted to in the case of genuine hardship. Thirdly, the only clearly dispositive provision in relation to the fund related to its modest income (cl 5). Fourthly, that provision was of a potentially perpetual nature. Fifthly, the draftsman (who, it must be allowed, seems not to have been particularly adroit) went out of his way to negative so far as lay within his powers the suggestion that the objects of the fund should be able to regard themselves as the beneficiaries, however discretionary, of a private trust (see cl 9).

[34] For all those reasons I do not think that anyone could have complained if the trustees had from the outset regarded this trust as being one for the relief of poverty. The fact that they apparently did so regard it and that no one ever did complain, while not tempting me into the heresy of construing the deed by reference to subsequent conduct under it, provides some comfort for the conclusion which I have reached that this trust did permit the application of its income (and to a potentially controversial extent its capital) exclusively for charitable purposes even though non-charitable applications could also have been contemplated. Having so concluded, the trust does not

*a* in my judgment fall to be characterised as a purely private discretionary trust in the sense of the distinction drawn by Cross J in *Saxone*.

[35] Accordingly I consider that the trust was validated by the 1954 Act and I shall so declare. The claim form asks in that event for the court to direct the establishment of a scheme for the administration of the trust, but Mr Teverson has invited me to stand over this question until further investigations have been made.

*b*

*Order accordingly.*

Celia Fox Barrister.

# Dian AO v Davis Frankel & Mead (a firm) and another

[2004] EWHC 2662 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

MOORE-BICK J

7, 11 OCTOBER 2004

*Practice – Application to search for, inspect and copy documents – Documents for which the court's permission required – Identification of documents sought – Criteria for allowing access – CPR 5.4(2)(c).*

An action was begun in 1994 and concluded by compromise in 1996. In 2004 a non-party (the applicant), in the hope of obtaining information which would be useful to it in litigation in the British Virgin Islands, applied to the court for permission to inspect and copy the court file in the matter. CPR 5.4(2)<sup>a</sup> provided that any person who paid the prescribed fee might, search for, inspect and take a copy of: (a) a claim form which had been served; (b) any judgment or order given or made in public; and (c) any other document if the court gave permission. The court considered: (i) whether a person who sought permission to search the court record under CPR 5.4(2) was required to identify the documents which he wished to search for, inspect and copy, or whether he was entitled to ask the court for permission to search the whole of the court file to see what it contained and to copy anything he considered to be of interest; and (ii) the factors the court could properly take into account when exercising its discretion under the rule. The applicant contended that the principle of open justice required that unfettered access to the court file should be given to anyone who could show a legitimate interest in seeing its contents.

**Held** – As the court's permission under CPR 5.4(2)(c) was required before a search could be made for a document, which if found, could then be inspected and copied, an applicant had to identify with reasonable precision the documents or class of documents which he sought the permission of the court to search for, inspect and copy, and had to lay before the court the grounds on which he said permission should be given. In the case of a class of documents, the class had to be identified with sufficient particularity to enable the court properly to consider all the relevant factors when exercising its discretion. The court ought generally to lean in favour of allowing access to documents that had been read by the court as part of the decision-making process, in accordance with the principle of open justice as currently understood. It should not be as ready to give permission to search for, inspect or copy affidavits or statements that had not been read by the court as part of that process, as the principle of open justice did not come into play in relation to documents filed only for the purposes of administration. The court should only give access to documents of that kind if there were strong grounds for thinking that it was necessary in the interests of justice to do so. In the instant case, certain pleadings had already been disclosed and it was appropriate to allow

<sup>a</sup> CPR 5.4, so far as material, is set out at [15], below



- a the applicant to search for, inspect and copy any further pleadings in order to complete the picture painted by the pleadings as a whole (see [30], [32], [34], [36], [50], [56], [57], [59], [60], below).

*Dobson v Hastings* [1992] 2 All ER 94 considered.

- b Per curiam. The position has not changed materially despite the difference in wording between CPR 5.4(2) and the new CPR 5.4(5)(b) which came into force on 1 October 2004. The permission of the court is still required to obtain a copy of any document other than a claim form, judgment or order. Both rules give the court a discretion which is to be exercised after taking into account all the circumstances of the case (see [19], [55], below).

c **Notes**

For supply of documents from court records, see 37 *Halsbury's Laws* (4th edn reissue) para 138.

d **Cases referred to in judgment**

- Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, [2000] 1 WLR 2353, CA. *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, [2002] 2 WLR 1511.

*Derby & Co Ltd v Weldon* (1988) Times, 20 October.

- e *Dobson v Hastings* [1992] 2 All ER 94, [1992] Ch 394, [1992] 2 WLR 414.

*GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984, CA.

*Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056, CA.

- f *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm), [2003] All ER (D) 165 (Oct).

*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.

**Application**

- g OOO Alfa-Eco applied on 10 September 2004 under CPR 5.4 for permission to inspect and copy the court file in the matter of *Dian AO v Davis Frankel & Mead and Tiller International Ltd*, an action commenced by writ issued on 20 September 1994 and stayed under the terms of a Tomlin order made on 29 March 1996. IPOC International Growth Fund made a similar application. The facts are set out in the judgment.
- h *Dian AO and Davis Frankel & Mead* took no part in the application.

Stephen Smith QC and Robert Levy (instructed by Lovells) for Alfa.

Charles Joseph (instructed by DFM Beckman) for Tiller.

- j Martin Mann QC and Adrian Francis (instructed by Winston & Strawn London) for IPOC.

*Cur adv vult*

11 October 2004. The following judgment was delivered.

**MOORE-BICK J.**

[1] This is an application by Alfa-Eco for permission to inspect and take copies of the documents on the court file in the case of *Dian AO v Davis Frankel & Mead and Tiller International Ltd*. A similar application has been made by IPOC International Growth Fund. a

[2] Alfa-Eco (to which I shall refer simply as 'Alfa' for the purposes of this judgment) is a Russian company involved in the telecommunications industry. It forms part of a Russian conglomerate known as the Alfa Group and together with other companies in the group, is currently involved in heavy litigation in the British Virgin Islands over the ownership of shares in Megafon, a Russian mobile telephone operator. b

[3] It is unnecessary to describe that litigation in any detail. It is sufficient to say that in 2003, three companies in the Alfa Group, Santel Ltd, Avenue Ltd and Janow Properties Ltd, acquired a shareholding in Megafon. Those shares had previously been owned by a company called LV Finance Group (LV). After the acquisition was announced IPOC International Growth Fund (IPOC) claimed that it had an option agreement with LV to purchase the shares. It is said that in disposing of the shares to Santel, Avenue and Janow Properties LV was in breach of that agreement and applied ex parte to the court in the British Virgin Islands, seeking interim relief, alleging that Santel, Avenue and Janow Properties had acquired the shares otherwise than as bona fide purchasers for value. The court in the British Virgin Islands granted relief by way of injunction and also appointed a receiver over the defendant's assets. c  
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[4] In addition to the proceedings in the Caribbean, IPOC also began two sets of arbitration proceedings against LV in Switzerland. One of these was conducted in Geneva; the other is currently going on in Zurich. Broadly similar allegations are being made in both sets of proceedings, including allegations of fraud against LV in seeking wrongly to deprive IPOC of its assets. LV is alleging that IPOC is nothing more than a vehicle for the laundering of money dishonestly obtained by Mr Leonid Reiman who is currently the Russian Minister for Telecommunications. f

[5] The defendants applied to set aside the court orders. On the hearing of the application IPOC was ordered to pay into court the sum of \$US 30m as security for the cross-undertaking it had been obliged to give when obtaining the ex parte order and as security for the defendant's costs. IPOC duly paid that amount into court and it has since been increased to \$US 40m. The orders relating to Alfa were discharged immediately at the conclusion of the hearing in October 2003 and the orders in relation to the other companies were discharged in January 2004 following the delivery of a reserved judgment. Those decisions are currently under appeal to the Court of Appeal of the Eastern Caribbean. g  
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[6] Until about October 2003 the chairman of IPOC was a Mr Vidya Sharma. At some point one of the defendants to the proceedings in the Caribbean, discovered that Mr Sharma had been convicted in Germany of an offence of dishonesty and brought that to the attention of IPOC which thereupon dismissed him. Following his dismissal, Mr Sharma provided LV with information about IPOC, suggesting that it was being used as a vehicle for money laundering and in due course he provided a statement with a view to giving evidence in the Geneva arbitration. j

a [7] The present application arises out of an application made by Alfa and the other defendants in the Caribbean proceedings, for security for their costs of the appeal. When the question of security was first raised IPOC said that it was unnecessary to provide any further security in view of the fact that a very substantial sum was already being held in court. The defendants' response was that in view of the allegations of money laundering the status of that money was uncertain, to say the least, and that it should therefore be disregarded for the purposes of security for costs.

b [8] In the event, Mr Sharma did not give evidence before the tribunal in Geneva. When the arbitrators were about to start hearing evidence LV left the hearing and took no further part in it. Although Mr Sharma's statement was before them, the arbitrators did not hear from him and he was not cross-examined. One of the witnesses called by IPOC was a Mr Jeffrey Galmond, a Danish lawyer who claimed to be a good friend of Mr Reiman. He told the tribunal that he, not Mr Reiman, was the beneficial owner of all IPOC's assets.

c [9] In August 2004 the tribunal published an award in favour of IPOC. In reaching their conclusions the arbitrators rejected the allegations of money laundering, expressed the view that Mr Sharma was an unreliable witness and found that the defendants were not bona fide purchasers for value of the shares in Megafon. They recognised, however, that their findings were not binding on any of those who were not parties to the arbitration.

d [10] In September 2004, IPOC served its evidence in opposition to Alfa's application for security for its costs of the appeal. The allegation of money laundering by IPOC had, by that time, become one of the central issues, if not the central issue, in the dispute over the provision of security. Alfa applied for and obtained disclosure of certain documents referred to in material that IPOC had put in evidence. It was in the course of preparing for that application that Alfa learnt of the proceedings in this country involving Dian.

e [11] Mr Galmond's evidence that he is the beneficial owner of IPOC is potentially of great significance in relation to the money-laundering allegations that were made against Mr Reiman. Understandably, therefore, Alfa would like to obtain any information that might enable it to undermine his account. The application for security has now been re-fixed for early November and I understand that Mr Galmond may be required to attend for cross-examination.

f [12] On 10 September 2004, Alfa applied to this court without notice for permission 'to inspect and copy the court file in the matter of Dian AO v Davis Frankel & Mead and Tiller International Ltd'. In other words, it sought permission to examine the whole of the court file and copy any documents it thought contained information that might be useful to it. I do not think it unfair to describe the application, therefore, as one for permission to trawl through the whole of the court file, to see what might be of assistance and to copy any documents it might think to be of any use.

g [13] The Dian action was commenced by writ issued on 20 September 1994 and is currently stayed under the terms of a Tomlin order made on 29 March 1996. It can safely be assumed, therefore, that the action has been compromised on terms agreed between parties.

h [14] The application came before Andrew Smith J on 10 September. He was clearly concerned by, among other things, the fact that the parties to the

original action had not at that stage been informed of the application and therefore had not had an opportunity to be heard. He gave Alfa permission to make use of copies of some of the pleadings which had already been provided to them by the court staff in error, directed that notice of the application be given to those other parties and adjourned the application to 23 September when the matter came before me. On that occasion, I adjourned the hearing for a further 14 days, to enable Tiller, which had been served with notice of the application only a few days earlier, to serve evidence and instruct solicitors and counsel. a  
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[15] The present application was made under CPR 5.4 and the related practice direction. Rule 5.4(2) provides:

‘Any other person who pays the prescribed fee may, during office hours, search for, inspect and take a copy of the following documents, namely—(a) a claim form which has been served; (b) any judgment or order given or made in public; (c) any other document if the court gives permission.’ c

[16] The rule should be read in conjunction with CPR PD 5 (the practice direction), para 4 of which deals with the manner in which an application of this kind is to be made. Paragraphs 4.2, 4.3 and 4.4 are particularly relevant. They provide: d

‘4.2 When the document searched for under CPR rule 5.4(2) is identified and upon payment of the prescribed fee, the document will be produced for inspection by a member of the Court staff. e

4.3 If, in the course of a computer search, the computer identifies documents held on the Court file, other than those which the person searching is entitled to inspect, that person may not, without the Court’s permission, inspect, take a copy or make a note of, or relating to, those documents. f

4.4 An application for inspection of a document under CPR rule 5.4(2)(c), even if made without notice, must be made under CPR Part 23 and the application notice must identify the document in respect of which permission is sought and the grounds relied upon.’ g

[17] On 1 October 2004, a new version of CPR Pt 5 came into force. The material provisions relating to the supply of documents from court records are now those of r 5.4(5) which reads:

‘Any other person may—(a) unless the court orders otherwise, obtain from the records of the court a copy of—(i) a claim form, subject to paragraph (6) and to any order of the court under paragraph (7); (ii) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (6); and (b) if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.’ h  
j

[18] The practice direction no longer contains any reference to computer searches, but para 4.3 which deals with the manner in which an application is to be made, reads:



a 'An application under rule 5.4(4), 5.4(5)(b) or 5.4(6)(b)(ii) for permission to obtain a copy of a document, even if made without notice, must be made under CPR Part 23 and the application notice must identify the document or class of document in respect of which permission is sought and the grounds relied upon.'

b [16] In some respects, the new rule brings about substantive changes in the rights of persons, other than parties to the litigation, to obtain copies of documents on the record. However, despite the difference in wording between the old r 5.4(2)(c) and the new r 5.4(5)(b), I do not think that the position has changed materially. The permission of the court is still required to obtain a copy of any document other than a claim form, judgment or order.

c [20] The first thing to notice about r 5.4(2) is that it does not give the general public an unfettered right of access to the court records. On the contrary, it proceeds on the footing that, except for those documents that are described in sub-paras (a) and (b), there is no right of access to the court files without permission.

d [21] This point was made by Nicholls V-C in *Dobson v Hastings* [1992] 2 All ER 94 at 99–100, [1992] Ch 394 at 401–402 in relation to the position under the former RSC Ord 63, r 4. He said:

e 'The Rules of the Supreme Court do not expressly prohibit inspection and taking copies of documents otherwise than in accordance with the rules. What the rules do is to require parties to proceedings to file certain documents in the court office. Order 63, r 4 provides that of the documents which must be filed some are to be open to general inspection. Other documents may be inspected with the leave of the court. Rule 4 provides further that this requirement is not to prevent parties to proceedings from inspecting or obtaining copies of documents on the file. In my view these provisions do not make sense unless they are read as indicating that, save when permitted under the rules, documents on the court file are not intended to be inspected or copied. That is the necessary corollary of the rules granting only a limited right to inspect and take copies. In other words, a court file is not a publicly available register. It is a file maintained by the court for the proper conduct of proceedings. Access to that file is restricted. Non-parties have a right of access to the extent, but only to the extent, provided in the rules. The scheme of the rules is that, by being filed, documents do not become available for inspection or copying save to the extent that access to specified documents or classes of documents is granted either generally under the rules or by leave of the court in a particular case. The purpose underlying this restriction presumably is that if and when affidavits and other documents are used in open court their contents will become generally available, but until then the filing of documents in court, as required by the court rules for the purposes of litigation, shall not of itself render generally available what otherwise would not be. Many documents filed in court never see the light of day in open court. For example, when proceedings are disposed of by agreement before trial. In that event, speaking generally, the parties are permitted to keep from the public gaze documents such as affidavits produced in

preparation for a hearing which did not take place. Likewise with affidavits produced for interlocutory applications which are disposed of in chambers. Again, there are certain, very limited, classes of proceedings, such as those relating to minors, which are normally not heard in open court. Much of the object sought to be achieved by a hearing in camera in these cases would be at serious risk of prejudice if full affidavits were openly available once filed. In all cases, however, the court retains an overriding discretion to permit a person to inspect if he has good reason for doing so.' a  
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[22] The present application gives rise to two questions of some general importance. The first is whether a person who seeks permission to search the court record under r 5.4(2) (now r 5.4(5)(b)) is required to identify with some precision the document or documents which he wishes to search for, inspect and copy, or whether he is entitled to ask the court for, and in an appropriate case to obtain, permission to search the whole of the court file to see what it contains and to copy anything he considers to be of interest. The second relates to the factors that the court can properly take into account when exercising its discretion under the rule. c  
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[23] It might be thought that the answer to the first of these questions is provided by para 4.4 (now para 4.3) of the practice direction which states that an application for inspection of a document must be made under CPR Pt 23 and that the application notice must identify the document in respect of which permission is sought and the grounds relied upon. However, Mr Smith QC submitted that that is not the case. As one can see from the application notice in this case, at the time it was issued, Alfa was unable to identify any specific document or class of documents on the court record that it wished to search for and it necessarily follows that it could not provide grounds for thinking that any particular document was likely to contain material that would justify inspection. e  
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[24] Mr Smith pointed out, quite fairly, that Alfa was in a difficult position. It knew that there had been proceedings involving Dian and because it had reason to think that Mr Reiman was connected with Dian it thought it possible that there might be material on the file that would cast further light on his position. However, it could not tell whether that was so or not until it had seen the documents. g

[25] The disclosure of the points of claim and the points of defence in the Dian action threw some further light on the matter because they contain allegations relating to the involvement of Mr Reiman and Mr Galmond in the sale of some shares in a company called St Petersburg Mayoralty and Tiller AO (PMT) to a Canadian company, Petersburg Long Distance Inc (PLD) in 1994. In the light of that information and certain other information that has since come to light Alfa now has better grounds for saying that there may be other documents on the record containing material that would be of assistance to it in the proceedings currently pending in the Caribbean. h

[26] Mr Smith submitted that it is not essential that an applicant identify a specific document for the purposes of an application under r 5.4(2) and that the court can and should grant an applicant permission to search the whole file and copy any documents it wishes where it can show legitimate grounds for doing so. In support of that submission, he drew my attention to a line of authority beginning with the decision of the House of Lords in *Scott v Scott* j

- a [1913] AC 417, [1911–13] All ER Rep 1 and extending through cases such as *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261 to *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056 and *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] EWHC 2297 (Comm), [2003] All ER (D) 165 (Oct) in which the courts have repeatedly emphasised the importance of the principle of open justice and
- b have taken steps, most notably in cases such as *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984, *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, [2000] 1 WLR 2353 and the *Law Debenture Trust Corp* case itself, to ensure that it is maintained in an age when an increasing amount of information and argument considered
- c by the judge is put before him in writing.

- [27] Mr Smith did not go quite so far as to submit that the principle of open justice required the court file to be open to anyone who wanted to look at it for any reason at any time, but he did submit that it required that unfettered access to the files should be given to anyone who could show a
- d legitimate interest in seeing its contents. He relied in particular on the comments of Potter LJ in the *GIO Personal Investment* case [1999] 1 WLR 984 at 993, who seems to have assumed that access would readily be given to a member of the public if an affidavit or other document had been read in open court and also on the readiness of Colman J in the *Law Debenture Trust Corp* case to allow access to the pleadings in another action.

- e [28] I would accept at once that the highest importance is to be attached to the principle of open justice, but I think it is important for the purposes of the present application to understand what end it is intended to serve. For the reasons set out in the speech of Lord Shaw in *Scott v Scott* it has long been recognised that if justice is to be properly administered it is essential that the
- f decisions of the courts and the decision-making process itself be open to public scrutiny. It is for that reason that in all but exceptional cases hearings are conducted in public, judgment is delivered in public and proceedings can be freely reported.

- [29] It is for the same reason that, as the use of written rather than oral
- g procedures have become more widespread, the courts have recognised that it is necessary to give the public access to documents that contain material that has been placed before the judge, but not read out in open court as would once have been the case. The two most obvious categories are statements of witnesses who are called to give evidence at trial and advocates' skeleton arguments. Both were considered in the *GIO Personal Investment Services* case and the position of skeleton arguments was considered again in the *Law Debenture Trust Corp* case. The principle was recognised in *Derby & Co Ltd v Weldon* (1988) Times, 20 October and more recently in the *Barings plc* case as extending to copies of documents that the judge has been invited to read in the privacy of his room. Without access to material of this kind a member of
- h the public attending the hearing could not form any reliable view about the
- j propriety of the decision-making process.

[30] In my view, however, this has a limited bearing on the first of the two issues before me. It could be argued that the principle of open justice demands that the court records be open to all and sundry as a right in order to enable anyone who wishes to do so to satisfy himself that justice was done

in any given case. But that has never been the law and it is not what r 5.4 says. I accept that the line of authority on the principle of open justice was not specifically drawn to the attention of Nicholls V-C in *Dobson v Hastings*, but I am unable to accept that he was not well aware of it. It clearly did not strike him as odd, however, that the court's permission should be required in order to obtain access to the record. The principle of open justice is primarily concerned with monitoring the decision-making process as it takes place, not with reviewing the process long after the event. In this context it is interesting to note that CPR 32.13 dealing with witness statements provides that a statement which stands as evidence in chief at the trial is open to inspection only during the course of the trial.

[31] This point is of some relevance in the present case because the action in question was begun in 1994 and was concluded by compromise in 1996. Alfa has no interest in the performance of the judicial function in that case, which as far as one can tell was in any event very limited. It simply seeks permission to use the court file as a source of potentially useful information to assist it in other litigation. That does not in my view engage the principle of open justice. Although, as Mr Smith pointed out, one consequence of observing the principle of open justice is that those who are present at a hearing may obtain access to information that they may be able to use to their advantage in other contexts, that is simply a consequence of doing justice in public. It is not one of its primary objects.

[32] It is necessary therefore to go back to the rules to see what they provide. In my view it is clear from the language of r 5.4(2) that the court's permission is required before a search may be made for any document which, if found, may then be inspected and copied. I think this makes it clear, even without recourse to the practice direction, that the documents which the applicant wishes to be allowed to look for must be identified with reasonable precision. The rule clearly does not contemplate permission to inspect the file as a whole. What it contemplates is permission as a necessary first step to search the record for a particular document or documents. It is difficult to see on what basis the court can exercise its discretion to permit a search unless the applicant has first identified which documents it wishes to search for.

[33] It is no surprise, therefore, to find that para 4.4 of the practice direction expressly requires the applicant to identify the document in respect of which permission is sought. Mr Smith drew my attention to paras 4.1, 4.2 and 4.3, which make provision for computer searches where those facilities are available. He suggested that a computer search would identify all the documents on the file and would therefore enable the applicant to identify which ones he wanted to inspect and copy. In other words, it would provide the same benefits that Alfa is seeking to obtain by this application. However, I am unable to accept that. The submission proceeds on the assumption that the search which the applicant has obtained permission to make will display a complete list of all the documents on the court file which he can then browse at will, but I have no reason to think that that will be the case. I do not know which courts, if any, currently have computerised search facilities or what form those facilities may take, but para 4.3 of the practice direction suggests that an index of the kind that Mr Smith suggests will not automatically be available to every applicant. On the contrary, it appears to envisage a search by reference to document types, names of deponents, or



a similar criteria which may display more than one document corresponding to the search criteria. I do not think that any support for a right to inspect the whole file can therefore be derived from that source.

[34] I agree, however, that the need to identify documents with reasonable precision does not preclude an applicant from seeking permission to search for, inspect and copy a class of documents. That appears to have b been the view of Nicholls V-C in *Dobson v Hastings* [1992] 2 All ER 94, [1992] Ch 394, and in *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] All ER (D) 165 (Oct) it appears that the applicant sought permission to search for, inspect and copy 'the pleadings', which was granted. Mr Joseph submitted that an application in that form was not permissible, but I see no reason to construe r 5.4(2)(c) in such a way as to require identification c of individual documents rather than a class of documents. What is necessary, in my view, is that the documents be identified with sufficient particularity to enable the court properly to consider all the relevant factors when exercising its discretion. Thus, an application to inspect 'the pleadings' is likely to be acceptable because it is unlikely that different considerations will apply in d relation to individual documents within that class. On the other hand, an application to inspect 'the witness statements' may well be too broad, because different factors could well apply to individual documents within that class. However, considerations of this kind do not arise in this case where the application is to inspect and copy all the documents on the court file.

[35] Finally, I should mention the argument based on cost and e convenience. Mr Smith submitted that individual documents on the record may well point to the existence of other potentially relevant documents, as is often the case, for example, with orders which identify the evidence before the court on which they are based. He pointed out that if an applicant can only obtain permission to inspect specific documents, the likelihood is that f following inspection of those documents, it will become necessary to make a further application, thus leading to a succession of time-consuming and expensive applications. Much better, he submitted, to allow the applicant unrestricted access to the file on the first occasion.

[36] I can see the attraction of that argument from the applicant's g perspective, and indeed even from the perspective of the court staff, but in my view it is not an approach that is permitted by the rules. For the reasons I have already given, I think it is necessary for the applicant to identify with reasonable precision the documents in respect of which he seeks permission and to lay before the court the grounds on which he says permission to search for those documents should be given. It follows that I do not think that the h application can succeed in its original form.

[37] However, as a result of information that has become available to Alfa since the original application was issued Mr Smith was able to identify in general terms certain documents which he says are very likely to be on the record and which Alfa seeks permission to inspect and copy. These include j various orders made in the action and the affidavits sworn in support of, and in opposition to, the applications in question.

[38] This more limited application was made on two grounds: first, that the information contained in the affidavits is likely to be relevant to the issues in the current proceedings in the Caribbean, in particular to the relationship between Mr Galmond and IPOC; secondly, that, in so far as the affidavits

were read by the court, they should be disclosed in accordance with the principle of open justice. a

[39] Mr Joseph for Tiller submitted that the link between the Dian action and the proceedings in the Caribbean is tenuous at best and that there is no reason to think that the contents of those affidavits are likely to be of any real significance as far as those proceedings are concerned. Any interest that Alfa may have in obtaining access to them is outweighed by the fact that they contain information of a sensitive nature, disclosure of which would harm Tiller's commercial interests, and by the fact that at the time when the affidavits were filed it was understood that proceedings in chambers were private and that no one other than parties to the case would have access to them. b

[40] The pleadings in the Dian case to which Alfa has already obtained access show that the plaintiff, Dian, was alleging (i) that PMT was owned by Dian and Tiller in equal shares, (ii) that PLD wanted to acquire 90% of those shares, (iii) that Mr Reiman acted for Dian in negotiating the sale of 40% of the shares in PMT to PLD and (iv) that Mr Galmond acted as agent for PLD in connection with the purchase. c

[41] They also show them the defendant, Tiller, was alleging (i) that it, Tiller, was the sole beneficial owner of PMT, (ii) that in so far as Dian was a shareholder it was acting as its nominee or agent, (iii) that Mr Reiman had acted for Tiller in connection with various transactions in the past, (iv) that the meeting between Mr Reiman and Mr Georgiou referred to in the particulars of claim was to resolve various differences between them and (v) that they had reached agreement on the basis that, amongst other things, Mr Reiman would become beneficial owner of Dian's remaining 10% of the shares in PMT. d

[42] In the Caribbean litigation, Mr Galmond has sworn an affidavit in which he describes how, following the privatisation of the St Petersburg telephone network, a company called Peterstar was set up to provide a new digital system. He has said that by March 1994 Peterstar was owned as to 10% by PMT, 50% by PLD, which had taken over Tiller's interest, and the balance by other parties. He says that following difficulties between the parties he stepped in and took over a 20% share of the company which he later sold for a significant sum. He describes the Peterstar venture as 'the first transaction to net me a significant capital sum'. e

[43] The significance of that evidence is said to be that Mr Galmond does not mention the involvement of Mr Reiman in any capacity in the privatisation of the St Petersburg telephone network. He describes his own involvement as that of a commercial partner and an investor in the Peterstar project, whereas the pleadings in the Dian action put Mr Reiman at the heart of negotiations for the sale of the shares in PMT and Mr Galmond's participation simply as a lawyer for PLD. f

[44] The allegations in the pleadings relate to an alleged sale of shares in PMT, whereas Mr Galmond's evidence only refers to PMT as one of the shareholders in Peterstar. None the less, it seems very likely that all the transactions are related to the privatisation of the St Petersburg telephone system and to that extent are related to each other. Beyond that, however, it is difficult to draw any firm conclusions. g

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a [45] On 22 September 1994, Rix J granted Dian an injunction restraining Davis Frankel & Mead from disposing of funds paid into their client account in London. Davis Frankel & Mead were Tiller's solicitors. They did not assert any interest in the money themselves, but once Dian and Tiller had notified them of their respective claims to the funds they were, in effect, in the position of stakeholders. That order was made on the basis of an affidavit of Mark Charles Tomlinson sworn on behalf of the plaintiff, which therefore played a significant part in the decision-making process.

b [46] At some point (it is not quite clear when) Tiller obtained permission to serve a counterclaim on Mr Reiman out of the jurisdiction. In the event, the proceedings were not served on him and he did not therefore become a party to the action. However, it must follow from the fact that an order was obtained that an affidavit was sworn in support of the application and was considered by a judge at an ex parte hearing on paper. To that limited extent that affidavit also played a part in the judicial process.

c [47] Mr Joseph told me on instructions that an application for summary judgment was made which was disposed of without a hearing, it having been agreed that Tiller should have unconditional leave to defend. That is not confirmed in Mr Georgiou's statement and formally, therefore, there is no evidence to support it. However, in the absence of an order reflecting a contested hearing, I have no reason to think that any affidavits sworn for the purposes of that application were, or should be treated as having been, read by a judge as part of the judicial process.

d [48] Finally, on 7 September 1995 Longmore J made an order on an application by Tiller for security for costs. The order recites the fact that the judge had read affidavits filed by the plaintiffs and the defendants and had heard counsel on their behalf. Those affidavits were, therefore, deployed as part of the judicial process.

e [49] Mr Smith submitted that Alfa has an interest in obtaining access to any affidavits on the court file because they may shed light on the involvement of Mr Reiman and Mr Galmond in the privatisation of the St Petersburg telephone network and thereby on Mr Galmond's interest, if any, in IPOC. I am prepared to assume that the affidavits filed in support of the various applications referred to earlier support and perhaps amplify the parties' pleaded cases. It is quite likely, therefore, that Tiller's affidavit tends to support its pleaded case that Mr Reiman was to have 10% of PMT which might in turn suggest that he had a significant interest in the Peterstar project.

f [50] The affidavits referred to in the orders were, as I have said, considered by the court as part of its judicial function. They may have been read out in the course of the proceedings, but I think it more likely that they were read by the judge in private as part of his preparation for the hearing and that particular passages were referred to at the hearing itself. In accordance with the practice of the court the hearings would all have taken place in chambers rather than open court, but it is clear from authorities such as *Barings plc (in liq) v Coopers & Lybrand* [2000] 3 All ER 910, [2000] 1 WLR 2353 and *Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co* [2003] All ER (D) 165 (Oct) that these affidavits ought to be treated as if they had been read in open court and that anyone with a legitimate interest ought to be allowed reasonable access to them in accordance with the principle of open justice.

[51] However, for reasons I have already given, that does not include any affidavits that were filed in connection with the application for summary judgment. Mr Smith submitted that it is not uncommon for affidavits or witness statements made for the purpose of one application to be deployed in support of, or in opposition to, a later application so that the use of these affidavits in connection with one of the contested applications cannot be ruled out. That is true, and it demonstrates why it is highly desirable that the preamble to any order should identify clearly the evidence on which it is based. However, where the matter is in doubt the burden is on the applicant to show that an affidavit or witness statement expressed to be made in relation to one particular application was in fact considered in relation to another. In the present case there is no basis for drawing that conclusion. a  
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[52] Two further questions have to be considered. The first arises from the fact that until relatively recently it was widely thought, rightly or wrongly, that proceedings in chambers were private so that the filing and reading out of an affidavit would not render it available to anyone other than the parties and their representatives. This understanding is reflected in the commentary on s 67 of the Supreme Court Act 1981 in *Supreme Court Practice* (1995 edn) vol 2, p 1613 (para 5276) (the White Book) published in 1994, which reads: c  
d

‘The expression “in Chambers” used in this section [sc s 67] in contrast to “in Court”, means in private, secret, secluded behind closed doors, in proceedings at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded unless invited to be present with the consent of the parties and the Court.’ e

This comment continued into the White Book (1999 edn) vol 2, p 1661 (para 20A-448) where, however, extensive reference was made to the judgment of Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056 in which he made it clear that whatever restrictions on access may be necessary for practical purposes, proceedings in chambers were not secret (ie what under the CPR would be termed ‘private’) unless a statutory provision or an order of the court so dictated. f

[53] Given that all the proceedings in the Dian action took place between 1994 and 1996, I can understand why Mr Joseph submitted that to allow access now to affidavits filed at a time when it was thought that their contents would remain private would be unfair to the party who filed them. However, Tiller can hardly complain about access being given to affidavits filed on behalf of Dian, since Dian was free to disclose their contents to anyone it chose and has not itself opposed this application. As far as Tiller’s own affidavits are concerned, the argument can only be pressed so far. In *Derby & Co Ltd v Weldon* (1988) Times, 20 October, Browne-Wilkinson V-C held that no duty of confidence attaches to affidavits served by one party on the other for the purposes of litigation. It follows that those affidavits were not really private either, since Dian was free to disclose the contents of those as well. All that can really be said is that in the ordinary way Tiller would not have expected them to come into the hands of third parties by way of the court records. g  
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j

[54] Mr Georgiou also says that the contents of some documents on the court file are commercially sensitive and that their publication might damage Tiller’s ability to enter into new commercial relationships, but he has not



- a given any real explanation of why that is so. I understand, of course, that he does not want to say too much for fear of letting the cat out of the bag, but if the court is to be asked to take a factor of that kind into account, it is necessary for it to have sufficient information to enable it to evaluate the position. In the present case I do not have information to enable me to give much weight to it.
- b [55] Mr Smith submitted that in so far as it could be shown that documents on the court file had been read in open court or read by the judge as part of the judicial process, the court had no discretion but to permit a search and inspection. However, I think that puts the matter too high, especially in a case where Alfa's purpose in seeking to inspect the documents has nothing to do with any interest in the decision-making process. In *Dobson v Hastings* [1992] 2 All ER 94 at 103, [1992] Ch 394 at 406 Nicholls V-C said:
- c

'Cases and circumstances vary so widely that any attempt to legislate in detail in advance for access to particular types of documents in particular types of cases across the whole spectrum of High Court litigation would be impossible. So the rules provide, in effect, a general prohibition but with a built-in safety valve: any person may apply ex parte (viz with minimum formality and expense) to the court for leave. The court will then consider all the circumstances.'

- d
- e Although he was speaking of the position under RSC Ord 63, r 4, the position is in my view exactly the same under r 5.4(2)(c) of the CPR. That rule and its successor, r 5.4(5)(b), gives the court a discretion which is to be exercised after taking into account all the circumstances of the case. The fact that a document has been deployed as part of the judicial process is no doubt an important factor, as the authorities to which I have already referred make clear, but it will not necessarily be the only factor to take into account and in some cases may not give the factor that ought to weigh most heavily with the court.
- f

- g [56] In the present case, although Alfa is not interested in whether justice was properly administered in the Dian case, I think it does have a legitimate interest in obtaining access to documents on the court record in so far as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean. I did not accept the submission that the link is too tenuous to make it appropriate to allow any access to the records at all. Moreover, I think that in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice as currently understood, notwithstanding the view that may have been taken in the past about the status of hearings in chambers.
- h

- i [57] On the other hand, I do not consider that the court should be as ready to give permission to search for, inspect or copy affidavits or statements that were not read by the court as part of the decision-making process, such as those filed in support of, or in opposition to, the application for summary judgment in this case. These were filed pursuant to the requirements of the rules but only for the purposes of administration. The principle of open justice does not come into play at all in relation to these documents. I do not think that the court should be willing to give access to documents of that kind as a routine matter, but should only do so if there are strong grounds for
- j

thinking that it is necessary in the interests of justice to do so. In the present case the likelihood is that the parties' respective cases are set out in some detail in the affidavits sworn in support of the application for a freezing order, the application to serve out of the jurisdiction and the application for security for costs. At this stage I am not satisfied that it is necessary in the interests of justice to go beyond them. a

[58] Mr Joseph accepted that to the extent that Alfa's application succeeded, IPOC's application should also succeed. Mr Mann QC on behalf of IPOC made it clear that his main concern was to ensure that inspection of the file was not limited in a way that adversely affected his client's interests by allowing a partial picture to emerge. Since the affidavits to which I have referred were filed by opposing parties, I think it unlikely that the information that can be derived from them will present an unbalanced picture. b

[59] Some, but perhaps not all, of the pleadings have already been disclosed. The pleadings themselves, of course, contain nothing but allegations and as such are scarcely more than a guide to what the parties may have understood at the time. However, even in this respect it is desirable that the picture that emerges should not be unbalanced. Since the points of claim and the points of defence and counterclaim have already been disclosed, I think it would be appropriate to allow Alfa and IPOC to search for, inspect and copy any further pleadings that may have been filed in order to complete the picture painted by the pleadings as a whole. c

[60] Accordingly, I think it is appropriate to make an order giving Alfa and IPOC the right to search for, inspect and copy the following documents: d  
(i) the affidavit of Mark Charles Tomlinson dated 22 September 1994; (ii) any affidavits sworn in support of Tiller's application to serve the counterclaim out of the jurisdiction; (iii) the pleadings; and (iv) any affidavits sworn in connection with Tiller's application for security for costs. e

*Application allowed in part.* f

Aaron Turpin Barrister.

End of Volume 1.